



Staff Memorandum

EXECUTIVE COMMITTEE Agenda Item # 20

REQUESTED ACTION: Approval of a proposal from the International Section to seek approvals from government agencies for one or more trips to Cuba.

Proposal

A. Thomas Levin, former New York State Bar Association ("NYSBA") President and current Vice-Chair – Special Projects of the International Section, has requested that the Executive Committee authorize the International Section, on behalf of NYSBA, to seek necessary approvals from government agencies for one or more trips to Cuba, as authorized by law. The proposed trip(s) would be planned for mid-2012 or 2013, at the earliest. The trip(s) would be open to NYSBA leaders and International Section members who are U.S. citizens. The International Section would prefer that the trip itinerary(ies) focus on legal aspects of Cuban society.

Analytical Memos (Attached)

Mr. Levin's proposal dated 12/20/11 is attached. This proposal followed a series of related memos, which also are attached: (1) a NYSBA staff memo dated 9/20/11 which analyzed an initial request from Mr. Levin and concluded that it would be better not to sponsor a trip to Cuba at this time; (2) a response dated 10/23/11 in which Mr. Levin stated that the staff memo was based on a lack of understanding about background information; and (3) a NYSBA staff memo dated 12/5/11 which replied to Mr. Levin's response and again concluded that sponsoring a trip to Cuba might not be advisable at this time.

Past Federal Investigation of NYSBA

Confidentially, the federal Office of Foreign Assets Control ("OFAC") opened investigations into previous NYSBA trips to Cuba, and those files remain open. In Mr. Levin's proposal dated 12/20/11, he stated as follows:

After extensive investigation, in which NYSBA fully cooperated, OFAC apparently was satisfied that the NYSBA trips complied with the restrictions and requirements in effect at the time of the travel, and took no action against NYSBA (OFAC also took no action against any of the other Bar Associations whose trips were investigated for these same reasons.) However, the pro bono counsel who assisted NYSBA in responding to these investigations (and who is a former OFAC General Counsel) has

advised us that OFAC does not formally close its investigations even when it does not take action, and as a result the files regarding the NYSBA trips technically remain open.

Current Landscape

As stated in the 12/20/11 proposal, Mr. Levin believes that the passage of time and recent changes in OFAC regulations, U.S. governmental policies, and interpretations regarding commerce and travel with Cuba present new opportunities for authorized travel.

"Specific License"

Mr. Levin has requested approval for the International Section to apply to OFAC for a "specific license." A specific license is a written document issued to a particular person or entity that authorizes a particular transaction in response to a written license application. In this situation, the International Section would need to prepare a written license application requesting authorization for one or more NYSBA-sponsored trips to Cuba.

It appears that the application for a specific license would need to be based on one or more specific categories of travel that are described in OFAC regulations. Mr. Levin did not appear to specify the relevant category of travel in the 12/20/11 proposal. However, it appears that a category for "professional research and professional meetings in Cuba" would be the most applicable OFAC category. It seems possible that NYSBA could receive a specific license under this category if it can demonstrate that the proposed conference would be a "working" conference with a full-time schedule, and that it would be sponsored for the professional benefit of attendees, and not merely their personal satisfaction.

With the parameters relating to this category in mind, NYSBA and the International Section would submit an application for a specific license to OFAC for approval. The application calls for information that includes a description of past research similar to the type that attendees wish to conduct on the proposed trip. This requirement would seem to call for information about NYSBA's past research trips to Cuba – including NYSBA trips that OFAC investigated. Providing such information could "remind" OFAC officials who review the application of the agency's past investigation of NYSBA. It is possible that this could prompt closer scrutiny of the application – and a renewed investigation of NYSBA. Consequently, there is some risk that submitting an application to OFAC could trigger a renewed investigation of past NYSBA trips.

"General License"

Mr. Levin also has requested approval for the International Section to take steps toward sponsorship of a trip pursuant to a "general license." Specifically, Mr. Levin stated in the 12/20/11 proposal, "Furthermore, if it can be confirmed that OFAC would approve such travel under a General License, [the International Section] requests that the NYSBA Executive Committee also authorize [the International Section] to apply for and pursue one or more such licenses."

A general license constitutes blanket authorization for those transactions set forth in the relevant regulation. No further permission is required. In this situation, it appears that the International Section would not need to submit a written license application to OFAC for a general license. Instead, NYSBA and the International Section would make a decision based on a legal interpretation of current OFAC regulations that the proposed trip(s) is/are authorized, and then move forward.

Both Mr. Levin and NYSBA staff recognize the risk that this could carry for NYSBA. Mr. Levin stated in the 12/20/11 proposal as follows:

However, because General License travel does not require pre-approval from OFAC, we cannot be assured that this itinerary would in fact meet with OFAC approval and that there would be no later investigations after the fact. [The International Section] would prefer to have any travel free from possible later recriminations, and therefore is not proposing that NYSBA pursue such travel under a General License, whether for Professional Research, under a People to People license, or otherwise.

Nevertheless, it appears that Mr. Levin is seeking approval from the Executive Committee for travel pursuant to a general license "if it can be confirmed that OFAC would approve such travel under a General License . . ." It appears that the best way to confirm whether current OFAC regulations provide a general license for the proposed trip(s) would be to contact OFAC for an interpretation. As described in the section above relating to specific licenses, contacting OFAC presents some risk that submitting an application to OFAC could trigger a renewed investigation of past NYSBA trips.

"People-to-People" License

Mr. Levin referred in the 12/20/11 proposal to a "people-to-people" license. A people-to-people license is a type of specific license. People-to-people licenses were created by President Bill Clinton to encourage more contacts between Americans and Cuban citizens. Although President George W. Bush ended the issuance of these licenses, President Barack Obama directed in 2011 that such licenses should again be issued.

Mr. Levin stated in the 12/20/11 proposal that a people-to-people license would not be appropriate for a proposed trip(s). Specifically, he stated as follows:

Clearly, NYSBA could participate in People to People trips under the General License category. However, such trips might not be within the NYSBA mission, because they would not be required to be limited to NYSBA members, nor to focus on the legal aspects of Cuban society. [The International Section] prefers that any Cuba travel under NYSBA [International Section] auspices be by NYSBA members and be focused on legal issues.

Relating to this statement, it is the understanding of NYSBA staff that people-to-people licenses are a type of specific license, and not generally licensed. NYSBA staff also believe that it is not clear whether OFAC would issue a specific license for the proposed trip(s) because the language that the government uses to describe the people-to-people program is vague. Regardless, it does not appear that Mr. Levin proposed to apply for a specific license under the people-to-people program. If he did, this would require the submission of a written license application to OFAC. As described above, contacting OFAC presents some risk that submitting an application to OFAC could trigger a renewed investigation of past NYSBA trips.

The proposal will be presented at the meeting on January 26, 2012, by Mr. Levin.

MEMORANDUM

TO: NYSBA Executive Committee
FROM: A. Thomas Levin
DATE: December 20, 2011
RE: Cuba Travel Proposal

As Vice Chair – Special Projects for the NYSBA International Section (ILS), I have been requested to submit a proposal that the NYSBA Executive Commission authorize ILS, on behalf of NYSBA, to seek necessary approvals from government agencies for one or more trips to Cuba, as authorized by law. It is proposed that these trips be planned for no earlier than mid-2012 or 2013, and that participation in the trips be limited to NYSBA members who are United States citizens, and who belong to ILS or otherwise hold NYSBA leadership positions.

Although I will elaborate on this when I meet with the Executive Committee, this memo is offered as background information.

As you no doubt know, for several decades US citizens have been restricted in their right to travel to and/or spend money in Cuba. Such activities are subject to the regulations and restrictions of the Office of Foreign Asset Control (OFAC).

In the early 2000s, the OFAC regulations permitted limited Cuba travel under either a General License or a specific license. A General License is a category of travel open to anyone who meets certain specific qualifications and who travels for certain limited purposes, and does not require specific review or approval of a particular itinerary, trip or traveler. In contrast, a specific license is available for certain other limited purposes, and travel under such a license is authorized only for the particular persons to whom the license is issued, and only for the particular itinerary specified and approved in the license.

In the early 2000s, OFAC recognized a category of General License known as “professional research” which at that time was defined as open to members of any licensed profession, for an itinerary which consisted solely of programs and events related to research in their licensed professional field. Those who participated in travel under this General License were required to limit their itinerary to activities related to the purpose of the travel, and upon their return were required to publish information and articles regarding their travel and the programs in which they participated. During that period of time, it was accepted practice at OFAC that this General License for professional research was open to licensed attorneys, provided that the participants in the travel were all licensed

attorneys (not spouses, other family members, or non-lawyer employees) and further provided the travel program met all the foregoing other requirements of the General License.

In 2003, I was invited to participate in such a General License trip to Cuba under the auspices of the ABA International Section. The trip was coordinated by a Professor of Law from California, and the participants included Jack Zulack and Les Reizes (both members of NYSBA's International Law Section), the Executive Director of the Delaware Bar Association, the President of the Beverly Hills Bar Association, two officers of the Minnesota Bar Association and one officer of the Chicago Bar Association. We all met in Miami, to travel to Havana via chartered air authorized by OFAC, and the trip was organized by Cuba Cultural Travel, an OFAC licensed Cuba travel provider. The only part of this trip which was problematic was our departure from Miami to Havana, as the Miami Airport INS agents were hostile to the trip, and were skeptical that it was legally authorized. We prevailed upon them to contact OFAC in Washington, DC, where they verified that the trip, and its specific itinerary, indeed was proper, and the remainder of that trip and our return to Miami went off without incident.

As a result of the success of that trip, and the interest it generated among other professionals, I and participants from other State and local Bars who had participated in that trip or other similar trips undertook to organize additional trips using the same licensed travel provider and following a virtually identically itinerary. In 2005 and 2006, NYSBA authorized five such trips, each of which went off without problems, and we assiduously followed all of the license requirements both during and after completion of travel. We also were able to generate some income to NYSBA by imposing a fee for participation in these trips.

Months after those trips were completed OFAC reinterpreted its rules governing travel by US citizens to Cuba, and applied that reinterpretation retroactively. This action, and a related issue regarding Cuba Cultural Travel, caused OFAC to open investigations into the NYSBA trips and trips conducted by several other State and local Bar Associations.

As they pertained to NYSBA, these reinterpretations centered upon two issues:

- (a) As noted above, the OFAC General License category "professional research", under which the NYSBA trips had been conducted, was limited to members of a licensed profession and to an itinerary organized solely around research into matters relevant to that profession. OFAC reinterpreted that definition, and concluded that "professional research" trips should have been limited to travel by academics engaged solely in academic research. After extensive investigation, in which NYSBA fully cooperated, OFAC apparently was satisfied that the NYSBA

trips complied with the restrictions and requirements in effect at the time of the travel, and took no action against NYSBA (OFAC also took no action against any of the other Bar Associations whose trips were investigated for these same reasons.) However, the pro bono counsel who assisted NYSBA in responding to these investigations (and who is a former OFAC General Counsel) has advised us that OFAC does not formally close its investigations even when it does not take action, and as a result the files regarding the NYSBA trips technically remain open.

- (b) The OFAC regulations in effect at the time of the previous NYSBA travel required use of a licensed Cuba travel provider to make all travel, hotel and meeting arrangements, and to coordinate and supervise the movement of the group from place to place. Cuba Cultural Travel's principal made all these arrangements for us, as he did with many other trips both for professional groups and groups traveling under other General License categories. However, subsequent to our travel, OFAC reinterpreted its rules to add a restriction that while the travel provider could accompany the group in its travel, the provider could not attend the programs because the travel provider was not a licensed professional. In our case, and in the case of other State and local Bar Associations for whom our travel provider had organized travel, it was customary for the travel provider to attend the programs, and provide assistance as an interpreter. When OFAC raised this as an issue with the travel provider, and threatened proceedings to rescind his travel license, he concluded that in light of these restrictions and others newly imposed by OFAC, it was not worth it to him to maintain his license, and he voluntarily surrendered it. (He since has applied for, and received, a new license, and using that new license has organized and conducted several trips under the current OFAC regulations.)

NYSBA fully cooperated with the OFAC review, and provided OFAC with information about each of the NYSBA members who had participated in our trips, the itinerary, the activities of the licensed travel provider, and the articles and journals which were published by the travel participants. We understand that the other Bars involved in the same investigation (including the Beverly Hills Bar Association and the Iowa Bar Association) also did so. OFAC took no action against any Bar Association for any of the trips arranged and supervised by Cuba Cultural Travel, and also imposed no penalties on Cuba Cultural Travel.

As a result of the foregoing involvement with OFAC, when later opportunities came along to resume Cuba travel for NYSBA members, NYSBA understandably

was reticent to authorize further such trips under its auspices, and there have been none to date.

However, with the passage of time, and still more changes in OFAC regulations, US government policies, and interpretations regarding commerce and travel with Cuba, there are now new opportunities to conduct such programs.

Several other Bar Associations (including the National Bar Association and the Chicago Bar Association) recently have conducted trips to Cuba under the same General License category which we used, with itineraries virtually identical to the one we used, without incident.

More recently, the Obama administration amended the OFAC rules, to add "People to People" trips under General License, provided that the itinerary consists primarily of interaction between the travelers and the Cuban public. This category and the long standing Humanitarian and Religious General License categories now are the principal license categories being used for many US citizens to conduct authorized travel to Cuba. The Professional Research category remains available, ostensibly limited to academic research, but in fact it has been used for attorney travel.

Due to these changes in policy, Cuba Cultural Travel applied for and received a new travel provider license and it is once again authorized to organize and conduct Cuba travel. It has done so for several groups without incident, including lawyer groups and others (professional and non-professional).

Clearly, NYSBA could participate in People to People trips under the General License category. However, such trips might not be within the NYSBA mission, because they would not be required to be limited to NYSBA members, nor to focus on the legal aspects of Cuban society. ILS prefers that any Cuba travel under NYSBA ILS auspices be by NYSBA members and be focused on legal issues.

I have had continued discussions with Cuba Cultural Travel about an itinerary which would qualify under current OFAC regulations. Using Cuba Cultural Travel contacts and my personal contacts in Cuba, we have devised an itinerary which we believe would qualify for a People to People General License, and include substantial contact with the Cuban professional, governmental and academic legal community along with other cultural activity not law-related. However, because General License travel does not require pre-approval from OFAC, we cannot be assured that this itinerary would in fact meet with OFAC approval and that there would be no later investigations after the fact. ILS would prefer to have any such travel free from possible later recriminations, and therefore is not proposing that NYSBA pursue such travel under a General License, whether for Professional Research, under a People to People license, or otherwise.

Rather, ILS proposes that NYSBA apply for a specific license for its specific itinerary. If successful, this process would result in an OFAC license for a particular itinerary, and thus remove any issues about the legality of such travel. This process also would make it easier to restrict the itinerary to law-related activities. A similar process has been followed by several universities and law schools, some of which have obtained and used such specific licenses and some of which currently have applications for such licenses pending.

If the Executive Committee were to approve the ILS proposal, ILS would seek OFAC authorization to conduct one or more trips to Cuba under a specific license for particular itineraries. ILS also proposes that participation in the trips be limited to US citizen members of ILS and to NYSBA leaders. It is not contemplated that non-US citizens be permitted to participate, as they are not subject to OFAC regulations and may engage in such travel anytime they wish, and there is a concern that mixing citizens and non-citizens in the same travel group would raise issues with OFAC. Similarly, although a specific license would permit non-lawyers to participate, ILS believes that restricting participation to NYSBA members is more in keeping with the spirit of the travel regulations.

ILS submits that if such trips were conducted under specific license, there would be no concern that the itinerary would result in any investigation or other issues involving NYSBA or the travel, because OFAC would have approved the travel in advance.

Because it takes at least six months to process an application for such specific licenses, and because the duration of Cuba Cultural Travel's travel provider license is limited to one year at a time, it is likely that any such trips, if authorized, could not be conducted until late spring or summer of 2012 at the earliest and are more likely to occur in 2013.

We do not yet know whether there are license application costs which apply to this process, but any such costs would be absorbed by ILS if ILS is permitted to retain a portion of the travel costs for its expenses. The legal and other services for preparation and submission of the license application will be donated.

ILS requests that the NYSBA Executive Committee grant permission for ILS to apply for and pursue one or more licenses from OFAC for travel to Cuba, subject to the restrictions outlined in this memo. Furthermore, if it can be confirmed that OFAC would approve such travel under a General License, ILS requests that the NYSBA Executive Committee also authorize ILS to apply for and pursue one or more such licenses.

Memo

To: Patricia Bucklin

From: Teresa Schiller

Date: September 20, 2011

Re: Cuba Issues – Privileged and Confidential

Background

Since the U.S. imposed a near-total commercial, economic, and financial embargo on Cuba in 1962,¹ U.S. residents have had difficulty traveling legally to Cuba. (Although traveling there is technically not illegal, the U.S. government forbids spending money in Cuba (which has the same effect).)² This ban has made travel to Cuba an enticing “forbidden fruit.”³

To encourage more contacts between Americans and Cuban citizens, President Bill Clinton created so-called “people-to-people” travel licenses in 1999. Although President George W. Bush ended the issuance of these licenses in 2003, President Barack Obama directed on January 14, 2011, that such licenses should again be issued.⁴

Following this policy change, Former New York State Bar Association (“NYSBA”) President A. Thomas Levin – on behalf of the NYSBA International Section -- inquired about whether

¹ See Wikipedia, “United States Embargo Against Cuba,” http://en.wikipedia.org/wiki/United_States_embargo_against_Cuba (last visited Sept. 12, 2011).

² See Michelle Higgins, “New Ways to Visit Cuba -- Legally,” *The New York Times* (June 30, 2011), available at <http://travel.nytimes.com/2011/07/10/travel/at-long-last-legal-trips-to-cuba.html> (last visited Sept. 12, 2011).

³ *Id.* (“It’s the forbidden fruit. It’s 50 years of pent-up demand for a country that 75 percent of Americans really, really want to travel to.”) (quoting Tom Popper of Insight Cuba).

⁴ See Press Release, The White House, “Reaching Out to the Cuban People,” (Jan. 14, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/01/14/reaching-out-cuban-people> (last visited Sept. 12, 2011).

NYSBA would agree to sponsor one or more trips to Cuba.⁵ Sponsorship would involve coordination with a licensed entity.⁶

Licenses -- which are authorizations to engage in transactions that otherwise would be prohibited⁷ -- are issued by the Office of Foreign Assets Control ("OFAC"), a division of the U.S. Treasury Department.⁸ Those who engage in transactions involving licenses must make sure that all conditions of the licenses are strictly observed.⁹

One type of license that OFAC issues is called a "specific license." A specific license is a written document issued to a particular person or entity, authorizing a particular transaction in response to a written license application.¹⁰ People-to-people licenses are specific licenses.¹¹

Cuba Cultural Travel ("CCT") is one of the entities that has a specific license for people-to-people trips to Cuba. CCT has been identified as the potential operator for a NYSBA-sponsored trip.¹²

CCT states on its website, "Cuba Cultural Travel was granted a People to People license by the Treasury Department on July 15, 2011. This one-year license allows Cuba Cultural Travel to operate tours in Cuba. These tours are open to all Americans, and no application or approval process is required. This license stipulates that our travelers must be part of a group and must adhere to the approved itinerary."¹³

CCT could operate a trip for NYSBA in "Spring 2012, running as late as June 15, 2012."¹⁴

Mr. Levin noted that the proposed trip to Cuba "cannot have a principally legal focus, but could include some legal elements, some business elements, and some cultural elements."¹⁵ There is no information on this issue on the Internet.

⁵ See E-mail from A. Thomas Levin to Vincent E. Doyle III and Seymour James (Jul. 28, 2011, 6:26 p.m.) (on file with author).

⁶ *Id.*

⁷ U.S. Dept. of the Treasury Resource Center, Frequently Asked Questions and Answers, "What is a license?" at 17 (Jun. 16, 2006), <http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/answer.aspx> (last visited Sept. 12, 2011).

⁸ See U.S. Dept. of the Treasury Resource Center, Frequently Asked Questions and Answers, "How long has OFAC been around?" at 1 (Jun. 16, 2006), <http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/answer.aspx> (last visited Sept. 12, 2011).

⁹ See U.S. Dept. of the Treasury Resource Center, Frequently Asked Questions and Answers, "What is a license?" at 17 (Jun. 16, 2006), <http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/answer.aspx> (last visited Sept. 12, 2011).

¹⁰ *Id.*

¹¹ See 31 C.F.R. § 515.565(b)(2) (Jan. 28, 2011).

¹² See E-mail from A. Thomas Levin to Vincent E. Doyle III, Seymour W. James, Jr., and Patricia Bucklin, at 1 and first attachment at 5 (Aug. 2, 2011, 10:06 p.m.) (on file with author).

¹³ Cuba Cultural Travel, Legal Travel to Cuba, "The Law Regarding Travel to Cuba," <http://www.cubaculturaltravel.com/travel/legal-travel-to-cuba?type=raw&tmpl=component> (last visited Sept. 12, 2011).

¹⁴ E-mail from A. Thomas Levin to Vincent E. Doyle III and Seymour James (Jul. 28, 2011, 6:26 p.m.) (on file with author).

Unfortunately, NYSBA was investigated by OFAC for problems relating to previous trips to Cuba. Mr. Levin stated,

As you may know, I organized several trips under NYSBA sponsorship in 2005 and 2006, under a different type of license. Due to a retroactive change in the interpretation of the federal regulations by [] OFAC, NYSBA had some issues regarding those trips. Similar circumstances affected several other Bar Associations which had done similar trips around the same time. With the assistance of pro bono counsel from Davis Polk in DC, we dealt with those issues and, to the best of our knowledge, the case is not being pursued by OFAC (although it has not closed the file. We have been advised that this is standard practice at OFAC, as it rarely closes files and either acts on them or leaves them in a drawer somewhere).¹⁶

Analysis

I. Does the U.S. government clearly authorize law-related trips to Cuba under the new people-to-people license program?

No. The language that the government uses to describe the program is vague. The government's examples of permissible and impermissible programs do not clearly address whether law-related trips are allowed.

The official language describing the program is vague. The regulation allows the authorization of travel on a case-by-case basis for "[e]ducational exchanges not involving academic study pursuant to a degree program when those exchanges take place under the auspices of an organization that sponsors and organizes such programs to promote people-to-people contact."¹⁷ Neither "educational exchanges" nor "people-to-people" appear to be defined. According to one legal analyst,

Because no definitions accompanied the promulgation of the new people to people rule," it is only over time that we will learn the scope and significance of that restored category of travel, with both measurable in terms of actual numbers of Americans on the ground in Cuba. That is, we must wait and see what U.S.-based organizations actually get licensed and precisely for what before the effect of the new rule can be assessed.¹⁸

A travel advisory issued by OFAC in July 2011 does not provide a definitive answer. The advisory states that all participants must have "a full-time schedule of educational exchange

¹⁵ E-mail from A. Thomas Levin to Vincent E. Doyle III, Seymour W. James, Jr., and Patricia Bucklin (Aug. 2, 2011, 10:06 p.m.) (on file with author).

¹⁶ E-mail from A. Thomas Levin to Vincent E. Doyle III and Seymour James (Jul. 28, 2011, 6:26 p.m.) (on file with author).

¹⁷ 31 C.F.R. § 515.565(b)(2) (Jan. 28, 2011).

¹⁸ Posting of Robert L. Muse to Cuba U.S. People to People Partnership, "New Rules Regulating Academic and People-to-People Travel to Cuba" at 3 (Jan. 28, 2011), <http://cubapeopletopeople.blogspot.com/2011/01/legal-analysis-by-robert-muse.html> (last visited Sept. 12, 2011).

activities that will result in meaningful interaction between the travelers and individuals in Cuba.”¹⁹ It appears that Mr. Levin, the International Section, and CCT are planning a full-time schedule of activities that will be educational for the NYSBA travelers. Will the activities result in meaningful interaction with individuals in Cuba? The answer is unclear at this point. It might be helpful to see the proposed itinerary, which is under development. In addition, Mr. Levin advised that an itinerary that focuses on purely legal topics would not be acceptable but that an itinerary with a mix of legal, business, and cultural elements would be allowed. Unfortunately, the advisory does not address this.

OFAC’s example in its guidelines of a permissible program does not sufficiently clarify that the proposed NYSBA trip would be allowed. The guidelines require a trip to be “for individuals to learn side-by-side with Cuban individuals in areas such as environmental protection or the arts.”²⁰ It is unclear whether “the law” is sufficiently like “environmental protection” or “the arts,” to be permissible. For example, is the law a more objectionable subject than “environmental protection” or “the arts,” given past U.S./Cuba relations? Even if there is common ground that can be explored -- such as how to further the rule of law -- it is unclear whether a law-related trip (or partially law-related trip) would involve learning “side-by-side with Cuban individuals.” Perhaps if there were several discussions between NYSBA travelers and Cuban lawyers during the trip, this would help the trip to qualify. At this point, however, the itinerary is not yet available for review. Moreover, a trip focused completely on the law apparently would not qualify under the “people-to-people” license. Given this example of learning side-by-side with Cubans, it is unclear how and whether a legal/business/cultural trip would qualify, either. For example, how much law would be “too much”? OFAC’s guidelines do not provide that level of clarification.

Examples of impermissible programs are not completely instructive, either. For instance, the relevant regulation states that “tourist-oriented [activities], including self-directed educational activities that are intended only for personal enrichment” are prohibited.²¹ To the extent that the proposed trip would involve an exchange of ideas with leaders in the Cuban legal profession, the proposed trip might be more similar to an educational exchange than to a tourist-oriented activity. However, it is not clear that the proposed trip would achieve more than the personal enrichment of the travelers.

Two other examples of impermissible programs -- discussed in OFAC’s guidelines -- provide more guidance, but they do not address whether a law-related focus (or partial focus) would be allowed. For instance, the guidelines state that a trip in which “travelers engage in individually-selected and/or self-directed activities” is not allowed.²² This is because “[a]uthorized trips are

¹⁹ Office of Foreign Assets Control, Cuba Travel Advisory, “Travel to Cuba and People-to-People Groups” (Jul. 25, 2011), http://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_trav_adv.pdf (last visited Sept. 12, 2011).

²⁰ Office of Foreign Assets Control, U.S. Dept. of the Treasury, “Comprehensive Guidelines for License Applications to Engage in Travel-Related Transactions Involving Cuba” at 23 (revised Apr. 19, 2011), http://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_tr_app.pdf (last visited Sept. 12, 2011).

²¹ 31 C.F.R. § 515.565(c) (Jan. 28, 2011).

²² Office of Foreign Assets Control, U.S. Dept. of the Treasury, “Comprehensive Guidelines for License Applications to Engage in Travel-Related Transactions Involving Cuba” at 23 (revised Apr. 19, 2011),

expected to be led by the licensed organization and to have a full-time schedule of activities in which the travelers will participate.”²³ The proposed NYSBA trip appears not to have the deficiencies in this example. The NYSBA trip would be led by CCT – which has a people-to-people license²⁴ – and a full-time schedule of activities for all the travelers is being planned.²⁵

A second example of an impermissible program prohibits trips in which “travelers only attend large lectures or otherwise engage in a schedule of activities that do not involve interaction with Cuban individuals.”²⁶ The proposed NYSBA trip appears to differ somewhat from this example of an impermissible program. The sample seven-day itinerary that CCT gave to Mr. Levin provides for ten interactive meetings with members of the Cuban community.²⁷ However, Mr. Levin wants to “adapt [the itinerary] to put in some more legal-oriented items,”²⁸ so he and the travel agency likely would need to retain the interactive aspects of the itinerary when modifying it.

The White House press release sheds light on President Obama’s intent in recreating the people-to-people program, but it does not provide a clear answer as to whether law-related travel is allowed. By reinstating people-to-people licenses, President Obama expressed an intent “[t]o enhance contact with the Cuban people and support civil society through purposeful travel, including religious, cultural, and educational travel . . .”²⁹ “Purposeful travel” is undefined, and it may be “narrowly focused.”³⁰ It is unclear whether law-related travel (or business-related travel) is sufficiently similar to “religious, cultural, or educational travel” to be allowed.

http://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_tr_app.pdf (last visited Sept. 12, 2011).

²³ *Id.*

²⁴ See Cuba Cultural Travel, Legal Travel to Cuba,” “The Law Regarding Travel to Cuba,” <http://www.cubaculturaltravel.com/travel/legal-travel-to-cuba?type=raw&tmpl=component> (last visited Sept. 12, 2011) (“Cuba Cultural Travel was granted a People to People license by the Treasury Department on July 15, 2011. This one-year license allows Cuba Cultural Travel to operate tours in Cuba. These tours are open to all Americans, and no application or approval process is required. This license stipulates that our travelers must be part of a group and must adhere to the approved itinerary.”).

²⁵ See E-mail from A. Thomas Levin to Vincent E. Doyle III, Seymour W. James, Jr., and Patricia Bucklin, at first and second attachments (Aug. 2, 2011, 10:06 p.m.) (on file with author).

²⁶ Office of Foreign Assets Control, U.S. Dept. of the Treasury, “Comprehensive Guidelines for License Applications to Engage in Travel-Related Transactions Involving Cuba” at 24 (revised Apr. 19, 2011), http://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_tr_app.pdf (last visited Sept. 12, 2011).

²⁷ See E-mail from A. Thomas Levin to Vincent E. Doyle III, Seymour W. James, Jr., and Patricia Bucklin, at first attachment (Aug. 2, 2011, 10:06 p.m.) (on file with author).

²⁸ *Id.*

²⁹ Press Release, The White House, “Reaching Out to the Cuban People,” (Jan. 14, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/01/14/reaching-out-cuban-people> (last visited Sept. 12, 2011).

³⁰ Karen Rubin, “Travel Industry Cheers Obama Move Opening Cuba to ‘Purposeful Travel’ but Seeks Free-Flow of Visitors,” *Huffington Post* at 4-5 (Jan. 24, 2011) (quoting David Evans, Esq., Vice President Government Affairs for the American Society of Travel Agents, Inc.) (“The proposal is very narrowly focused on the issue of ‘purposeful travel,’ and doesn’t dramatically change the travel landscape.”), http://www.huffingtonpost.com/karen-rubin/travel-industry-cheers-ob_b_813436.html (last visited Sept. 12, 2011).

II. How might the Cuban government treat a law-related trip to Cuba?

It appears that the Cuban government generally welcomes Americans. I do not have information about whether the Cuban government would welcome Americans on a law-related trip.

According to one reporter, “[t]he cash-strapped Cuban government welcomes more Americans because tourism is a major money earner for the island, but also because it gets a chance to change perceptions.”³¹ Another stated, “Delegations of Americans are good public relations and a promising source of income for Cuba.”³²

It appears, however, that a group of travelers may not know until the departure date whether they will be allowed entry into Cuba because “[v]isas are obtained at the airline departure desk.”³³

III. Is there any information from third parties to suggest that law-related trips to Cuba are allowed under the people-to-people license program?

Yes. Bar association representatives were involved with President Obama’s announcement of the people-to-people license program, and at least two other entities that appear to have people-to-people licenses are coordinating law-related trips to Cuba.

First, Chicago Bar Association (“CBA”) representatives were present on the January 14th conference call in which President Obama announced his decision to expand Americans’ ability to travel to Cuba.³⁴ CBA was invited to participate in the call after it sponsored a trip to Cuba in late 2010 and after several participants then contacted the White House to urge President Obama to take action to loosen travel restrictions.³⁵

Second, two travel-related entities – Witness for Peace and Authentic Cuba Travel – are advertising law-related trips to Cuba on the Internet. Witness for Peace is promoting a ten-day trip called “Cuba: Contemporary Developments in Cuban Law: People to People Licensed Delegation.”³⁶ The advertisement states, “This trip was previously advertised as a Professional Research delegation but now, since we have a Person-to-Person license from the Treasury Department, we are able to extend participation to all who are interested in the delegation as

³¹ Jeff Franks, “First Americans in Cuba Under Easier U.S. Travel Rules,” Reuters at 2 (Aug. 16, 2011), <http://www.reuters.com/assets/print?aid=USTRE77F6WB20110816> (last visited Sept. 12, 2011).

³² Victoria Burnett, “In Cuba, Yes, but Only With a Purpose,” *The New York Times* at 3 (Jul. 8, 2011), available at <http://travel.nytimes.com/2011/07/10/travel/in-cuba-and-staying-with-a-purpose.html?pagewanted=all> (last visited Sept. 12, 2011).

³³ Posting of John McAuliff, Fund for Reconciliation and Development to Cuba U.S. People to People Partnership (Sept. 4, 2011, 9:36 a.m.), <http://cubapeopletopeople.blogspot.com> (last visited Sept. 12, 2011).

³⁴ See Posting by The CBA to Gavel Talk: Thoughts from the President of the Chicago Bar Association (Jan. 24, 2011, 9:26 a.m.), <http://gaveltalk.chicagobar.org/2011/01/presidential-action-on-travel-to-cuba.html> (last visited Sept. 12, 2011).

³⁵ See *id.*

³⁶ Witness for Peace, “Cuba: Contemporary Developments in Cuban Law: People to People Licensed Delegation – All Applicants Welcome!” http://witnessforpeace.org/userdata_display.php?modin=51&uid=758 (last visited Sept. 12, 2011).

described above. Individuals need not be lawyers or legal professionals; however, lawyers and legal professionals will receive preference.”³⁷

Authentic Cuba Travel is coordinating a program called “Cuba Study Tour II: Cuba Academic Travel for Lawyers, Legal Scholars, Law Professors, and Legal System Professionals.”³⁸ It appears that a people-to-people license has been granted for the trip. Next to the advertisement on the same page is the following statement: “Under a Specific License, travel has been re-authorized for educational exchanges not involving academic study when those exchanges take place under the auspices of an organization that sponsors and organizes such programs to promote people-to-people contact.”³⁹

IV. Do other factors exist that might make a NYSBA-sponsored law-related trip to Cuba vulnerable to challenge?

Yes. The following factors demonstrate NYSBA’s vulnerability to challenge: (1) the existence of an open file from a past investigation of similar activity; (2) a past decision by the U.S. government to make a retroactive change to a Cuba-related travel rule; (3) Congressional opposition to President Obama’s decision to re-create the program; and (4) the apparent inability of NYSBA to receive advance authorization from OFAC due to its third-party status in the licensing relationship.

First, OFAC apparently has an open file relating to a past investigation of NYSBA with regard to one or more Cuba trips. This suggests that NYSBA should be particularly sensitive to potential problems with sponsoring similar trips.

Second, a reason for OFAC’s past investigation of NYSBA was that a retroactive change was made to a relevant rule. If this happened before, it possibly could happen again. Governmental leaders could construe the people-to-people license program quite narrowly, and this could be harmful to entities like NYSBA that are considering the sponsorship of related trips.

Third, it appears that there is Congressional opposition to the re-creation of the people-to-people license program, and this opposition could lead to the passage of legislation that ends it. For example, Senator Robert Menendez (D-NJ) apparently issued a press release within minutes of President Obama’s January announcement that stated, “Unless new efforts are undertaken to limit the impact of these policy changes, the sole result will be to enrich the Castro regime and enhance the political and economic impoverishment of the Cuban people.”⁴⁰ The travel advisory issued by OFAC in July was in response to complaints by Representative Ileana Ros-Lehtinen (R-Fla.) that the press was misrepresenting that the program is open to tourists.⁴¹ As of last

³⁷ *Id.*

³⁸ Authentic Cuba Travel, “Cuba Study Tour II: From December 16 to December 23, 2011,” <http://www.authenticcubatours.com/cuba-education-tours/lawyers-education-tour.htm> (last visited Sept. 12, 2011).

³⁹ *Id.*

⁴⁰ Posting of Robert L. Muse to Cuba U.S. People to People Partnership, “New Rules Regulating Academic and People-to-People Travel to Cuba” at 4 (Jan. 28, 2011) (emphasis omitted), <http://cubapeopletopeople.blogspot.com/2011/01/legal-analysis-by-robert-muse.html> (last visited Sept. 12, 2011).

⁴¹ See Kitty Bean Yancey, “Back to Cuba: ‘People-to-People Trips’ Get the Green Light,” *USA Today* (Aug. 10, 2011), http://www.usatoday.com/NEWS/usaedition/2011-08-11-cuba11_ST_U.htm (last visited Sept. 12, 2011).

month, Cuban-American members of the U.S. Congress reportedly had proposed legislation to roll back the people-to-people program regulations.⁴² One attorney specializing in OFAC matters warned,

Due to the scrutiny OFAC has been placed under by members of Congress, it is likely that they will in turn heavily scrutinize those applying and being granted license to ensure they are in compliance with the new rules. Before advertising your people to people tour in Cuba, it is best to make sure you have the appropriate authorization from OFAC and are in full compliance with the law.⁴³

Because the first trip to Cuba is being planned many months in advance (planning is underway now for Spring or Summer 2012), the anticipated trip would be vulnerable over those months to a change in the rules. It could be vulnerable as well to any rules passed with retroactive effect after the trip ends.

Fourth, NYSBA does not appear to have the ability to receive advance authorization for the trip(s) from OFAC because OFAC communicates with and grants licenses to entities like CCT, and not potential sponsors like NYSBA. In this situation, NYSBA essentially would need to rely on representations by CCT that the trip is permitted.

V. What conclusion can be drawn from this information?

It appears that it would be more prudent to forego a trip -- in the absence of a clear statement from the U.S. government about the permissibility of such a trip and in light of other factors that make NYSBA vulnerable.

The information from third parties that I found is helpful, but it might not be sufficiently persuasive if the U.S. government chooses to investigate NYSBA again. An “others are doing it” defense might be insufficient, given that NYSBA is on notice of potential problems due to the earlier investigation.

Conclusion

In conclusion, based on the foregoing, I am inclined to think it would be better not to sponsor a trip to Cuba at this time.

TS

⁴² See Jeff Franks, “First Americans in Cuba Under Easier U.S. Travel Rules,” Reuters at 2 (Aug. 16, 2011), <http://www.reuters.com/assets/print?aid=USTRE77F6WB20110816> (last visited Sept. 12, 2011).

⁴³ Posting of Erich Ferrari to Sanction Law, “Cuba People to People Exchanges Begin This Week” (Aug. 10, 2011), <http://sanctionlaw.com/2011/08/10/cuba-people-to-people-exchanges-begin-this-week/> (last visited Sept. 12, 2011).

Schiller, Teresa

Subject: Cuba memos
Attachments: _0920102831_001.pdf; Cuba Memo v3.pdf

From: A. Thomas Levin [<mailto:ATLevin@msek.com>]
Sent: Sunday, October 23, 2011 11:51 AM
To: Bucklin, Patricia
Subject: Cuba memos

Pat – I've reviewed this memo and would like to respond, since I think it is based on misinformation, a lack of understanding of what happened in the past, and a lack of understanding of what I am proposing be undertaken by NYSBA.

I am disappointed that Ms. Schiller didn't take any time to discuss this matter with me, and apparently relied solely upon my prior emails as a basis for her discussion. It was plain (at least to me) that those emails were not intended to give a full background of the previous history with this, and her reliance upon them as the apparent sole source of the history therefore may have led her down the wrong path. I also don't understand her apparent reliance upon blogs or other internet sources of dubious provenance for other information about the history of similar trips to Cuba in the past. It seems to me that personal discussion with me, or many others involved in this issue and whom I could have identified for Ms. Schiller, would have avoided the misunderstandings.

In any event, let's start with the history of which I am personally familiar.

In 2003, I was invited to participate in a trip to Cuba under the auspices of the ABA International Section. Jack Zulack also went on this trip. We were accompanied by a Professor of law from California, Paul Carlin (Executive Director of the Delaware Bar Association), Marc Staenberg (then President of the Beverly Hills Bar Association), two officers of the Minnesota Bar Association and one office of the Chicago Bar Association. This trip was conducted under an OFAC General License for professional research. The only part of this trip which was problematic was our departure from Miami to Havana, as the INS agents at the Miami airport were of the view that the trip was not permitted. We prevailed upon them to contact OFAC in Washington, DC, where they verified that the trip, and its specific itinerary, had been approved.

In 2005 and 2006, NYSBA authorized five more such trips, which also were done under the same General License category for professional research, and which followed an itinerary virtually identical to the 2003 itinerary. Each of these trips went off without any hitch. (I was the leader on one of these trips, and Kate Madigan was a participant in one of the others. Several other Bar leaders also participated.)

At the time of the foregoing trips (2003, 2005 and 2006) the applicable General License category was "professional research". This category did not require specific itinerary approval, and the OFAC regulations required only that the trip be conducted under the auspices of an authorized travel provider, all participants in the trip were required to be members of the profession involved, the itinerary was required to consist solely of professional contacts and meetings, and the participants were required upon their return to publish accounts of the trip and their conclusions. We were assiduous in meeting and adhering to all of these conditions.

During this period of time, similar trips were conducted by many other Bar Associations under the auspices of Cuba Cultural Travel (the travel provider which the ABA and NYSBA used for all of the foregoing trips). My memory is that this included the Beverly Hills, Iowa, and Ohio Bar Associations.

Many months after we concluded our last trip OFAC raised some issues regarding the activities of Cuba Cultural Travel in the NYSBA trips and some of the others. Apparently, OFAC concluded that the licensed provider could facilitate the travel, hotel and meeting arrangements, attend and supervise the travel to and from Cuba, and between locations in Cuba, but could not attend the actual meetings unless the provider were also a licensed professional in the same profession as the travelers. In the case of the Cuba Cultural Travel provider, the principal had attended some of the meetings, serving in the capacity of a translator. OFAC's investigation caused it also to look into the itineraries of the several trips conducted under the auspices of Cuba Cultural Travel.

In addition, OFAC also reinterpreted the "professional research" category of General Licenses such that the license would be available only for trips conducted by persons employed in academia, rather than persons who were licensed in a particular profession. This reinterpretation was applied retroactively to groups which had already completed travel under the previous interpretation that the participants were required to be licensed professionals. As a result, the NYSBA trips, and the trips of several other Bar Associations, were reviewed by OFAC.

To our knowledge, OFAC never took any action against any of the Bar Associations whose trips were reviewed, and all of those investigation files, although technically still open, are dormant. The principal of Cuba Cultural Travel concluded that he did not want to have to deal with OFAC any further, and voluntarily relinquished his travel provider license, at which point the review of his activities was terminated. OFAC claims that it has continued to apply its new interpretation of the "professional research" license, but in fact several other Bar Associations (including the National Bar Association) have conducted trips to Cuba under this license category with itineraries virtually identical to the one we used, without incident.

More recently, the Obama administration changed the OFAC rules, to authorize "People to People" trips under General License, in which the itinerary is required to consist primarily of interaction with the Cuban people. This category, along with the long standing Humanitarian and Religious general license categories, are the principal license categories used by the dozens of trips to Cuba which are conducted by groups of Americans at the current time.

With this change in policy, Cuba Cultural Travel applied for and received its travel provider license so that it could once again organize and conduct such trips. It has done so for several groups, without incident.

Clearly, NYSBA could organize People to People trips under the General License for this category. However, such trips would not be focused on the legal aspects of Cuban society, and would not fall within the focus of NYSBA.

Earlier this year, the Chicago Bar Association took a highly publicized trip to Cuba, without any interference or investigation by OFAC. I do not know what license category might have been used for this trip.

At the request of the NYSBA International Section (I am the Section Vice-Chair for Special Projects), I have had discussions with Cuba Cultural Travel about an itinerary which would qualify under current OFAC regulations. Using Cuba Cultural Travel contacts and my personal contacts in Cuba, we have

devised an itinerary which we believe would include substantial contact with the Cuban professional, governmental and academic legal community, but which would also meet the requirements for the People to People general license. However, because I cannot be assured that this itinerary would meet with OFAC approval, and because I would want to be assured that no adverse consequences to NYSBA would accrue, I have not suggested that NYSBA pursue such travel.

Rather, Cuba Cultural Travel and I both have suggested that NYSBA apply for a specific license for its specific itinerary. This process would result in an OFAC license for a particular itinerary, and thus remove any issues about the legality of such travel. The concerns expressed in Ms. Schiller's memorandum would be irrelevant if we were to obtain such a specific license.

A similar process has been followed by several universities and law schools, some of which have obtained the specific license and some of which have applications pending.

My proposal (which appears to have been misunderstood by Ms. Schiller) is that NYSBA permit the International Section to apply to OFAC for permission to conduct one or more trips to Cuba under a specific license for particular itineraries. Participation in the trips would be limited to members of the Section and leaders of NYSBA. If the rules permit non-lawyers to participate, non-lawyer spouses and domestic partners would also be included. If NYSBA were to do this under specific license, there would be no concern that the itinerary would result in any investigation or other issues involving NYSBA.

Because it takes at least six months to process an application for such specific licenses, and because the duration of Cuba Cultural Travel's travel provider license is limited to one year at a time, it is likely that any such trips, if authorized, could not be conducted until late spring or summer of 2012 at the earliest.

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Go Green! Print this email only when necessary. Thank you for being environmentally responsible.

From: A. Thomas Levin
Sent: Friday, September 23, 2011 1:06 PM
To: Bucklin, Pat
Subject: Cuba memos

Pat - just home from the hospital, so I won't get to this in detail for a few days. But, I definitely want to follow up on this. I think this memo is incomplete, contains some errors, and omits the most feasible alternative.

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From: Bucklin, Patricia [<mailto:PBUCKLIN@NYSBA.ORG>]
Sent: Tuesday, September 20, 2011 2:52 PM
To: A. Thomas Levin
Subject:

Hi Tom,

I have attached a memo analyzing the Cuba trip. Please review and let me know your thoughts. Also, please let me know if you still would like to raise this at the Executive Committee meeting in November.

I hope that your surgery went well and that you are feeling much better!

Pat

IRS Circular 230 Disclosure

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Memo

To: Patricia Bucklin

From: Teresa Schiller

Date: December 5, 2011

Re: Cuba Issues 2 – Privileged and Confidential

Background

This memo relates to the issue of whether the New York State Bar Association (“NYSBA”) should sponsor a trip to Cuba.

It provides further information relating to an e-mail from A. Thomas Levin dated October 23, 2011, which attaches a memo from me dated September 20, 2011. (The e-mail and memo are attached here.)

In Mr. Levin’s October e-mail, he clarified that he proposes that NYSBA apply to the Office of Foreign Assets Control (“OFAC”) for a specific license for travel to Cuba -- rather than concluding from a review of the regulations that it qualifies for such travel under a general license.¹

Analysis

I. What is the difference between a “general license” and a “specific license”?

A general license for a trip to Cuba is authorized generally by regulation, while a specific license is specifically authorized by OFAC for a particular trip.

¹ See E-mail from A. Thomas Levin to Patricia Bucklin (Oct. 23, 2011, 11:51 a.m.) (on file with author).

A general license constitutes “blanket authorization for those transactions set forth in the relevant regulation.”² No further permission is required.³

“OFAC will consider the issuance of specific licenses on a case-by-case basis to permit travel-related transactions where the proposed activity is not covered by a general license . . . A specific license applicant must wait for OFAC to issue the license **prior** to engaging in travel-related transactions.”⁴

Even if we believe that NYSBA could qualify for a general license, we should apply for a specific license, out of an abundance of caution.

II. Pursuant to what regulation would NYSBA apply for a specific license?

31 C.F.R. § 515.564. This regulation is entitled “professional research and professional meetings in Cuba.”⁵ Section 515.564 authorizes both specific and general licenses for travel “by full-time professionals to attend professional meetings or conferences in Cuba organized by an international professional [] association that regularly sponsors meetings or conferences in other countries . . .”⁶ If the international association is headquartered in the U.S., it must receive a specific license to sponsor the meeting in Cuba.⁷

As described above, this regulation authorizes professional meetings or conferences in Cuba. It is my understanding that NYSBA leaders contemplate hosting this type of event.

The regulation further specifies that a trip must be for “full-time professionals.” NYSBA would need to specify this requirement in its invitation to NYSBA members about the trip. For example, although it is my understanding that all NYSBA members could be classified as “professionals” because they are admitted to a bar as lawyers, it is possible that they also would need to be employed full time to qualify for the trip.

The regulation also specifies that an international professional association must host the trip. Based on my understanding of NYSBA’s involvement in the international arena (*e.g.*, through the International Section), I believe that NYSBA would qualify. Based on the regulation’s further specification regarding associations that are headquartered in the U.S., it seems clear that NYSBA would need to apply for a specific license for the proposed trip.

² Office of Foreign Assets Control, U.S. Dept. of the Treasury, “Comprehensive Guidelines for License Applications to Engage in Travel-Related Transactions Involving Cuba,” at 5 (revised Apr. 19, 2011), *available at* http://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_tr_app.pdf (last visited Sept. 12, 2011).

³ *Id.*

⁴ *Id.* at 6 (emphasis in original).

⁵ 31 C.F.R. § 515.564 (64 FR 25815, May 13, 1999, as amended at 69 FR 33772, Jun. 16, 2004; 74 FR 46006, Sept. 8, 2009).

⁶ 31 C.F.R. § 515.564(a)(2).

⁷ 31 C.F.R. § 515.564(a)(2)(i).

III. Could NYSBA qualify for a specific license under § 515.564?

Possibly. It seems possible that NYSBA could qualify to host a training conference in Cuba. The conference would need to be held for the professional benefit of attendees (not merely their personal satisfaction), and it would need to provide a full schedule of meetings.

OFAC provides the following example of permissible travel in its guidelines accompanying § 515.564:

An international professional association of jurists headquartered in England organizes an annual training conference. This year the conference will be held in Cuba. The prior venues for this conference have included locations in Spain, China, and Mexico. The general license is applicable to individuals who are full-time professionals.⁸

This example appears to be analogous to a situation in which NYSBA would host an annual training conference through the International Section. It is my understanding that the International Section has in the past hosted annual training conferences in international locations such as Panama.

According to this example, the invitees would need to be full-time professionals – presumably currently employed full time.

Although this example refers to a “general license,” NYSBA would need to apply for a specific license because it is headquartered in the U.S. In addition, as described previously, we believe it would be prudent to obtain advance authorization for the trip.

In planning a trip and preparing an application for a specific license, NYSBA would need to be mindful of prohibited activities that are described in § 515.564 and in OFAC’s related guidelines.⁹ For example, § 515.564 specifies that the following types of travel do not qualify for either general or specific licenses:

⁸ Office of Foreign Assets Control, U.S. Dept. of the Treasury, “Comprehensive Guidelines for License Applications to Engage in Travel-Related Transactions Involving Cuba,” at 16 (revised Apr. 19, 2011), *available at* http://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_tr_app.pdf (last visited Sept. 12, 2011).

⁹ Notably, the following example of impermissible travel is provided in a version of OFAC guidelines that is online, but this example is not in the official version of the OFAC guidelines that is on the U.S. Treasury website:

A U.S. law firm seeks to sponsor a conference in Havana with a focus on Cuban law and lectures by Cuban attorneys. Absent any direct nexus between the law practices of participating attorneys and the need for exposure to the Cuban legal system, this activity is not eligible for authorization by specific license.

Office of Foreign Assets Control, “Comprehensive Guidelines for License Applications to Engage in Travel-Related Transactions Involving Cuba,” Professional Research & Meetings – 31 CFR § 515.564, Application Criteria for Specific Licenses for Other Professional Research, Meetings, or Conferences – 31 CFR § 515.564(b), *available at* <https://cubatravel.ofac.treas.gov/guidelines.htm#ProfessionalResearch> (last visited Dec. 3, 2011).

- (1) recreational travel;
- (2) tourist travel;
- (3) travel in pursuit of a hobby;
- (4) research for personal satisfaction only; and
- (5) any travel for an authorized professional research purpose if the schedule of activities includes free time, travel, or recreation in excess of that consistent with a full work schedule of professional research or attendance at professional meetings or conferences.¹⁰

Parts (1), (2), and (3) above do not appear to be problematic to the extent that NYSBA leaders contemplate hosting a “working” conference in Cuba. However, regarding (4) above, our proposal for a specific license would need to show that the research and learning at the conference would be for professional reasons, and not merely personal satisfaction. Moreover, regarding (5) above, the proposed itinerary would need to outline a full schedule of work-related events.

OFAC also provided the following example of impermissible travel:

A group of architects wants to arrange a sight-seeing trip to view the architecture of Old Havana. This does not constitute research and would not qualify for a license since it constitutes travel for personal satisfaction only.¹¹

This example of impermissible travel seems analogous, to the extent that architects interested in Cuban architecture are similar to lawyers interested in Cuban law. NYSBA would need to distinguish its situation by demonstrating in its licensing application that the research and learning at the proposed conference would be for professional reasons, and not merely personal satisfaction.

For these reasons, it seems possible that NYSBA could qualify for a specific license, as long as it can demonstrate that the proposed conference is a “working” conference with a full-time

This example seems to be similar to the type of trip that the International Section would like to host. If the proposed itinerary focuses on Cuban law, then it seems that the trip only would be available for lawyers who can show a “direct nexus” with their practices. I do not have information about how many NYSBA members would be able to demonstrate such a connection, or whether there would be enough such members to justify a trip. However, this example appears not to be prohibitive because it does not appear to be part of the official guidelines at the present time. See Office of Foreign Assets Control, U.S. Dept. of the Treasury, “Comprehensive Guidelines for License Applications to Engage in Travel-Related Transactions Involving Cuba,” at 19 (revised Apr. 19, 2011), *available at* http://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_tr_app.pdf (last visited Sept. 12, 2011).

¹⁰ 31 C.F.R. § 515.564(c).

¹¹ Office of Foreign Assets Control, U.S. Dept. of the Treasury, “Comprehensive Guidelines for License Applications to Engage in Travel-Related Transactions Involving Cuba,” at 19 (revised Apr. 19, 2011), *available at* http://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_tr_app.pdf (last visited Sept. 12, 2011).

schedule, and that it is being sponsored for the professional benefit of attendees, and not their personal satisfaction.

IV. How would NYSBA apply for a specific license?

NYSBA could apply for a specific license by using OFAC's online application form or by preparing a letter application. (I attempted to access the online application, but I stopped when it appeared that doing so would cause an official OFAC file to be created.) Both the online application form and the letter application apparently call for the same information:

- (1) Contact information of an individual;
- (2) Description of the applying organization and its goals and objectives;
- (3) Stated request for a specific license for the attendance at a professional meeting or conference, or for the organization of a professional meeting or conference, in Cuba;
- (4) Duration of the proposed travel (can request multiple trips if applicant can demonstrate a significant record of research);
- (5) Description of meeting/conference and the subject matter involved. Name the entity organizing the meeting or conference and where the entity is headquartered. Provide the agenda. *Clearly articulate why attendance is necessary and explain whether a similar conference elsewhere is not readily available;*
- (6) Documentation of qualifications. Include a resume or curriculum vitae, at a minimum. *Discuss how your professional background or area of expertise is related to the meeting/conference. Describe past research that is of a similar nature to the type you wish to conduct in Cuba;*
- (7) Extensions and renewals – when applying for an extension or renewal of a license, reference the past license number and provide information about the use of the license and why an extension or renewal is necessary; and
- (8) Sign the application to certify that the statements are true and accurate.¹²

The most challenging aspects of the application appear to be Parts (5) and (6). For example, Part (5) requires a clear articulation of why attendance is “necessary.” NYSBA would need to show in its application that attendance at the convention is necessary for invitees. Perhaps we could explain that certain aspects of the International Section’s business are conducted at annual training conferences (if true), and that attendance by members is therefore important. In addition, if continuing legal education courses would be offered at the conference, we could explain that this benefit is an important part of membership in NYSBA and in the International Section.

Part (6) requires a description of how the attendees’ professional backgrounds or areas of expertise relate to the conference. (This requirement echoes the example discussed above in note 9, which called for a “direct nexus” between the attorneys’ practices and the proposed trip. Although that example does not appear to be in the official guidelines at the present time, we should be mindful of this issue if NYSBA prepares an application.) Assuming that the training conference would cover legal issues of international importance beyond Cuban law, we should

¹² See *id.* at 17-18 (emphasis added).

state that International Section members need to attend the conference to stay abreast of current developments in international law.

Importantly, Part (6) also requires a description of past research that is similar to the type that attendees wish to conduct on the proposed trip. This requirement would seem to call for information about NYSBA's past research trips to Cuba – including NYSBA trips that OFAC investigated. As described further in Part V below, providing such information could “remind” OFAC officials who review the application of the agency's past investigation of NYSBA. It is possible that this could prompt closer scrutiny of the application – and a renewed investigation of past trips.

Regarding Part (7), it does not appear that documentation would be necessary because it seems that NYSBA would be applying for a new license. However, if OFAC were to interpret the proposed application as an application for a renewal of a past license, then documentation about past trips (including ones that were under investigation) might be necessary.

V. In light of OFAC's investigation of past NYSBA trips, what risk is associated with applying for a specific license?

It seems that some amount of risk would be involved in applying for a specific license: OFAC could renew its investigation of NYSBA's previous trips. As described in Part IV(6) above, NYSBA would need to describe in its application similar research that it has conducted with respect to Cuba in the past. This request would seem to call for information about NYSBA's past research trips to Cuba – including NYSBA trips that OFAC was investigating. OFAC officials who review the new application for a specific license might decide to review old OFAC files about NYSBA in deciding whether to grant a new license. For example, OFAC officials might search a computerized database for history on NYSBA activities in Cuba. There is a possibility that such a review could prompt a renewed investigation. Unfortunately, I do not have enough information about OFAC's practices and priorities to be able to measure the likelihood of such a possibility.

VI. What conclusions can be drawn from this information?

It seems possible that NYSBA could receive a specific license to sponsor a training conference in Cuba. However, there is some risk that submitting an application to OFAC could trigger a renewed investigation of past NYSBA trips.

Conclusion

In conclusion, based on the foregoing, I am inclined to think that sponsoring a trip to Cuba might not be advisable at this time.

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