

## **THE CUBA CONUNDRUM: CORPORATE GOVERNANCE AND COMPLIANCE CHALLENGES FOR U.S. PUBLICLY-TRADED COMPANIES**

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The list of companies exploring business opportunities in Cuba reads like a who's who of household names – Starwood Hotels, Netflix, Jet Blue, Carnival, Google, and AirBnB are either conducting business or have publicly announced plans to do so now that the Obama administration has normalized relations with Cuba. The 1962 embargo and the 1996 Helms-Burton Act remain in place, but companies are preparing for or have already been taking advantage of the new legal exemptions. Many firms, however, may not be focusing on the corporate governance and compliance challenges of doing business in Cuba. This Essay will briefly discuss the pitfalls related to doing business with state-owned enterprises like those in Cuba; the particular complexity of doing business in Cuba; and the challenges of complying with US anti-bribery and whistleblower laws in the totalitarian country. I will also raise the possibility that Cuba will return to a state of corporatism and the potential impact that could have on compliance and governance programs. I conclude that board members have a fiduciary duty to ensure that their companies comply with existing U.S. law despite these challenges and recommend a code of conduct for Cuba or any emerging markets which pose similar difficulties.

A number of chief executive officers and board members of U.S. companies are salivating at the opportunity to enter the once-elusive Cuban market now that President Obama has moved toward normalizing relations with the communist nation, even as many in Congress oppose

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normalization.<sup>1</sup> These executives seek a first mover advantage, at least among their U.S. peers. Europeans and Canadians have conducted business on the island for years but U.S. opportunities have been stifled by the embargo initially imposed by President Eisenhower in 1960, President Kennedy in 1962 and updated and strengthened by the Cuban Democracy Act of 1992 as well as the Helms Burton Act in 1996.<sup>2</sup> Although only the U.S. and Israel have supported the embargo, the other member states of the United Nations have overwhelmingly condemned the embargo for twenty-three years in a row.<sup>3</sup> Nonetheless, as a result of the “thaw,” major U.S. companies have already conducted public fact-finding missions to the island, often with local or state officials in tow.<sup>4</sup> These companies could face a first-mover *disadvantage* by proceeding too hastily and running into the compliance and governance problems outlined below. Publicly-traded firms will face major hurdles related to both (1) compliance with U.S. law and (2) ensuring that board members meet their fiduciary duties including the duty of oversight.

Unfortunately, U.S. firms face a conundrum. The U.S. government has a double standard when dealing with human rights and labor issues in Cuba. Although firms are permitted and often encouraged to do business with other communist regimes or nations with similar human rights records, due to the embargo, U.S. companies have strict restrictions related to doing business in Cuba.<sup>5</sup> This essay will discuss some of the key

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1. Danielle Renwick & Brianna Lee, *U.S.-Cuba Relations*, COUNCIL ON FOREIGN RELATIONS (Aug. 4, 2015), <http://www.cfr.org/cuba/us-cuba-relations/p11113> [<https://perma.cc/3NFM-JCNJ>].

2. Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, 22 U.S.C. §§ 6021-91 (1996); Proclamation No. 3447, 27 Fed. Reg. 1085 (Feb. 3, 1962).

3. See Press Release, UN General Assembly, As General Assembly Demands End to Cuba Blockade for Twenty-Third Consecutive Year, Country’s Foreign Minister Cites Losses Exceeding \$1 Trillion (Oct. 28, 2014). Notwithstanding the embargo, the United States has been Cuba’s largest trading partner since 2007.

4. E.g. Steve Kaufman, *Kentucky Business Leaders and Company Owners Embark on Fact-finding Trip to Cuba*, INSIDER LOUISVILLE (Nov. 24, 2015, 6:00 AM), [http://insiderlouisville.com/business/kentucky\\_business\\_leaders\\_visit\\_cuba/](http://insiderlouisville.com/business/kentucky_business_leaders_visit_cuba/) [<https://perma.cc/EU73-L28U>]; see also Mike Stone & Mirra Taj, *U.S. Hotel Chains Circle Cuba as Visitors Surge, Restrictions Ease* (Sep. 30, 2015, 9:19 am EDT), <http://www.reuters.com/article/us-cuba-usa-hotels-idUSKCN0RU0BZ20150930> [<https://perma.cc/HW6M-HCNG>] (“Executives from Marriott International, Hilton Worldwide and Carlson Hospitality Group, which runs the Radisson chain, are among those who have held talks with Cuban officials in recent months . . .”).

5. See Tom Malinowski, Assistant Sec’y, Bureau of Def., Human Rights, & Labor, Prepared Remarks for the Senate Committee on Foreign Relations: Human Rights in the New Approach to U.S.-Cuba Policy (Feb. 3, 2015), <http://www.state.gov/j/drl/rls/rm/2015/237120.htm> [<https://perma.cc/ZJY4-K4C7>] (emphasizing that Obama and the U.S. government will continue programs that promote “the realization of human rights and fundamental freedoms such as freedoms of peaceful

corporate governance and compliance risks of doing business in Cuba pre and post-embargo. It will recommend that board members adopt a specific code of conduct to which socially responsible investors and other stakeholders will be able to hold them accountable.<sup>6</sup> To be clear, although there are significant human rights and rule of law issues in Cuba, I do not argue that U.S. firms avoid entering the Cuban marketplace. Instead, I urge that U.S. firms use caution because of the potentially precarious political and legal situation that the current U.S. government climate imposes on companies wishing to do business on the island during the embargo. Accordingly, while a Cuba-specific code of conduct is not legally-required, it may help mitigate some of the risks inherent in doing business there, and could be easily adopted for doing business in any emerging economy or economy with a significant state-owned enterprises.

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expression, association, and assembly in Cuba . . . [as] [t]hese are a fundamental part of our human rights policy and national security interests around the world.” However, “The Cuban government may continue to object to these efforts.”); Danielle Renwick & Brianna Lee, *U.S.-Cuba Relations*, COUNCIL ON FOREIGN REL., <http://www.cfr.org/cuba/us-cuba-relations/p11113> [<https://perma.cc/5JNU-BG9D>] (last updated Aug. 4, 2015) (noting that Congress maintains control over U.S. economic sanctions and experts say the repeal of Helms-Burton is unlikely for example).

6. In another essay, I previously discussed the ethical ramifications of doing business in Cuba in light of human rights concerns. I do not intend to minimize the potential for U.S. companies to promote or to exacerbate human rights impacts by only briefly touching on human right issues in this Essay. Marcia Narine, *Ten Ethics-Based Questions for U.S. Companies Seeking to do Business in Cuba*, 1 COMPLIANCE ELLIANCE J. 62 (2015), <http://ul.qucosa.de/fileadmin/data/qucosa/documents/17651/CEJ%20Summer%202015%20Narine.pdf> <https://perma.cc/29JG-X7NJ>. In the future, I will address these issues in a much longer article in which I will discuss whether foreign direct investment will spur human rights reform or perpetuate the status quo.

## I. THE ROLE OF THE BOARD OF DIRECTORS IN ENTERPRISE RISK MANAGEMENT

Prudent companies conduct enterprise risk management (“ERM”) assessments; rating agencies and investors expect them to do so because ERM analysis is becoming a leading indicator of a firm’s ability to operate within a controlled risk/reward framework.<sup>7</sup> ERM extends to strategic, operations, reporting, and compliance risks, including human rights risks, as outlined by the Committee of Sponsoring Organizations (“COSO”), the standard-bearer for ERM.<sup>8</sup> According to COSO, ERM is as a “process, effected by an entity’s board of directors, management and other personnel, applied in a strategy setting and across the enterprise, designed to identify potential events that may effect the entity, and manage risk to be within its risk appetite, to provide reasonable assurance regarding the achievement of entity objectives.”<sup>9</sup>

Directors also have duties under state law. Under the *Caremark* case: a director’s obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances, may, in theory at least, render a director liable for losses caused by non-compliance with applicable legal standard.<sup>10</sup>

As I will discuss later, companies also rely on anonymous whistleblower hotlines and compliance mechanisms to ensure that the board is informed of known or suspected wrongdoing, but this may be difficult, if not impossible, in an authoritarian state, in which the government is actively involved in all aspects of daily life.<sup>11</sup>

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7. See Mark Murray, *Rating Agencies Are Positive on ERM Why Insurers Need to Pay Attention*,

TOWERS WATSON (Sept. 2013), <https://www.towerswatson.com/en-US/Insights/Newsletters/Global/emphasis/2013/rating-agencies-are-positive-on-erm> [<https://perma.cc/TZJ8-95YX>] (explaining ERM’s increasing influence on ratings and regulations and determining that the methodologies employed by rating agencies and the reporting requirements set by regulators have become more prospective in nature).

8. See COMMITTEE OF SPONSORING ORGANIZATIONS OF THE TREADWAY COMMISSION, THOUGHT LEADERSHIP IN ERM: DEMYSTIFYING SUSTAINABILITY RISK, 5 (2013); see also COSO EXECUTIVE SUMMARY, ENTERPRISE RISK MANAGEMENT - INTEGRATED FRAMEWORK, 3 (2004) (hereinafter COSO EXECUTIVE SUMMARY) (explaining the premise of enterprise risk management).

9. COSO EXECUTIVE SUMMARY, *supra* note 8, at 2.

10. *In re Caremark Int’l, Inc. Derivative Litig.*, 698 A.2d 959, 970 (Del. Ch. 1996).

11. While the U.S. government considered Cuba an authoritarian state in 2014, in 2011, the State Department had previously labeled it a totalitarian state. U.S. DEP’T OF

*Stone v. Ritter* confirmed the *Caremark* holding and further emphasized that directors have a duty of good faith to address potential or actual violations of law.<sup>12</sup> The business judgment rule, which protects a board's informed decision made in good faith, will not protect a director from liability in an oversight failure case because the business judgment rule only applies when the directors have actually made a decision.<sup>13</sup> Therefore, directors who exhibit willful blindness and fail to consider how operating in Cuba, with its vast network of state owned enterprises ("SOEs"), may exacerbate the risk to the enterprise do so at their own peril. Not only do they risk personal liability, but they also risk damaging the value and reputation of the firm.

Accordingly, U.S. firms focused on ERM have to factor in the particular risks related to doing business in Cuba discussed in this Essay and must determine whether the potential rewards outweigh the significant risks. They must also consider state law. Finally, directors of publicly-traded firms should also consider whether the risks factors discussed in this essay should be disclosed in filings with the Securities and Exchange Commission ("SEC") including 10-K or 10-Qs.<sup>14</sup>

## II. THE RISKS OF DOING BUSINESS WITH STATE-OWNED ENTERPRISES

U.S. businesses already operate in countries with a large number of state-owned enterprises<sup>15</sup> particularly in the BRIC countries — Brazil,

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STATE, *Human Rights and Labor, Cuba 2014 Human Rights Report* (2014), <http://www.state.gov/documents/organization/236892.pdf> [https://perma.cc/XF4G-RLS4]; U.S. DEP'T OF STATE, *Human Rights and Labor, Cuba* (2011), <http://www.state.gov/documents/organization/186717.pdf> [https://perma.cc/SM6Q-DAFL].

12. *Stone v. Ritter*, 911 A.2d 362 (Del. 2006); *see also In re China Auto. Sys. Inc. Derivative Litig.*, 2013 WL 4672059, at \*8 (Del. Ch. 2013) (emphasizing that bad faith can lead to personal liability for directors).

13. *Aronson v. Lewis*, 473 A.2d 805, 813 (Del. 1984) (observing that the business judgment rule "has no role where directors have either abdicated their functions or absent a conscious decision, failed to act."). For more on the business judgment rule, *see* D. Gordon Smith, *The Modern Business Judgment Rule*, RESEARCH HANDBOOK ON MERGERS AND ACQUISITION, BYU L. Research Paper Series No. 15-09, (forthcoming 201\_) <http://ssrn.com/abstract=2620536> [https://perma.cc/SQ5W-ZKFL] (describing the evolution of the business judgment rule).

14. *See, e.g., How to Read a 10-K, SEC*, <http://www.sec.gov/answers/reada10k.htm> [https://perma.cc/Z5FS-XSX2] (last visited Dec. 29, 2015) (discussing why 10-Ks are created and how they should be read).

15. For the purposes of this essay a state-owned enterprise is an entity in which the government owns all or part of the shares, and in some cases as few as 20% of the shares. *See* Jeremy Schwartz & Tripp Zimmerman, *Emerging Markets And State-Owned Enterprises*, NASDAQ (Dec. 5, 2014, 05:11:49 PM),

Russia, India, and China — the world’s largest emerging market economies.<sup>16</sup> Brazil’s government controls firms with assets of over \$750 billion; a significant percentage considering the country’s GDP in 2013 was \$2.3 trillion.<sup>17</sup> In 2013, SOEs constituted over 50% of Russia’s GDP.<sup>18</sup> According to the World Bank, 41 SOEs make up 20% of the Mumbai Stock Exchange.<sup>19</sup> The Chinese government owns or controls the twelve largest firms in China.<sup>20</sup>

The role of the state in these business enterprises poses special challenges for U.S. companies doing business with them. As the OECD has observed:

SOEs may suffer just as much from undue hands-on and politically motivated ownership interference as from totally passive or distant ownership by the state. There may also be a dilution of accountability. SOEs are often protected from two major threats that are essential for policing management in private sector corporations, i.e., takeover and bankruptcy. More fundamentally, corporate governance difficulties derive from the fact that the accountability for the performance of SOEs involves a complex chain of agents (management, board, ownership entities, ministries, the government), without clearly and easily identifiable, or with remote, principals. To structure this

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<http://www.nasdaq.com/article/emerging-markets-and-state-owned-enterprises-cm420401> [<https://perma.cc/PC7S-7CHF>](“State-owned enterprises are typically defined as companies that are either wholly or partially owned or operated by a government.”); ORG. FOR ECON. COOPERATION & DEV., *OECD Guidelines On Corporate Governance Of State-Owned Enterprises Draft For Public Comment* (2014), [hereinafter OECD CORPORATE GOVERNANCE GUIDELINES ON SOE’S] <http://www.oecd.org/daf/ca/SOE-guidelines-update-draft-text-May-2014.pdf> [<https://perma.cc/VGL8-LFHH>] (noting additionally that “statutory corporations, with their legal personality, established through specific legislation should be considered as SOEs if their purpose and activities are of a largely commercial nature”).

16. *The BRIC Countries: Brazil, Russia, India, China*, ECONOMY WATCH (June 29, 2010), <http://www.economywatch.com/international-organizations/bric.html> [<https://perma.cc/9QX9-9A3>]. South Africa is also included in many lists.

17. Marcelo Pontes Vianna, *Brazilian State Owned Enterprises: A Corruption Analysis*, GEO. WASH. U. 1, 20 (2014), [http://www.gwu.edu/~ibi/minerva/Fall2014/Marcelo\\_Vianna.pdf](http://www.gwu.edu/~ibi/minerva/Fall2014/Marcelo_Vianna.pdf) [<https://perma.cc/V7PR-PHRH>].

18. *2014 Investment Climate Statement – Russia*, U.S. DEP’T OF STATE (2014), <http://www.state.gov/e/eb/rls/othr/ics/2014/227933.htm> [<https://perma.cc/M4KM-YNJP>].

19. World Bank Grp., *Corporate Governance of State-Owned Enterprises A Toolkit* 1, 7 (2014) (hereinafter Corp. Gov. SOE Toolkit), <https://openknowledge.worldbank.org/bitstream/handle/10986/20390/9781464802225.pdf?sequence=1> [<https://perma.cc/DKC7-FSHE>].

20. Scott Cendrowski, *China’s Global 500 Companies Are Bigger Than Ever—And Mostly State-Owned*, FORTUNE (July 22, 2015, 9:01 AM), <http://fortune.com/2015/07/22/china-global-500-government-owned/> [<https://perma.cc/B9AM-E8MP>].

complex web of accountabilities in order to ensure efficient decisions and good corporate governance is a challenge.<sup>21</sup>

However, investors want and expect accountability and transparency from directors so that they can properly evaluate the directors' actions.<sup>22</sup> This drive for accountability and transparency has led to a number of mandated and suggested disclosures from the SEC for U.S. issuers.<sup>23</sup> Accordingly, SOEs pose specific challenges for U.S. firms that focus on transparency and good corporate governance.

Multinationals also have access to guidance on best practices because there are so many risks in doing business with an SOE. The World Bank Toolkit, for example, provides country and company level tools adapted in part from the corporate governance guidelines of the International Finance Corporation.<sup>24</sup> This guidance is particularly important because:

Driven by the divergence of political interests between ownership (by the government on behalf of the citizens of the country) and control (by the directors and managers that run the company), these governance problems can include complicated and at times contradictory mandates, the absence of clearly identifiable owners, politicized boards and management, lack of autonomy in day-to-day operational decision making, weak financial reporting and disclosure practices, and insufficient performance monitoring and accountability systems. Where these shortcomings are more common, SOEs may also be a source of corruption.<sup>25</sup>

Indeed, it is no coincidence that the BRIC countries are considered among the most corrupt large economies in the world.<sup>26</sup> In 2014, 25% of

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21. OECD CORPORATE GOVERNANCE GUIDELINES ON SEO'S, *supra* note 15, at 3.

22. Luis A. Aguilar, *Looking at Corporate Governance from the Investor's Perspective*, HARV. L. SCH. FORUM ON CORPORATE GOVERNANCE AND FIN. REGULATION (Apr. 24, 2014), <http://corpgov.law.harvard.edu/2014/04/24/looking-at-corporate-governance-from-the-investors-perspective/> [<https://perma.cc/L6PW-FNXP>].

23. See U.S. SEC. AND EXCH. COMM'N, FORMS LIST (listing of the kinds of forms and disclosures U.S. issuers must file). For more on whether these disclosures provide material information for the investing public, see ERNST & YOUNG LLP, *Disclosure effectiveness: What companies can do now* (2014), [http://www.ey.com/Publication/vwLUAssets/EY-disclosure-effectiveness-what-companies-can-do-now/\\$FILE/EY-disclosure-effectiveness-what-companies-can-do-now.pdf](http://www.ey.com/Publication/vwLUAssets/EY-disclosure-effectiveness-what-companies-can-do-now/$FILE/EY-disclosure-effectiveness-what-companies-can-do-now.pdf) [<https://perma.cc/B433-TCNB>] (providing an overview of corporate disclosures).

24. Corp. Gov. SOE Toolkit, *supra* note 19 at xvii-xix.

25. Corp. Gov. SOE Toolkit, *supra* note 19 at xxii-xxiii.

26. See TRANSPARENCY INT'L, CORRUPTION PERCEPTIONS INDEX 2014: RESULTS (2014), <http://www.transparency.org/cpi2014/results> [<https://perma.cc/8GZY-DQDT>] (observing that out of 175 countries and territories, Brazil ranks 69, Russia ranks 136, India ranks 85, and China ranks 100. The least corrupt country in the world is Denmark. The U.S. ranks 17 and Cuba ranks 63. The lower the number the higher the score).

Chinese SOE officials were investigated for corruption in the energy sector.<sup>27</sup> Similarly, federal prosecutors in Brazil have announced corruption investigations into the former president; Dilma Rousseff was impeached due to a bribery scandal involving one of the country's largest SOEs, Petrobras, which she chaired for several years.<sup>28</sup> Board members of U.S. firms should therefore expect the likelihood of encountering corruption when entering any emerging market and doing business with SOEs. For the reasons stated below, this may hold particularly true in Cuba.

### III. THE PARTICULAR RISKS OF DOING BUSINESS IN CUBA

Under Raul Castro, the Cuban government has allowed and encouraged private sector activity. Cuban scholars estimate that Cuba's private sector currently employs roughly two million people.<sup>29</sup> This is comprised of both employees and self-employed individuals — with almost 9% of the total workforce being self-employed.<sup>30</sup> Despite Cuba's acceptance of increased private sector activity, at this time the state still

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27. See Angela Meng, *A quarter of Chinese SOE executives investigated for corruption work in energy sector From November 2012 to April; 124 top officials in state-owned enterprises held on suspicion of corruption, 13 per cent working in infrastructure, 12 per cent in telecoms*, SOUTH CHINA MORNING POST, (Apr. 28, 2015, 5:55 PM) <http://www.scmp.com/news/china/policies-politics/article/1778702/quarter-chinese-soe-executives-investigated-corruption> [https://perma.cc/3984-4GR4] (discussing the prevalent corruption in China).

28. See Simon Romero, *Brazil Adds to Tally of Corruption Scandals With Investigation of a Former President*, N.Y. TIMES (July 16, 2015), <http://www.nytimes.com/2015/07/17/world/americas/brazil-corruption-scandal-investigation-luiz-inacio-lula-da-silva.html> [https://perma.cc/HDX7-G2PE] (discussing the investigation of Luiz Inácio Lula da Silva, former president, and his protégée and successor, Dilma Rousseff); see also Jennie Avins, *Brazil's Petrobras scandal has finally reached Dilma Rousseff's inner circle*, QUARTZ (Mar. 17, 2015), <http://qz.com/364526/brazils-petrobras-scandal-has-finally-reached-dilma-rousseffs-inner-circle/> [https://perma.cc/CW4Z-JX2V] (discussing the investigation of the people around Dilma Rousseff, including João Vaccari, treasurer of Rousseff's Working Party).

29. See Jorge I. Dominguez, *International Business: What You Might Not Know About the Cuban Economy*, HARV. BUS. REV. (Aug. 17, 2015), <https://hbr.org/2015/08/what-you-might-not-know-about-the-cuban-economy> [https://perma.cc/D4G6-5C9Y].

30. Drew Desilver, *What we know about Cuba's economy*, PEW RESEARCH CENTER (May 28, 2015), <http://www.pewresearch.org/fact-tank/2015/05/28/what-we-know-about-cubas-economy/> [https://perma.cc/TTF6-L394]; see Dominguez, *supra* note 29 (noting that there are over 500,000 people with self-employment licenses in Cuba). The scholars' estimates are based on a "rule of thumb" that states for every one private sector licensee (currently 500,000 licenses issued) there are four hired employees. Dominguez, *supra* note 29. This "rule of thumb" is based on Cuba's tax system that increases tax rates for companies with five or more employees. *Id.*



exerts a significant amount of control over the national economy – 75% by one estimate.<sup>31</sup> It is also worth noting that the military does not limit its activities to protecting the homeland. Instead, the Fuerzas Armadas Revolucionarias controls at least an estimated 60% of the economy, 20% of the workers, and 40% of foreign exchange revenues.<sup>32</sup>

As in all markets but particularly emerging markets, corruption in Cuba reportedly reaches all levels, from the black market and taking advantage of job perks which the average Cuban uses to survive day to day to more systemic corruption at the top.<sup>33</sup> One foreign businessman imprisoned for corruption denied paying the kickbacks for which he was charged but claimed to have paid a 1-2% fee in “protection money” for routine transactions to Cuban officials prior to his arrest.<sup>34</sup> Over the past few years, the Cuban government has publicly confiscated assets of foreign business people accused of corruption, most notably \$91.7 million of the Canadian Tokmajian group.<sup>35</sup> For these reasons, U.S. firms considering

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31. Ernesto Hernández-Catá, *The Institutional Structure Of Production In The Cuban Economy*, ASS'N FOR THE STUDY OF THE CUBAN ECON., 224, 229 (2014), <http://www.ascecuba.org/c/wp-content/uploads/2015/01/v24-hernandezcata.pdf> [<https://perma.cc/DT86-V8Q9>].

32. James Bruno, *How Obama's Cuba Deal is Strengthening Its Military*, POLITICO MAGAZINE (Mar. 17, 2015), <http://www.politico.com/magazine/story/2015/03/cuba-relations-obama-revolutionary-forces-far-116158> [<https://perma.cc/CS6W-5HSP>]. Some studies believe the FAR's influence is much more extensive. See Brenden M. Carbonell, *FAR from Perfect: The Military and Corporatism in CUNY GRADUATE CENTER, CHANGING CUBA/CHANGING WORLD* 175, 181 (2008) [http://www.gc.cuny.edu/CUNY\\_GC/media/CUNY-Graduate-Center/PDF/Centers/Bildner%20Center%20for%20Western%20Hemisphere%20Studies/Publications/Carbonell10\\_000.pdf](http://www.gc.cuny.edu/CUNY_GC/media/CUNY-Graduate-Center/PDF/Centers/Bildner%20Center%20for%20Western%20Hemisphere%20Studies/Publications/Carbonell10_000.pdf) [<https://perma.cc/PA7Z-X8YB>] (discussing a study in which “enterprises managed by Cuba’s armed forces are responsible for ‘89 percent of exports, 59 percent of tourism revenues, 24 percent of productive service income, 60 percent of hard currency wholesale transactions, 66 percent of hard currency retail sales, and employ 20 percent of state workers.” (quoting Brian Latell, *The Cuban Military and Transition Dynamics*, INST. CUBAN & CUBAN-AMERICAN STUD., UNIV. OF MIAMI, [http://ctp.iccas.miami.edu/Research\\_Studies/BLatell.pdf](http://ctp.iccas.miami.edu/Research_Studies/BLatell.pdf) [<https://perma.cc/8CR5-69DF>] (last visited Feb. 23, 2016)).

33. Romina Ruiz-Goiriena, *Cuba Is A Kleptocracy, Not Communist*, THE DAILY BEAST (Dec. 19, 2014, 5:55 AM), <http://www.thedailybeast.com/articles/2014/12/19/cuba-is-a-kleptocracy-not-communist.html> [<https://perma.cc/WSD9-6WK7>].

34. Jeff Gray, *How a Canadian businessman lost everything in Cuba*, THE GLOBE AND MAIL, <http://www.theglobeandmail.com/report-on-business/international-business/latin-american-business/canadian-businessman-accused-of-spying-lost-everything-in-cuba/article23569652/> [<https://perma.cc/S5RB-4EFZ>] (last updated Mar. 22, 2015, 4:12 PM).

35. See Vito Echevarria, *Cuban Asset Confiscations Put Spotlight on Arbitration*, CUBASTANDARD.COM (Apr. 25, 2015, 4:54 PM), <https://www.cubastandard.com/?p=12969> (highlighting that the Canadian entrepreneur was sentenced to 15 years in prison by Cuban authorities for corruption and bribery. Cuban authorities seized \$91.7 million of the

doing business in Cuba need to be particularly wary of potential ramifications of bribery both in Cuba and at home for the reasons described below.

#### IV. THE FCPA PROBLEM

Although there are a number of compliance challenges with doing business with Cuba or any emerging market for that matter, the Foreign Corrupt Practices Act (“FCPA”) should be close to the top of the list of concerns. The FCPA prohibits

“any domestic concern” from “mak[ing] use of the mails or any means . . . of interstate commerce corruptly in furtherance of” a bribe to “any foreign official,” or to “any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official,” for the purpose of “influencing any act or decision of such foreign official . . . in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person. . . . A ‘foreign official’ is any officer or employee of a foreign government or any department, agency, or instrumentality thereof.”<sup>36</sup>

The accounting provision of the law also requires firms to keep accurate books and records.<sup>37</sup> A violation of the accounting provisions can lead to civil penalties and if the company knowingly circumvents the provisions, the company can be subject to \$25 million in criminal penalties and up to twenty years in prison for individual defendants.<sup>38</sup> Corporations can be held criminally liable for up to \$2,000,000 in fines and individuals are subject to up to \$250,000 in fines and five years of imprisonment.<sup>39</sup> FCPA fines may be increased to twice the gross financial gain or loss

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Tomakjian Group’s assets on the island during his detention, and the company says government officials sought an additional \$55 million to get the company founder released).

36. The Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-2(a), h(2)(A) (1977).

37. Carlos Ayres, *Key Aspects of the FCPA Accounting Provisions*, FCPAMÉRICAS BLOG (Mar. 5, 2014), <http://fcpamericas.com/english/enforcement/key-aspects-fcpa-accounting-provisions/> [<https://perma.cc/YF85-QQSK>].

38. See Stuart H. Demming, *FCPA Prosecutions: The Critical Role of the Accounting and Recordkeeping Provisions*, [http://www.americanbar.org/publications/blt/2010/08/06\\_deming.html](http://www.americanbar.org/publications/blt/2010/08/06_deming.html) [<https://perma.cc/F5FR-6U67>] (last visited March 4, 2016) (noting for example, “a supplier to an issuer who knowingly facilitates the making of a false invoice to conceal the true nature of the underlying transaction could be subject to prosecution for violating the recordkeeping provisions.”).

39. The Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-2(a),(g) (1977).

resulting from the corrupt payment.<sup>40</sup>

The law provides that an instrumentality of a foreign government can include a state-owned company, complicating matters for U.S. firms.<sup>41</sup> This significantly heightens the risks for companies doing business in Cuba given the high number of SOEs in the country. Further exacerbating the matter, the average Cuban employee earns approximately \$20 USD per month.<sup>42</sup> Employees paid by foreign companies do not fare any better because the Cuban government takes 92% of those wages in an effort to ensure that all workers in the same industry and geographic area are on the same pay scale.<sup>43</sup> These low wages do not match the significant responsibility that some Cuban employees have for procurement and licensing, and thus it provides an ideal opportunity for bribery for even low-level employees.

Although the Cuban government has arrested some high level officials from state-owned telecom, sugar, and tourism industries in the past year,<sup>44</sup>

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40. See Crimes and Criminal Procedure, 18 U.S.C. § 3571(d) (2012) (If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss . . . □).

41. See *United States v. Esquinazi*, 752 F.3d 912 (11th Cir. 2014), cert. denied, 135 S. Ct. 293 (2014) (emphasizing that state-owned or state-controlled companies that provide services to the public may meet the definition of an instrumentality of a foreign government).

42. See *Average Salary in Cuba Rose 1 pct Last Year to a \$20 a Month*, LATINO.FOXNEWS.COM (Aug. 30, 2015, 3:04 PM), <http://latino.foxnews.com/latino/news/2014/06/17/average-salary-in-cuba-rose-1-pct-last-year-to-20-month/> [<https://perma.cc/WE83-ZE2R>] (highlighting that the average Cuban actually makes closer to \$25 per month and acknowledging by sectors that construction maintained the highest average state salary in 2013 at 582 pesos (\$24)); see also Isbel Díaz Torres, *The Mean Salary of Cubans*, HAVANA TIMES (Aug. 6, 2013), <http://www.havanatimes.org/?p=97506> [<https://perma.cc/V5RU-QKV2>] (noting the disparity in pay between the highest paid employees, construction workers, and employees commanding lower pay, such as those working in retail, restaurants, and hotels). Numerous reporters and professors in Cuba discussed wage ranges of \$25-45 USD per month with the author in both June and December of 2015.

43. Frances Martel, *Castro to Pocket 92% of Worker Salaries from Foreign Companies*, BREITBART (Dec. 19, 2014), <http://www.breitbart.com/national-security/2014/12/19/castro-to-pocket-92-of-worker-salaries-from-foreign-companies/> [<https://perma.cc/WP5K-Y8ZT>]; Circles Robinson, *Cuban Gov. to Keep 92% of Worker Salaries*, HAVANA TIMES (Dec. 16, 2014), <http://www.havanatimes.org/?p=107948> [<https://perma.cc/FNA8-YRUL>]; see also Onaisys Fonticoba, *Nuevas Disposiciones Sobre Pago a Trabajadores Vinculados con la Inversión Extranjera* (Dec. 15, 2014, 21:12:18), <http://www.granma.cu/cuba/2014-12-15/nuevas-disposiciones-sobre-pago-a-trabajadores-vinculados-con-la-inversion-extranjera> [<https://perma.cc/ZV7P-XTAF>] (discussing resolutions that established new provisions for payment to employees linked to enterprises with foreign capital).

44. Timothy Belevetz & Ronald Oleynik, *A Warning on doing business in Cuba*,

that does not mean that government employees will not take advantage of the influx of U.S. requests for licenses and government contracts to re-build Cuba's infrastructure.

U.S. corporate board members should also closely watch the pace and form of Cuba's economic reform. While there is a possibility that Cuba will follow Vietnam's model (another communist country), some fear that Cuba will return to corporatism, defined as:

a system of interest representation in which the constituent units are organised into a limited number of singular, compulsory, noncompetitive, hierarchically ordered and functionally differentiated categories, recognised or licensed (if not created) by the state and granted a deliberate representational monopoly within their respective categories in exchange for observing certain controls on their selection of leaders and articulation of demands and supports.<sup>45</sup>

By granting a limited monopoly to a small number of firms in exchange for following certain rules, the state empowers more previously disenfranchised people while still maintaining a level of control. Under Batista, certain scholars believe that corporatism led to widespread corruption which, in part, led to the 1959 revolution.<sup>46</sup> There is no reason to believe that a return to corporatism and the patronage of the state would not increase the corruption that may already exist.

Further, the government would likely maintain enough control that the new businesses could still possibly qualify as SOEs. Accordingly, corruption poses a significant risk to U.S. firms. In addition to the staggering fines, U.S. companies can risk debarment from government contracts, shareholders derivative suits, and drops in the stock price.<sup>47</sup> On the other hand, it will be interesting to see whether the same government that has been so aggressive with the FCPA prosecutions will be as diligent when the Obama administration has been so focused on restoring relations with Cuba. Perhaps prosecutors will exercise more discretion, but that

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CNBC.COM (July 30, 2015, 11:09 AM), <http://www.cnn.com/2015/07/30/a-warning-on-doing-business-in-cuba-commentary.html> [<https://perma.cc/HR8Y-TCUL>].

45. Paul Kubicek, *Variations on a Corporatist Theme: Interest Associations in Post-Soviet Ukraine and Russia*, 48(1) EUROPE-ASIA STUDIES 27, 28 (1996).

46. Brenden Marino Carbonell, *Cuban Corporatism: Batista's Three-Year Plan and a Nation Betrayed*, 19 CUBA IN TRANSITION 274, 275 (2009), <http://www.ascecuba.org/c/wp-content/uploads/2014/09/v19-carbonell.pdf> [<https://perma.cc/NT6T-XVR9>].

47. Marcia Narine, *Whistleblowers and Rogues: The Urgent Call for an Affirmative Defense to Corporate Criminal Liability*, 62 CATH. U. L. REV. 41, 54 (2012) (providing for a more detailed description of the effects of an FCPA investigation and the resulting deferred or nonprosecution agreement with the Department of Justice and Securities and Exchange Commission).

remains to be seen, particularly if a Republican administration enters office in 2016.

## V. THE WHISTLEBLOWER RISK

Public companies must also comply with a number of state and federal whistleblower laws<sup>48</sup> but for the purposes of this essay, I will address the applicable provisions of Sarbanes-Oxley<sup>49</sup> and Dodd-Frank,<sup>50</sup> which amended parts of Sarbanes-Oxley and added other laws of protection. Companies generally use hotlines or other anonymous reporting mechanisms to comply with the requirement to provide a vehicle for tipsters.<sup>51</sup>

Sarbanes-Oxley provides protection from retaliation for both employees and contractors of publicly-traded companies who provide information to a supervisor, Congress, or the SEC regarding securities fraud, bank fraud or the violation of any SEC rule; however, it does not protect foreign employees of U.S. issuers.<sup>52</sup>

Under Dodd-Frank, the whistleblower must provide original information to the SEC related to a violation of the securities law (which includes the FCPA) to be entitled to a reward of between 10-30% of any recovery over \$1 million.<sup>53</sup> Relying on the presumption against

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48. See *Federal Whistleblower Protections*, NAT'L WHISTLEBLOWERS CTR., [http://www.whistleblowers.org/index.php?option=com\\_content&task=view&id=816&Itemid=129](http://www.whistleblowers.org/index.php?option=com_content&task=view&id=816&Itemid=129) [<https://perma.cc/9VLE-CP65>] (last visited Feb. 23, 2016) (listing many whistleblower protections under Federal law). See generally OCCUPATIONAL SAFETY & HEALTH ADMIN., *The Whistleblower Protection Programs*, U.S. DEP'T LABOR, <http://www.whistleblowers.gov/> [<https://perma.cc/MM7Z-B9A3>] (last visited Feb. 23, 2016). For full disclosure, I am a member of the Department of Labor Whistleblower Protection Advisory Committee.

49. See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 806, 116 Stat. 745, 806 (codified at 18 U.S.C. § 1514A (2010)).

50. Dodd-Frank Act § 922(a) (codified at 15 U.S.C. § 78u-6 (2012)) ("The Securities Exchange Act of 1934 . . . is amended by inserting . . . the following: 'Sec. 21F. Securities Whistleblower Incentives and Protections.'").

51. Kobi Kastiel, *Elements of an Effective Whistleblower Hotline*, HLS FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (Oct. 25, 2014), <http://corpgov.law.harvard.edu/2014/10/25/elements-of-an-effective-whistleblower-hotline/> [<https://perma.cc/A46R-6DFB>].

52. See *Villanueva v. Core Laboratories NV*, No. 09-108, 2011 WL 7021145, at \*9 (ARB Dec. 22, 2011), affirmed on other grounds, *Villanueva v. U.S. Dep't of Labor*, 743 F.3d 103 (5th Cir. 2014) ("Section 806(a)(1) does not allow for its extraterritorial application.").

53. See Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 34-64545, 2011 WL 12700336 (May 5, 2011) (detailing first, that eligible whistleblowers are entitled to an award equal to 10 to 30 percent of the money recovered when they voluntarily provide us with original

extraterritoriality espoused in *Morrison v. National Australia Bank Ltd.*,<sup>54</sup> the Second Circuit in *Liu v. Siemens AG* held in 2014 that a foreign worker employed by a foreign company reporting activities that occurred outside of the United States could not enjoy the protection of Dodd-Frank even though the parent company listed its shares on the New York Stock Exchange.<sup>55</sup> However, the *Liu* court did *not* address whether the decision would differ for a foreign employee of a U.S.-based multinational, and indeed the SEC has provided whistleblower bounties to a number of foreign citizens. In fact, the largest Dodd-Frank award of \$30 million went to a foreigner.<sup>56</sup> Further, the Chief of the Office of the Whistleblower is encouraging more foreign reporting stating,

This award . . . shows the international breadth of our whistleblower program as we effectively utilize valuable tips from anyone, anywhere to bring wrongdoers to justice. Whistleblowers from all over the world should feel similarly incentivized to come forward with credible information about potential violations of the U.S. securities laws.<sup>57</sup>

The SEC did not write an amicus brief on the issue of extraterritorial application of Dodd-Frank in the *Liu* case, but in my view has made its position clear. Therefore, U.S. multinationals operating in Cuba should proceed with the understanding that their Cuban employees could be entitled to a whistleblower award, and even if they were not, they could file a report with the SEC that would lead to an investigation of business practices. Further, because of the high risk of corruption due to the demand for scarce licenses and permits, the chances exponentially increase for an FCPA tip to the SEC from a Cuban employee, vendor, or other interested party.

On the other hand, the average Cuban employee may be less apt to file such a report due to the very real concerns about retaliation from the Cuban government, which would likely be the joint venture partner of their U.S. employer. Although a 2014 SEC report reveals 32 tips from China and 10

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information that leads to a monetary sanction greater than \$1 million in a Commission enforcement action and second; and second, that Section 21F prohibits employment retaliation against individuals for making submissions, which can be anonymous).

54. 561 U.S. 247, 255 (2010) (“When a statute gives no clear indication of an extraterritorial application, it has none.”).

55. 763 F.3d 175, 179 (2d Cir. Aug. 14, 2014).

56. U.S. SEC. & EXCH. COMM’N, 2014 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM, 1, 1 (2014), <http://www.sec.gov/about/offices/owb/annual-report-2014.pdf> [<https://perma.cc/4ALB-ZG36>].

57. Press Release, Sec. & Exch. Comm’n, SEC Announces Largest-Ever Whistleblower Award (Sept. 22, 2014), <https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543011290> [<https://perma.cc/LMA6-6E4P>].

from Russia—<sup>58</sup>two other similar regimes—as discussed earlier, neither of those countries has the level of state control over business that Cuba has.

Further, Cuba's human rights record is well-documented and provides legitimate reasons for employees to fear retaliation. Cuba currently ranks 169 out of 180 countries for press freedom, which by definition stifles the ability of the average Cuban to speak out.<sup>59</sup> Amnesty International's 2015 report on Cuba indicated that the government routinely restricts freedom of assembly, association, movement, and expression.<sup>60</sup> Seventy-five percent of average Cubans believe report that they must be careful about what they say.<sup>61</sup> These statistics may be similar in Russia and China, but again, the likely requirement to enter into a joint venture with the government makes doing business in Cuba more perilous for a U.S.-style whistleblower program. This then begs the question of whether the whistleblower program can operate effectively at all in Cuba.

In practice, the local Cuban employees are unlikely to trigger whistleblower considers for companies; rather, it may be the employees from the company's home nation. For example, for U.S. based companies doing business in Cuba, the real fear would be that the company's own compliance officer could seek and receive a whistleblower award from the SEC. In 2015, the SEC awarded between \$1.4 and \$1.6 million to a compliance officer, and in 2014, an audit or compliance professional received a \$300,000 award.<sup>62</sup> Directors may bank on the fact that their Cuban employees will be too afraid to blow the whistle. But ironically, they may face an internal threat from the compliance officer who discovers wrongdoing during the risk assessments meant to ensure that the directors comply with their Caremark duties. There is also the very real issue of "retributive justice" by Cuban employees of European and other joint ventures who, after decades of working for a company that has facilitated

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58. *Id.* at 29.

59. 2015 *World Press Freedom Index*, REPORTERS WITHOUT BORDERS, <https://index.rsf.org/> [<https://perma.cc/T5W9-QKBR>] (last visited Feb. 23, 2016).

60. *Amnesty International Report 2014/15*, AMNESTY INT'L, <https://www.amnesty.org/en/countries/americas/cuba/report-cuba/> [<https://perma.cc/DNA6-SHW7>] (last visited Feb. 23, 2016).

61. *Cuba: Do you always express yourself freely or do you feel that you have to be careful about what you say?*, STATISTA (2015), <http://www.statista.com/statistics/419378/freedom-of-speech-in-cuba/> [<https://perma.cc/N4J5-CV92>].

62. Samuel Rubinfeld, *SEC Awards More than \$1.4 Million to Whistleblower Compliance Officer*, WALL ST. J. (Apr. 22, 2015, 12:53 PM EST), <http://blogs.wsj.com/riskandcompliance/2015/04/22/sec-awards-more-than-1-4-million-to-whistleblower-compliance-officer/> [<https://perma.cc/7HSJ-THHB>]; *SEC Announces Million-Dollar Whistleblower Award to Compliance Officer*, SEC (Apr. 22, 2015), <http://www.sec.gov/news/pressrelease/2015-73.html> [<https://perma.cc/9MF9-HXQG>].

the Cuban government's hold on power, may seek to report abuses to U.S. authorities if they think they could profit from the disclosure.

#### VI. A CODE OF CONDUCT FOR U.S. COMPANIES DOING BUSINESS IN CUBA

This Essay has thus far painted a relatively pessimistic view of compliance and governance risks in Cuba. In this section, I propose a code of conduct for firms that wish to do business in Cuba and minimize the impact of those legal risks, some of which go beyond the whistleblower and bribery issues discussed above.<sup>63</sup> Washington D.C. based attorney Jason Poblete has spoken publicly and often about his disapproval of the Obama administrations normalization of relations with Cuba and warning U.S. companies of “irrational exuberance”<sup>64</sup> with respect to the Cuba market, at least in the near term.<sup>65</sup> Nonetheless, despite his adamant warnings about U.S. firms supporting the Castro regime, he has published, in discussion draft format, a proposed voluntary corporate code of conduct, which requires that:

1. Consistent with U.S. law (including the transition roadmap contained in LIBERTAD)<sup>66</sup> and international law, U.S. companies respect labor rights of Cuba workers by adopting voluntary minimum standards before engaging in transactions allowed under exceptions to the U.S. comprehensive embargo;
2. U.S. companies will not do business with Cuban entities, or persons, that violate human rights including the right of speech, assembly, and religion.
3. U.S. companies, as a requirement of engaging with Cuban state-owned entities, will require that counterparts agree to generally accepted anti-corruption principles;
4. Respect employee right of association and other fundamental freedoms and to communicate these

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63. See also Narine, *supra* note 4 (discussing the issues that firms should consider in light of their existing Codes of Conduct).

64. Joel Schectman, *Sanctions Expert Warns Against Cuba 'Irrational Exuberance'*, WALL ST. J. (Feb. 2, 2015, 6:41 PM EST), <http://blogs.wsj.com/riskandcompliance/2015/02/02/sanctions-experts-warn-against-irrational-exuberance-on-cuba/> [https://perma.cc/99BD-UYC8].

65. See, e.g., Jason Poblete, *From Beacon of Hope to Regime Facilitator and Enabler*, THE DC DISPATCHES (Aug. 14, 2015), <http://jasonpoblete.com/2015/08/14/from-beacon-of-hope-to-regime-facilitator-and-enabler/> [https://perma.cc/QA9D-8KE2] (arguing that President Obama placed global interests, including that of Cuba, ahead of the interests of the United States).

66.



- principles to all employees without restrictions from the Cuban government;
5. Companies subject to U.S. law will not engage in tourism or medical apartheid or any other activity that discriminates against Cuban workers.
  6. All transactions and business activities in Cuba must be done on property that is not subject to a U.S. certified claim, or if known, potential uncertified claims held by Cuban-Americans.

I believe that this is a good start, but have some questions and comments that I believe can assist firms in developing an appropriate code that meets or exceeds the “Poblete Factors”.

## VII. LABOR RIGHTS

First, Poblete recommends that companies must follow U.S. and international law respecting the rights of Cuban workers. While I agree with this in principle and agree that companies should follow basic minimum standards regarding labor law, this factor has some flaws. As an initial matter, U.S. employment laws contain exceptions if their application would violate the laws of the foreign country in which the business is located.<sup>67</sup> Further, non-U.S. citizens working for U.S. companies do not receive protection from the Americans with Disabilities Act, Title VII, the Fair Labor Standards Act or the Age Discrimination in Employment Act.<sup>68</sup> Thus none of these U.S. laws would protect Cuban workers. Surprisingly, Cuba’s law actually protects against discrimination based on gender identity and sexual orientation, unlike U.S. federal law. But Cuban law does not provide for protection against disability discrimination.<sup>69</sup> Companies can provide their own protections that go beyond local law, but Cuban employees would have no legal recourse to enforce them.

There is also no international law governing all employers worldwide. The International Labour Organization has both legally binding conventions, that must be ratified by member states, and non-binding

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67. *International Assignment: Extraterritorial Laws: Do laws like the Fair Labor Standards Act and the Family and Medical Leave Act apply to U.S. citizens working in several other countries?*, SOC’Y FOR HUMAN RES. MGMT. (Oct. 22, 2014), <http://www.shrm.org/templatestools/hrqa/pages/dolawslikethefairlaborstandardsactandthefamilyandmedicalleaveactapplytouscitizensworkinginseveralothercountries.aspx> [<https://perma.cc/6NFT-6NJZ>].

68. *Id.*

69. *Human Rights and Labor, Cuba 2014 Human Rights Report*, *supra* note 11, at 26-27.

recommendations.<sup>70</sup> The United States, which provides 22% of the ILO's budget, has only ratified 14 of the 189 conventions.<sup>71</sup> Cuba, on the other hand, has ratified 90 ILO conventions and one protocol; however 12 conventions have been denounced.<sup>72</sup> Cuba also does not permit workers to strike or collectively bargain.<sup>73</sup> The U.S., which does allow strikes and collective bargaining has an increasingly shrinking union base. In 2015, only one in ten American workers is a member of a union.<sup>74</sup> Accordingly, while I believe that U.S. firms must respect labor rights, companies must understand the legal limitations to doing so under an "American" standard of labor relations.

#### VIII. HUMAN RIGHTS

The second and fourth Poblete factors prohibits companies from doing business with Cuban entities that violate human rights, including the rights to freedom of speech, assembly, and religion. I agree with this factor as well but this may invariably foreclose doing business in Cuba until the government makes significant changes. Human Rights Watch, for example, reported that 7,000 people were detained by the Cuban government in 2014.<sup>75</sup> Although I agree that the human rights issues in Cuba are extremely serious, and that U.S. companies cannot condone or participate in violations, U.S. companies currently operate in three other communist

70. INT'L LABOUR ORG., *Conventions and Recommendations*, <http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm> [https://perma.cc/GCD8-9DM9] (last visited Feb. 23, 2016).

71. INT'L LABOUR ORG., *The US: A Leading Roles in the ILO*, <http://www.ilo.org/washington/ilo-and-the-united-states/the-usa-leading-role-in-the-ilo/lang--en/index.htm> [https://perma.cc/X3DX-3NNU] (last visited Feb. 23, 2016).

72. INT'L LABOUR ORG., *Ratifications for Cuba*, [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200\\_COUNTR Y\\_ID:102603](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTR Y_ID:102603) [https://perma.cc/3RTM-FZ9K] (last visited Feb. 23, 2016).

73. Marc Frank, *Foreign businesses tread carefully as Cuba opens up*, FIN. TIMES (Feb. 1, 2015, 12:40 PM), <http://www.ft.com/intl/cms/s/0/eb663b9a-a7b3-11e4-8e78-00144feab7de.html#axzz3kPtjfqKS> [https://perma.cc/CGE5-PKNW]; *The Plight of Cuban Workers: Rights Violations by the Cuban Government and Foreign Investors*, INST. CUBAN & CUBAN-AMERICAN STUD., UNIV. OF MIAMI (Nov. 2012), <http://ctp.iccas.miami.edu/CubaBrief/Cuba%20Brief-LaborConditionsInCuba.pdf> [https://perma.cc/34AN-HVC8].

74. *50 Years of Shrinking Union Membership*, In *One Map*, NPR, <http://www.npr.org/sections/money/2015/02/23/385843576/50-years-of-shrinking-union-membership-in-one-map> [https://perma.cc/672A-VD58] (last updated Feb. 23, 2015, 11:53 AM EST).

75. *World Report 2015: Cuba*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2015/country-chapters/cuba> [https://perma.cc/R7ME-7F9B] (last visited Feb. 23, 2016).

countries with similarly poor human rights records—China, Laos, and Vietnam.<sup>76</sup> Further, Russia’s human rights record is remarkably similar to Cuba’s according to the State Department, and this problem is separate and apart from the annexation of Crimea.<sup>77</sup> Companies that adopt this Poblete factor will not likely be able to operate in Cuba under the current regime, even if the embargo were lifted tomorrow.

#### IX. BRIBERY AND “APARTHEID”

I have no criticism of the third Poblete factor related to bribery, and have discussed that issue at length in this Essay. The fifth factor prohibits engaging in tourism, medical apartheid, or other activities that discriminate against Cubans. This factor would also foreclose a number of business opportunities for U.S. firms by virtue of the fact that the average Cuban cannot afford the activities that tourists engage in. But the concept of tourism apartheid is real. Tourists and average Cubans (who are not in the tourism industry or the *cuentrapistas*, who own small businesses) do not get the opportunity to interact together on an extended basis.<sup>78</sup> Further, as of the time of the writing of this Essay, Americans cannot legally visit Cuba as tourists.<sup>79</sup> Others, however, argue that the re-opening of relations could facilitate medical developments in both countries.<sup>80</sup> Complying with this factor in its strictest sense of the word would foreclose most U.S. businesses from entering the Cuban marketplace. Firms must therefore determine whether their entry into the country will exacerbate human rights

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76. See *China (includes Tibet, Hong Kong, and Macau) 2014 Human Rights Report*, U.S. DEP’T OF STATE 52-53 (2014), <http://www.state.gov/documents/organization/236644.pdf> [https://perma.cc/E5X6-CED3] (discussing human rights violations taking place in Tibet, Hong Kong, and Macau); *Laos 2014 Human Rights Report*, U.S. DEP’T OF STATE (2014), <http://www.state.gov/documents/organization/236664.pdf> [https://perma.cc/6KHS-NH49] (discussing human rights in Laos); *Vietnam 2014 Human Rights Report*, U.S. DEP’T OF STATE (2014), <http://www.state.gov/documents/organization/236702.pdf> [https://perma.cc/6GLA-SRFF] (discussing human right standards in Vietnam).

77. *Russia 2014 Human Rights Report*, U.S. DEP’T OF STATE (2014), <http://www.state.gov/documents/organization/236782.pdf> [https://perma.cc/UW5G-JDD5].

78. Kim-Marie Evans, *The Truth About ‘Tourist Apartheid’ in Cuba*, YAHOO (Feb. 16, 2015), <https://www.yahoo.com/travel/the-truth-about-tourist-apartheid-in-cuba-110808487252.html> [https://perma.cc/Z73R-F33X].

79. *Cuba: Quick Facts*, U.S. PASSPORTS & INT’L TRAVEL (Oct. 16, 2015), <http://travel.state.gov/content/passports/english/country/cuba.html> [https://perma.cc/S3GT-WMQK] (last visited Feb. 23, 2016).

80. Alice Ollstein, *How the U.S.-Cuba Reconciliation Could Save Lives in Both Countries*, THINK PROGRESS (July 1, 2015, 2:42 PM), <http://thinkprogress.org/world/2015/07/01/3676059/us-cuba-reconciliation-save-lives-countries/> [https://perma.cc/Q7KK-TSND].

problems or can spur gradual reform through their presence—the justification behind the normalization of relations, according to the Obama administration.

#### X. THE CUBAN PROPERTY CLAIMS

The final Poblete factor requires that no company conduct business on property that is the subject of a certified or potential uncertified claim by a U.S. person or company. There are approximately \$7 billion worth of claims (including interest) that the Castro government confiscated company or personal property pending as of the time of this writing, and it is likely that Congress will not consider lifting the embargo until these claims are resolved.<sup>81</sup> This Poblete factor is legitimate. AirBnB, which boasts 2,000 listings must face the very real possibility that some of those listings are the subjects of certified claims. Similarly, the state-run telephone company also sits on property that is the subject of a disputed claim.<sup>82</sup> Notwithstanding the fact that Cuba is a sovereign nation, I agree with this final factor and would recommend that compliance officers and counsel conduct the appropriate due diligence prior to purchasing property or doing business with any entity that may be utilizing disputed property. This should be no problem for companies that routinely do FCPA and other audits.

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81. See *Cuban Claim FAQs*, CERTIFIED CUBAN CLAIMS <http://www.certifiedcubanclaims.org/faqs.htm> [<https://perma.cc/PRA5-LHVN>] (last visited Feb. 23, 2016) (answering questions about U.S. property claims in Cuba); see also Alan Gomez, *Americans have new hopes to reclaim property seized by Cuba 50 years ago*, USA TODAY (July 30, 2015, 7:44 PM EDT), <http://www.usatoday.com/story/news/world/2015/07/30/cuba-opening-property-claims/30784849/> [<https://perma.cc/PC6B-4CL8>] (discussing the possibility for U.S. companies and citizens to reclaim Cuban property); *Rubio, Vitter: Cuba Must Resolve Legal Claims Before U.S. Re-Establishes Relations*, MARCO RUBIO, U.S. SENATOR FOR GOVERNOR (May 19, 2015), <http://www.rubio.senate.gov/public/index.cfm/2015/5/rubio-vitter-cuba-must-resolve-legal-claims-before-u-s-re-establishes-relations> [<https://perma.cc/NK9E-YRMU>] (arguing that there are billions of dollars of outstanding claims for properties in Cuba); Mark P. Sullivan, CONG. RESEARCH SERV. REP., Mark P. Sullivan, *Cuba: Issues for the 114th Congress 51–59* (Jan. 11, 2016), <http://www.fas.org/sgp/crs/row/R43926.pdf> [<https://perma.cc/53RD-2X67>]. Officials from Cuba and the United States are expected to meet in early 2016 to discuss a resolution of the claims. See Monika Gonzalez Mesa, *US-Cuba Commercial Ventures Undergo Sudden Transformation*, DAILY BUS. REV. (Dec. 29, 2015), <http://www.dailybusinessreview.com/id=1202745909205/USCuba-Commercial-Ventures-Undergo-Sudden-Transformation?mcode=0&curindex=0&curpage=2> [<https://perma.cc/4TJF-TLZE>] (discussing changes in business and investments in Cuba).

82. Craig Offman, *As Cuba-U.S. Relations Thaw, The Thorny Matter Of Property Disputes Heats Up*, GLOBE & MAIL <http://www.theglobeandmail.com/news/world/as-cuba-us-relations-thaw-the-thorny-matter-of-property-disputes-heats-up/article22988839/> [<https://perma.cc/NG8B-2GP7>] (last updated Feb. 13, 2015 3:28 PM EST).

## CONCLUSION

Cuba, a nation the size of Ohio, has eleven million residents. Yet it currently plays an outsize role in discussions in Congress, the editorial pages of newspapers, and in executive suites. President Obama and the U.S. Congress do not appear to be on the same page as the Administration continues to promulgate new regulations further easing restrictions even as the embargo remains in place.<sup>83</sup> However, almost weekly, the thaw continues, and more members of Congress and the business community are seeking to normalize relations.<sup>84</sup> Indeed, the President of the United States announced plans to visit the island in March 2016.<sup>85</sup>

With these rapid changes, corporate board members exploring pre and post-embargo opportunities must ensure that they perform the appropriate due diligence to protect the enterprise from the risks related to doing business with SOEs in general and with Cuba in particular. These risks include bribery and local employees' failure to utilize internal whistleblower hotlines to report known or suspected wrongdoing. In addition to conducting appropriate risk management assessments, firms can adopt some version of the Poblete factors, taking into account the caveats that I have discussed. While the "deshielo" or the "thaw" in relations is real and I do not argue against conducting business on the island, U.S. firms may skate on thin ice if they do not take heed of the risks that lie ahead and ensure that they disclose them as appropriate.

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83. Treasury and Commerce Announce Further Amendments to the Cuba Sanctions Regulations, U.S. DEPARTMENT OF THE TREASURY (Jan. 1, 2016), <https://www.treasury.gov/press-center/press-releases/Pages/jl0328.aspx> [<https://perma.cc/X5CG-WGAL>].

84. See Gonzalez Mesa, *supra* note 81 (discussing a letter signed by ten congress members explaining benefits of having a relationship with Cuba).

85. Tanya Somanader, *Big News: President Obama Is Headed to Cuba*, WHITE HOUSE (Feb. 18, 2016, 7:01 PM ET), <https://www.whitehouse.gov/blog/2016/02/18/big-news-president-obama-headed-cuba> [<https://perma.cc/V7RC-ERQ4>].