

OFAC and BIS Further Ease Cuba Restrictions

Skadden

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On September 21, 2015, the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) and the U.S. Department of Commerce's Bureau of Industry and Security (BIS) amended their respective Cuba regulations to further ease U.S. sanctions and export control restrictions applicable to Cuba. These revisions to OFAC's Cuban Assets Control Regulations (CACR) and BIS's Export Administration Regulations (EAR) build on the changes implemented in January 2015 (Skadden client alert, "[OFAC and BIS Implement Changes in Cuba Policy](#)," Jan. 20, 2015) and are in furtherance of the Cuba policy shift announced by President Barack Obama in December 2014.

Many of the changes are intended to further contact between Americans and Cubans, enhance the free flow of information, and support civil society and the nascent private sector in Cuba. To that end, the CACR and EAR amendments generally continue to focus on those categories of transactions and areas of trade that were the subject of the January 2015 easing, such as travel, telecommunications, Internet-based services, certain financial transactions and remittances. The new changes expand upon the January amendments and further facilitate several previously permitted activities, including by allowing U.S. persons to establish a physical presence in Cuba to undertake authorized activities, such as sales and marketing of authorized products.

Despite these changes, most elements of the U.S. embargo on Cuba remain in place, and, therefore, most transactions involving Cuba by U.S. persons (and their overseas subsidiaries) and non-U.S. companies whose activities are subject to U.S. jurisdiction continue to be prohibited. Even in areas where certain sanctions and export controls have been eased, there may be conditions that need to be met to use an OFAC general license or BIS license exception. Companies should therefore continue to act with significant caution in business and other dealings with respect to Cuba. As with the January 2015 changes, the latest changes should be viewed as an incremental easing. Both OFAC and BIS should be expected to continue to strictly enforce the restrictions that remain in place.

A range of companies and business sectors will be affected by the new amendments to the CACR and EAR. We highlight below some of the more significant changes and the types of institutions, sectors and activities that they will most impact.

Establishment of a Physical Presence in Cuba

Together, OFAC's and BIS's Cuba amendments now authorize U.S. news bureaus; exporters of authorized goods; providers of designated telecommunications services, software and technology; providers of Internet-based services; entities organizing or conducting educational activities; religious organizations; and providers of travel and carrier services to establish and maintain a business presence in Cuba (including through subsidiaries, offices, joint ventures, franchises and agencies with any Cuban person) to facilitate authorized transactions. OFAC's authorization to maintain a physical presence in Cuba includes the authorization to open and maintain bank accounts in Cuba, engage in marketing related to the company's physical presence, employ Cuban nationals and employ in Cuba individuals subject to U.S. jurisdiction. At the same time, BIS has expanded license exception SCP to permit the export and re-export to Cuba of certain designated items for use by U.S. individuals and companies in establishing an office or other physical presence in Cuba to engage in authorized activities. Depending on the circumstances, these changes may permit U.S. persons to, for example, establish a retail or other sales space to support sales to authorized end users and end uses in Cuba.

Financial Institutions

Unblocking of Now-Authorized Transactions. A new general license authorizes the unblocking and return of previously blocked funds that can be rejected or processed under

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the current regulations: certain wire transfers; transactions related to the official business of the U.S. government, foreign governments and certain intergovernmental organizations; or funds transfers for third-country official missions and certain intergovernmental organizations. U.S. Persons who unblock such funds must report the unblocking to OFAC within 10 business days.

Cuban Nationals in the United States. Previously, banks were authorized to open and maintain accounts for Cuban nationals present in the United States on non-immigrant status, as long as the accounts were blocked if not closed before the Cuban national's departure from the United States. Now, banks are authorized to maintain these accounts while the Cuban-national account holder is located outside of the United States as long as the account holder can only access the account while lawfully present in the United States. Additionally, OFAC removed the \$250 cap on payments from blocked accounts held by Cuban nationals while in the United States to allow Cuban nationals access to more adequate funds for living expenses while in the United States.

Cuban Nationals in Third Countries. OFAC has issued an expanded general license authorizing U.S. persons, their foreign branches and foreign subsidiaries to provide goods and services to Cuban national individuals located in third countries. Banking institutions also are now authorized to open, maintain and close bank accounts for Cuban national individuals located in third countries. The provision of goods or services, including banking services, to Cuban nationals in third countries is subject to certain conditions.

Remittances. The CACR amendments affect remittances flowing in both directions between the United States and Cuba. OFAC issued a general license authorizing the unblocking and return of remittances that were blocked because they exceeded the previously established quarterly limits (*i.e.*, \$500 per quarter before January 2015 and \$2,000 per quarter after January 2015). OFAC also removed the limitations on donative remittances to permitted Cuban nationals, remittances that authorized travelers may carry to Cuba, and remittances that Cuban nationals permanently resident in Cuba departing from the United States may carry to Cuba. OFAC further issued a new general license authorizing remittances from either Cuba or Cuban nationals located in third countries to the United States, and financial institutions are authorized to provide related services.

Estate-Related Transactions. OFAC expanded the general license related to administering decedent's estates and the general license allowing the unblocking of, and remittances related to, estates in which a Cuban national has an interest.

Telecommunications and Internet Companies

Licensing Agreements, Marketing and Mobile Apps. OFAC now authorizes U.S. persons to enter into licensing agreements related to authorized telecommunications and Internet-based services and to

market such services. Additionally, the new amendments to the Cuba sanctions program authorize the importation into the United States of Cuban-origin mobile applications (apps) and the employment of Cuban nationals to develop mobile apps.

Information Technology. Under EAR license exceptions CCD and SCP, certain consumer communications devices (CCD) and telecommunication items and software specifically designated by BIS can be exported and re-exported without a license to Cuba to support the improvement of the free flow of information to, from and among the Cuban people. Restrictions on supply of such items for Cuban government and Cuban Communist Party end users remain in place.

BIS also has clarified that, as a general matter, no license is required for release of EAR99 technology and source code to Cuban nationals in the United States and third countries outside of Cuba. Releases of EAR99 technology and source code in such cases remain subject to all other licensing requirements applicable to the country, end use and end user in question.

Building upon the January 2015 amendments, OFAC has expanded its general authorization of services related to the export of CCD to Cuba and now authorizes services including software design, business consulting, information technology management, and other services to install, repair and replace CCD items. Similarly, the new amendments authorize U.S. persons to provide services related to CCD items that were exported to Cuba from a third country.

Internet-Based Services to Government of Cuba. OFAC has removed the restriction on providing Internet-based services to organizations administered or controlled by the government of Cuba or the Cuban Communist Party. The restriction on providing such services to prohibited government or communist party officials remains, however.

Travel Service Providers

Airlines and Shipping Companies. BIS has expanded the Aircraft, Vessels and Spacecraft (AVS) license exception to permit temporary sojourns of up to 14 days for certain ocean-going vessels engaged in authorized activities (such as transportation of otherwise authorized passengers and freight) and up to seven days for civil aircraft subject to the EAR.

Carrier Vessels Between the United States and Cuba, Including Lodging. U.S. Persons are authorized to provide carrier services by vessel between the United States and Cuba, including the provision of lodging services aboard such vessels in connection with the transportation. The new amendments also contain a note clarifying which categories of persons may be transported by vessel between Cuba and the United States. Other U.S. government authorizations, including from the Department of Homeland Security or the U.S. Coast Guard, may be needed to conduct such trips.