

## OFAC and BIS Implement Changes in Cuba Policy

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Since the 1960s, the United States has maintained an embargo on Cuba that in many respects is the most comprehensive set of economic and trade restrictions on any country. On January 16, 2015, amendments to regulations issued by the U.S. Department of the Treasury Office of Foreign Assets Control (OFAC) and the U.S. Department of Commerce Bureau of Industry and Security (BIS) took effect that implement policy changes announced by President Barack Obama in December 2014. These changes allow for certain previously prohibited dealings with Cuba with a focus on activities that “further engage and empower the Cuban people.”

While likely the most significant change in the United States’ Cuban policy in many years, this is not the first time that this or any president has taken steps to loosen U.S. sanctions against Cuba. Several presidents have used their broad authority to ease certain restrictions on travel, financial transactions, remittances and telecommunications. Nevertheless, the president’s authority to implement changes by executive order is not limitless. Laws such as the Cuban Liberty and Democratic Solidarity Act (known as Libertad or Helms-Burton) and the Cuban Democracy Act, among others, impose statutory restrictions that prevent the president from suspending or lifting sanctions entirely unless certain conditions have been satisfied (such as the determination that a transition government or a democratically elected government is in power in Cuba) or unless these laws are amended or repealed.

Despite the recent easing of the Cuban embargo, U.S. and non-U.S. companies whose activities are subject to U.S. jurisdiction should continue to act with significant caution. These changes should be viewed as an incremental loosening. Most transactions between the United States, or persons subject to U.S. jurisdiction, and Cuba remain prohibited. Exporters should be mindful that the remaining controls on exports and reexports to Cuba are extensive and, in particular, continue to prohibit the export of defense articles and services and items controlled for national security reasons, such as dual-use items with both military and civilian applications. Moreover, in order to comply with the latest changes to the Export Administration Regulations (EAR), U.S. exporters (and their overseas subsidiaries) will be required to conduct and document potentially extensive presale due diligence concerning the end user and end use of any items proposed for sale to Cuba. Companies also should pay close attention to the general licenses in the new Cuban Assets Control Regulations (CACR), which contain many exceptions and conditions that must be fully met in order to be applicable.

Both OFAC and BIS have stated that they intend to continue to strictly enforce the current restrictions.

Here we have highlighted some of the more significant changes to the OFAC and BIS regulations.

### Office of Foreign Assets Control

Rather than eliminating any prohibitions, OFAC’s changes expand upon or create new general licenses that are applicable to all persons without the need to seek additional

specific authorization from OFAC. Although the amendments impact many types of companies — by, for example, providing new opportunities for business development — the following will be most affected by the new CACR.

**Financial Institutions.** Almost all changes to the CACR impact financial institutions that will process and engage in other transactions related to permissible activities. However, financial institutions are not required to process permissible transactions. Persons wishing to engage in permissible transactions involving Cuba should consult with their financial institutions in advance.

- Financial institutions subject to U.S. jurisdiction may open up correspondent accounts at banks in Cuba for processing authorized transactions.
- Financial institutions subject to U.S. jurisdiction may process authorized transactions, including new increases in remittances and debit or credit card transactions for authorized travelers. They may rely on the traveler for compliance unless they have reason to know the transaction is not authorized.
- Blocked property of Cuban nationals living in third countries is now unblocked.
- Financial institutions subject to U.S. jurisdiction may now reject instead of block prohibited transactions that originate and terminate outside the United States where neither the originator nor beneficiary are persons subject to U.S. jurisdiction and where the transaction does not involve certain prohibited persons.

**Telecommunications and Internet Companies.** Given the focus on providing the Cuban people with access to information, many of the new licenses impact telecommunications and Internet companies.

- OFAC has expanded the general authorizations for transactions that provide commercial telecommunications services within Cuba and establish facilities to link third countries to Cuba.
- The amendments authorize additional services related to Internet-based communication or software-related services. This includes fee-based services such as email or other messaging, social networking, Voice over IP (VoIP), Web-hosting, services related to software used on personal computers, phones and other devices, cloud storage, software design, business consulting, and the provision of IT management and support related to permitted hardware and software exports authorized by BIS.

**Travel Service Providers.** Twelve categories of travel that previously required specific licenses from OFAC now are generally authorized. Additionally, some of the accompanying travel-related restrictions have been loosened, such as the amount of goods a person may bring back. The CACR amendments authorize travel service providers, such as travel agents and airlines, to offer services to these, and only these, authorized travelers.

- Air carrier services for authorized travel to, from or within Cuba are permitted. Scheduled service is expected to be restored subject to procedures issued by the Department of Transportation and other relevant agencies.
- Travel agents and tour group operators may provide services directly to authorized travel.

U.S. insurers may provide coverage for global health, life or travel insurance policies for individuals ordinarily resident in a third country who travel to or within Cuba, in addition to travel insurance for authorized travel.

**Trade and Shipping Companies.** In addition to amendments to the EAR discussed below, the CACR now authorize certain transactions related to the import and export of goods.

- Companies that export or reexport goods to Cuba consistent with BIS' licensing policy are generally licensed to engage in various related transactions, including market research, commercial marketing, sales negotiation, and accompanied delivery or servicing of the items.
- The definition of the term "payment of cash in advance" is changed to payment before the transfer of title to, and control of, the exported items. This allows for export as long as payment is received prior to the goods' arrival in a Cuban port of entry rather than prior to shipment.
- Independent Cuban entrepreneurs will be selected by the State Department and persons subject to U.S. jurisdiction are authorized to import goods produced by these persons into the United States.
- Foreign vessels may now enter the United States after engaging in trade with Cuba.

**Non-US Subsidiaries of US Companies.** Unlike most other sanctions programs, the Cuban sanctions apply in all respects to non-U.S. subsidiaries of U.S. companies. U.S.-owned or -controlled entities in third countries may now provide goods and services, including financial services, to Cuban nationals located outside of Cuba, provided there is no direct or indirect provision of goods or services to or from Cuba and the transaction otherwise complies with applicable export controls and economic sanctions.

### **Bureau of Industry and Security**

In addition to the changes to the OFAC sanctions, the EAR administered by BIS also have been amended, effective January 16, 2015, to permit the export and reexport to Cuba of a wider range of goods, technology and software subject to U.S. jurisdiction, in the following three categories:

- Items to support improved living conditions and independent (i.e., private sector) economic activity in Cuba, including building materials, equipment and tools for private-sector construction and renovation of privately owned buildings; tools and equipment for private-sector agricultural activity; "tools of the trade" items for use by private-sector entrepreneurs, such as mechanics and restaurateurs; donated or temporarily exported items for use in scientific, archaeological, cultural, educational, historic preservation and sporting activities; and items to support the development of civil society and the free flow of information to, from and among the Cuban people (such as certain telecommunications and Internet-related items). Only items that are controlled for anti-terrorism reasons or are not specifically listed on the Commerce Control List are eligible for export under this category. In addition, the exported items may not be used in connection with defense articles and services or items on the Commerce Control List subject to other national security or dual-use based controls.
- Consumer communications devices, such as personal computers, cellphones, televisions, radios, and digital cameras. This category includes consumer communications devices containing mass-market and other weaker-level encryption hardware and software (except encryption source code). Such items may not be exported for use by a government end user or in connection with defense articles and services or items on the Commerce Control List subject to other national security and dual-use based controls.
- Gift parcels and humanitarian donations of items such as food and clothing. Limited donations of such items were previously authorized. The changes to the EAR expand this authorization to permit the consolidation of multiple gift parcels in a single shipment.

In addition, the EAR have been amended to implement a general policy of approval for licenses for the export and reexport to Cuba of items “necessary” for the environmental protection of U.S. and international air quality, waters and coastlines (including items related to renewable energy or energy efficiency). The full extent of this new general policy is not yet clear. For example, it is arguable that the export of new cars and trucks to Cuba to replace that country’s well-known fleet of 1950s era (now classic) cars would result in the enhancement of international air quality by reducing pollution from Cuban vehicles. However, whether such an export would be sufficient in BIS’s view to satisfy the requirement that the export be “necessary” remains to be seen.