

US Further Eases Sanctions Ahead of President's Historic Trip to Cuba

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On March 15, 2016, the Department of the Treasury's Office of Foreign Assets Control (OFAC) and the Department of Commerce's Bureau of Industry and Security (BIS) announced regulatory amendments that further eased U.S. sanctions and export control restrictions applicable to Cuba. The changes went into effect on March 16, 2016. This is the fourth round of amendments to OFAC's Cuban Assets Control Regulations and BIS' Export Administration Regulations (EAR) to implement the Cuba policy shift that President Barack Obama announced in December 2014. This round builds on prior amendments in January 2015 (see January 20, 2015, client alert "[OFAC and BIS Implement Changes in Cuba Policy](#)"), September 2015 (see September 29, 2015, client alert "[OFAC and BIS Further Ease Cuba Restrictions](#)") and January 2016 (see February 5, 2016, client alert "[OFAC and BIS Ease Cuba Restrictions with New Amendments](#)").

These amendments occur ahead of the president's landmark trip to Cuba, planned for the week of March 20, 2016. The trip will mark the first time in more than 80 years that a sitting U.S. president has visited the country. The amendments are another important step in the executive branch's implementation of the shift in Cuba policy: They expand Cuba's and Cuban nationals' access to the U.S. financial system, facilitate U.S. citizens' travel to Cuba, allow Cuban citizens to earn a salary in the United States, and expedite trade and commercial opportunities between the two countries.

Despite these changes, most elements of the U.S. embargo on Cuba remain in place, and 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 sanctions and export controls have been eased, those relying on an OFAC general license or BIS license exception may need to meet certain conditions. Companies should therefore continue to act with significant caution in business and other dealings that involve Cuba. As with the previous changes, the latest amendments should be viewed as an incremental easing. Both OFAC and BIS have continued to issue penalties for historic violations and are expected to continue to enforce all the restrictions that remain in place.

Key changes implemented by this round of amendments are highlighted below.

Financial Institutions

U-Turn Transactions. OFAC has issued a general license authorizing U.S. banking institutions to process so-called "U-turn" payments in which Cuba or a Cuban national has an interest. The general license requires that payments that are cleared through U.S. banking institutions originate and terminate outside the United States and that neither the originator nor the beneficiary be "a person subject to U.S. jurisdiction."¹ OFAC previously issued, and in 2008 subsequently revoked, a similar general license under the sanctions against Iran that permitted U.S. dollar clearing of transactions in which there was an Iranian interest.

OFAC's authorization of U-turn payments is a significant development, particularly for non-U.S. financial institutions and other non-U.S. entities that wish to engage in U.S. dollar-denominated business involving Cuba. Financial institutions that are not persons subject to U.S. jurisdiction that originate U-turn payments involving Cuba should ensure such payments fully disclose any involvement of Cuba or Cuban nationals. Many non-U.S. financial institutions have paid significant penalties to the New York State

¹ A "person subject to U.S. jurisdiction" is a (1) U.S. citizen or permanent resident, (2) any person located in the United States, (3) any entity organized under the laws of the United States or of any state, territory, possession or district of the United States, and (4) an entity owned or controlled by any of the foregoing.

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Department of Financial Services (NYDFS) for failing to disclose the involvement of Iran or Iranian sanctions targets in payment messages that were sent through New York financial institutions. NYDFS has imposed penalties for nontransparency on otherwise permissible payments, including payments authorized under the former Iranian U-turn rule.

Processing U.S. Dollar Monetary Instruments. The March 2016 OFAC amendments authorize U.S. banking institutions² to process U.S. dollar-denominated monetary instruments, such as cash and traveler's checks, that are presented indirectly by Cuban financial institutions. The banking institution receiving such monetary instruments may rely on the institution having presented such monetary instruments as confirmation that the underlying transactions are authorized, exempt or otherwise not prohibited, unless the financial institution knows or has reason to know differently. The correspondent accounts at third-country financial institutions used for such transactions may be denominated in dollars; however, this easing does not authorize U.S. banking institutions to open or maintain correspondent accounts for Cuban banking institutions. U.S. depository institutions³ are permitted to open correspondent accounts at Cuban banks located in Cuba and in third countries, and at foreign banks located in Cuba to carry out authorized transactions, but they cannot open correspondent accounts for Cuban banks.

U.S. Bank Accounts for Cuban Nationals. A new OFAC general license now authorizes banking institutions to open and maintain accounts in the name of Cuban nationals located in Cuba to receive payments from the United States related to authorized transactions.

Expanded Scope of Financial Institutions. Several previously issued general licenses applied only to U.S. depository institutions, thus limiting the financial institutions that could benefit from the general license. The general licenses issued in this most recent round of changes apply to U.S. banking institutions, which include a broader universe of financial institutions. Additionally, OFAC also expanded the scope of two existing general licenses by changing the reference from "depository institution" to "banking institution." The two general licenses relate to the processing of transactions ordinarily incident to the Cuban national's presence in the United States and to the unblocking of certain previously blocked funds transfers.

² A "banking institution" is any person engaged primarily or incidentally in the business of banking, of granting or transferring credits, or of purchasing or selling foreign exchange or procuring purchases and sellers thereof, as principal or agent, or any person holding credits for others as a direct or incidental part of its business, or any broker. A banking institution also includes each principal, agent, home office, branch or correspondent of any of the foregoing.

³ A "depository institution" is a federally insured institution or an institution that carries on banking activities pursuant to a charter from a federal or state banking authority.

Trade and Commerce

Importation of Cuban-Origin Software. The OFAC amendments previously authorized the importation of Cuban-origin mobile applications. OFAC expanded this authorization to allow the importation of Cuban-origin software. Note, however, that many restrictions remain on the sharing of U.S.-origin software and technology with Cuba-based software developers.

Transshipment of Cargo Through Cuba. BIS has amended License Exception Aircraft, Vessels, and Spacecraft to authorize transit through Cuban territory of cargo laden aboard a vessel on a temporary sojourn to Cuba that is destined for other countries, provided that such cargo departs with the vessel at the end of its stay, does not enter the Cuban economy and is not transferred to another vessel while in Cuba. BIS expects that this change will enable more efficient use of vessels that carry cargo from the United States to Cuba and to other countries and allow exporter carriers to select more efficient routes. Significantly, this license exception does not apply to certain items controlled under the EAR for national security reasons as well as defense articles controlled under the International Traffic in Arms Regulations. Thus, it will continue to be important for the shipping industry to screen cargos transiting Cuba to ensure they do not contain any such items.

Export of Items to Facilitate Exports by Cuban Private Sector.

BIS has adopted a policy of conducting a case-by-case review of license applications to export or re-export items to Cuba that will enable or facilitate exports from Cuba of items produced by Cuba's private sector. This amendment generally expands the list of items that can receive a license for export or re-export to private Cuban entrepreneurs and private Cuban businesses. However, exports and re-exports of items subject to the EAR to the Cuban government and state-owned enterprises are likely to continue to be denied.

Physical Presence

Physical and Business Presence in Cuba. OFAC's September 2015 amendments to the Cuba regulations authorized U.S. persons engaged in certain categories of business to establish a business and physical presence in Cuba to facilitate their authorized transactions. The March 2016 amendments expand the physical presence authorization to include the following additional categories of U.S. persons:

- entities engaged in noncommercial activities authorized under the "Support for the Cuban People" general license;
- entities engaged in humanitarian projects; and
- private foundations, or research or educational institutes engaged in authorized transactions.

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Additionally, the following categories of U.S. persons also are authorized to establish a physical and business presence in Cuba: entities providing mail or parcel transmission services or cargo transportation services, and providers of carrier and travel services to facilitate authorized transactions. The amendments further clarify that the physical and business presence authorizations allow exporters and re-exporters of authorized or exempt goods to assemble those goods in Cuba.

BIS has simultaneously revised the EAR to authorize exports and re-exports of nonmilitary items not specifically listed on the Commerce Control List (*i.e.*, EAR99 items) and items controlled solely for anti-terrorism reasons for use in "physical presence" activities authorized by OFAC. From now on, if a physical presence activity is authorized by OFAC pursuant to a general or specific license, shipments of covered items also will be eligible for License Exception Support for the Cuban People without the need for BIS to issue a separate license or continue to amend the EAR to conform to OFAC's licensing policy.

Travel

Expanded Category of Individual Travel to Cuba. The recent OFAC amendments have significantly increased U.S. citizens' ability to travel to Cuba to directly engage with the Cuban people. With the March 2016 amendments, OFAC has amended the general license authorizing people-to-people educational travel by removing the requirement that the travel be conducted under the auspices of an organization that sponsors such exchanges. Even with this expanded authorization, it is important to note that the statutory prohibition on travel for tourist activities remains in place. Specifically, individuals traveling on their own to Cuba under this expanded general license must still maintain a full-time schedule of educational activities intended to enhance contact

with the Cuban people, support civil society in Cuba or promote the Cuban people's independence from Cuban authorities. A predominant portion of the U.S. traveler's activities must not be with officials of the Cuban government or the Cuban Communist Party. Persons relying on this expanded authorization must retain records related to the authorized travel transactions, including records demonstrating a full-time schedule of activities.

Payment of Cuban Nationals' Salaries While in the United States. OFAC has expanded the ability for Cubans legally present in the United States to earn stipends and salaries beyond their living expenses. Cuban nationals in the United States on a nonimmigrant status are now authorized to earn compensation, consistent with the terms of their visa, provided that the recipient is not subject to any special tax assessments in Cuba. Additionally, U.S. businesses are authorized to sponsor or hire Cuban nationals to work in the United States, as long as the employers do not make additional payments to the Cuban government. Transactions related to filing an application for nonimmigrant travel authorizations also are allowed.

Purchase of Cuban-Origin Merchandise in Third Country. The new OFAC amendments authorize persons subject to U.S. jurisdiction that are located in a third country to purchase Cuban-origin goods for personal consumption while in a third country. The authorization also allows the U.S. person in a third country to receive or obtain services from Cuba or from a Cuban national if the services are ordinarily incident to travel and maintenance in that third country. It is important to note, however, that this provision does not alter existing restrictions on the importation of Cuban-origin goods into the United States, including as accompanied baggage.

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