

OFAC and BIS Implement Additional Amendments in Support of Cuba Policy Shift

Skadden

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On October 14, 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 further amendments to ease U.S. sanctions and export control restrictions applicable to Cuba. The changes went into effect on October 17, 2016. This is the fifth round of amendments to OFAC's Cuban Assets Control Regulations (CACR) 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 2015¹, September 2015², January 2016³ and March 2016⁴.

The latest amendments announced by OFAC and BIS are intended to increase commercial activity between the United States and Cuba and create more opportunities for Cubans to access U.S. goods and services. Broadly, the most recent amendments expand certain authorizations related to trade and commerce; authorize certain transactions related to Cuban-origin pharmaceuticals and joint medical research; facilitate opportunities for individual travel; authorize civil-aviation-related services; and expand existing authorizations for grants and humanitarian-related services.

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 OFAC general licenses or a 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.

Exports to Cuba

Direct Sale of Goods to Cuba for Personal Use. BIS expanded the scope of goods, software and technology that may be exported to Cuba without a license under License Exception SCP ("support for the Cuban people"). To be eligible for this license exception, a transaction must meet the following criteria:

- It must be a direct sale to an end-user in Cuba. Sales to third parties (such as wholesalers and retailers in Cuba) for resale in Cuba are not included.
- The items to be exported or reexported must be for the personal use of the recipient or his or her immediate family. They must not be for resale or transfer by such recipients.
- The recipient of the items must not be a member of the Cuban Council of Ministers, a flag officer of the Cuban Revolutionary Armed Forces or a member of the Cuban Politburo.
- The items to be exported or reexported must be classified as EAR99 or, if listed on the CCL, controlled only for "anti-terrorism" (*i.e.*, in BIS-speak, "AT-only") reasons. Eligible items include most apparel, consumer electronics, certain consumer-level communications devices (such as cell phones and personal computers), automotive parts and accessories, and many other consumer items.

¹ See Jan. 20, 2015, Skadden client alert, "OFAC and BIS Implement Changes in Cuba Policy."

² See Sept. 29, 2015, Skadden client alert, "OFAC and BIS Further Ease Cuba Restrictions."

³ See Feb. 5, 2016, Skadden client alert, "OFAC and BIS Ease Cuba Restrictions with New Amendments."

⁴ See March 17, 2016, Skadden client alert, "US Further Eases Sanctions Ahead of President's Historic Trip to Cuba."

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Persons Ineligible for Exports Narrowed. Consistent with the amendments issued by OFAC, BIS narrowed the list of Cuban persons who remain ineligible to receive exported items under License Exceptions GFT (for humanitarian gift parcels) and CCD (for consumer communication devices, such as cell phones and certain other consumer electronics). As with License Exception SCP, License Exceptions GFT and CCD remain unavailable for transactions involving a member of the Cuban Council of Ministers, a flag officer of the Cuban Revolutionary Armed Forces or a member of the Cuban Politburo.

Payments Incident to Authorized Exports. Payments incident to the BIS-authorized exports from the United States or of items with U.S.-origin content are generally authorized by OFAC. Subject to certain conditions, OFAC authorized transactions that are ordinarily incident to the export or reexport from the United States or from a third country of items that are licensed or otherwise authorized by BIS under the EAR (including by meeting the criteria of Exception SCP). Previously, OFAC only authorized reexport transactions from a third country involving 100 percent U.S.-origin items; OFAC has removed this percentage requirement. Notably, transactions between a U.S.-owned or -controlled entity in a third country and Cuba for the exportation to Cuba of commodities produced in any country other than the United States or Cuba remains prohibited. Such transactions must be specifically licensed by OFAC in addition to any required authorization by BIS.

Transit of Cargo Through Cuba. BIS clarified that under License Exception AVS, cargo bound for a destination outside of Cuba may be shipped onboard an aircraft that transits Cuba without a license, provided that the cargo is not removed from the aircraft during the stopover in Cuba. Previously, License Exception AVS applied only to cargo transiting Cuba by ship.

Other Trade and Commerce

Contingent Contracts. OFAC authorized persons subject to U.S. jurisdiction to enter into certain contingent contracts for transactions currently prohibited by the CACR. The performance of such contracts, such as making deposits, receiving payments, and providing certain goods and services, must be made contingent on OFAC (and any other relevant federal agency) authorizing the underlying transaction or authorization no longer being required. The general license also authorizes transactions ordinarily incident to negotiating and entering into such contracts.

Imports of Previously Exported Items. OFAC authorized the importation into the United States or a third country of items that were previously exported or reexported to Cuba pursuant to a BIS or OFAC authorization, including those exported or reexported for service and repair. However, the exportation or

reexportation of serviced, repaired or replacement items to Cuba must be separately authorized.

Infrastructure Development. OFAC authorized persons subject to U.S. jurisdiction to provide Cuba or Cuban nationals with services related to developing, repairing, maintaining and enhancing Cuban infrastructure to directly benefit the Cuban people. Under this authorization, “infrastructure” may include systems and assets used to provide the Cuban people with goods and services produced by the public transportation, water management, waste management, non-nuclear electricity generation and electricity distribution sectors, as well as hospitals, public housing, and primary and secondary schools.

Certain Vessel Transactions. OFAC issued a general license that will waive the restriction prohibiting foreign vessels that call on Cuban ports for purposes of trade from entering a U.S. port for the purposes of loading or unloading freight for 180 days from the date they depart Cuba. Vessels may avail themselves of the exception if the items that they carried to Cuba would be, if subject to EAR, designated as EAR99 (see discussion of EAR99 below) or controlled on the Commerce Control List for anti-terrorism reasons only.

Pharmaceuticals and Medical Research

Cuban-Origin Pharmaceuticals. OFAC authorized the importation of Cuban-origin pharmaceuticals approved by the U.S. Food and Drug Administration (FDA) into the United States, as well as their marketing, sale, or other distribution in the United States. Certain transactions incident to obtaining FDA approval of Cuban-origin pharmaceuticals are also authorized.

Joint Medical Research. Persons subject to U.S. jurisdiction are now authorized to engage in joint medical research projects with Cuban nationals, to include both non-commercial and commercial medical research.

Financial Institutions

Financing the Export and Reexport of Certain US-Origin Items. OFAC expanded the scope of eligible institutions that may engage in financing for authorized exports and reexports of items, other than agricultural commodities, including issuing, advising, negotiating, paying or confirming letters of credit, accepting collateral for issuing or confirming letters of credit, and processing documentary collections. Previously, only depository institutions were eligible to engage in financing for authorized exports and reexports. Under the most recent amendments, OFAC authorized any “banking institution” that is a person subject to U.S. jurisdiction to provide financing for authorized exports or reexports of items. While primarily banks and credit unions were

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eligible under the previous regulations, other financial institutions, such as money service businesses, are now eligible to provide financing for authorized exports and reexports.

Travel

Importation of Cuban Merchandise as Accompanied Baggage. OFAC made several changes regarding the importation into the United States of Cuban merchandise as accompanied baggage:

- OFAC removed the monetary value limitations on Cuban-origin merchandise (including Cuban-origin rum and cigars) that authorized travelers may import into the United States as accompanied baggage;
- OFAC removed the prohibition on foreign travelers importing Cuban-origin alcohol and tobacco products into the United States as accompanied baggage; and
- Persons subject to U.S. jurisdiction may also now import to the United States as accompanied baggage Cuban merchandise purchased in a third country.

The normal limits on duty and tax exemptions for such merchandise imported as accompanied baggage still apply, and in all cases the goods must be for personal use.

Remittances. OFAC authorized persons subject to U.S. jurisdiction to make remittances to third-country nationals for travel by third-country nationals to, from or within Cuba, provided that the travel would be authorized by a general license for a person subject to U.S. jurisdiction.

Civil Aviation Companies

Civil Aviation Safety. OFAC authorized U.S. persons to provide Cuba and Cuban nationals, wherever located, with services aimed at ensuring safety in civil aviation and the safe operation of commercial aircraft.

Humanitarian Transactions

Grants, Scholarships and Awards. OFAC expanded the authorization for grants, scholarships and awards to Cuba or Cuban nationals to include grants, scholarships and awards related to scientific research and religious activities.

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

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