
Treasury and Commerce Departments Issue Regulations to Implement New Cuba Policy

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The Obama administration implemented its promised changes to U.S. sanctions and export controls for Cuba effective January 16, 2015. Although most trade and transactions still are prohibited, the revisions to the Cuban Assets Control Regulations (CACR) and Export Administration Regulations (EAR) ease licensing requirements in a number of areas, including exports to and imports from Cuba of certain types of goods and services, telecommunications and Internet services, travel and travel services, financial services, remittances, and treatment of Cuban nationals in third countries.

Presidential Action to Relax the U.S. Cuba Embargo

The CACR, administered by the U.S. Department of Treasury, Office of Foreign Assets Control (OFAC) implements a comprehensive trade, investment, financial and travel embargo on Cuba prohibiting U.S. persons, including owned or controlled foreign subsidiaries of U.S. companies, from engaging in transactions in which Cuba or a Cuban national has a property interest. The EAR, administered by the Commerce Department's Bureau of Industry and Security (BIS), control the export or reexport of goods, software and technology that are U.S. origin or contain more than de minimis U.S. content. Like the CACR, the EAR broadly prohibit trade with Cuba.

The CACR were first implemented in July 1963 under the authority of the Trading with the Enemy Act (TWEA). The sanctions were strengthened by the Cuba Democracy Act of 1992 which, among other things, prohibited the issuance of licenses for U.S.-owned foreign companies to trade with Cuba. The Cuban Liberty and Democratic Solidarity Act of 1996 (Helms/Burton) codified the CACR, requiring the President to instruct the Treasury and Justice Departments to enforce fully the CACR and prescribing conditions for the termination of the embargo including a determination that a transition government in Cuba is in power.

Both OFAC and BIS have retained licensing authority to permit certain types of transactions on a case-by-case basis. Also, the CACR incorporate exceptions that allow certain types of transactions, such as limited remittances to family members in Cuba, without requiring specific approval. OFAC and BIS have

previously used their discretion to allow certain travel transactions, temporary sojourns of aircraft, agricultural exports and telecommunications services for Cuba, among other activities.

On December 17, 2015, President Obama made an unexpected announcement signaling a “new course” for Cuba after more than fifty years of comprehensive U.S. sanctions. Because of the statutory framework of the Cuba embargo, the changes are restricted to those the administration can implement within its executive discretion. Larger changes will require Congressional approval.

Announced Changes in U.S. Policy

OFAC and BIS both issued final rules amending their regulations for Cuba on January 15, 2015, which were published and became effective on January 16. See 80 Fed. Reg. 2286 and 80 Fed. Reg. 2291 (Jan. 16, 2015). Both agencies have issued additional guidance in the form of Frequently Asked Questions (FAQ). The key changes to U.S. policy are as follows:

Expanded exports of certain goods to Cuba’s private sector (§ 515.533; EAR § 740) – CACR § 515.533 permits transactions incident to the export or reexport of goods to Cuba that are authorized by BIS under the EAR. BIS has expanded authorizations for trade with Cuba via two license exceptions.

- License Exception “Support for the Cuban People” (SCP) authorizes a range of exports from the United States and reexports from third countries to the private sector in Cuba involving:
 - Sale or donation of (1) building materials, equipment and tools to construct or renovate privately owned buildings, residences, and religious or social/recreational facilities; (2) tools and equipment for private sector agricultural activity; and (3) items for private sector entrepreneurs, such as auto mechanics, barbers and restaurateurs.
 - Donation or temporary export for less than two years of items for use in scientific, archeological, cultural, ecological, educational, historic preservations or sporting activities (and, in the case of temporary exports, use in professional research).
 - Sale or donation of certain items for telecommunications, including Internet access and services, infrastructure creation and upgrades (including for the Cuban government and government-related entities in some cases).
 - Use for human rights organizations, individuals or NGOs for civil society purposes, or by news media personnel engaged in newsgathering and dissemination.

Only low-technology items classified as EAR99 or controlled only for anti-terrorism reasons are eligible under this license exception.

- License Exception “Consumer Communications Devices” (CCD) – Established for Cuba in 2009, this license exception was expanded to allow sales in addition to donations of consumer electronics and software. Authorized items listed by specific export control classification numbers (ECCNs) for each category include certain computers and related equipment; input-output control units; network equipment; mobile phones; memory devices; consumer information security equipment and software; digital cameras; televisions and radios; recording devices; accessories for the above; and consumer software. BIS expanded the range of computers previously authorized and adjusted some other eligible categories. CCD may be used to sell authorized items to the Cuban government and related entities for resale to the Cuban people.

For exports and reexports authorized by BIS, OFAC eased the permitted terms of payment, allowing cash to be received before transfer of title and control. Previously, the regulations required that exporters be paid in cash prior to shipment, which created significant obstacles. Financing is permitted by non-U.S. banking institutions located in third countries, and can be confirmed or advised by U.S. banks. Further easing the burden on exporters, BIS provided guidance that Cuban government import agencies and other government-owned, -operated or -controlled companies may receive, deliver and act as consignees of items exported under the two license exceptions so long as the end user is a private party. The existing license exception for agricultural commodities (AGR) continues unchanged and BIS still will require licenses for medicine and medical devices.

Telecommunications Services (§ 515.542) – OFAC expanded the existing general license for telecommunications to authorize transactions to establish facilities to provide telecommunications services linking Cuba and third countries, in addition to Cuba and the United States, and to provide those services. Persons subject to U.S. jurisdiction also are authorized to enter into and make payments under contracts with all telecommunications providers in Cuba (not just non-Cuban providers) in order to provide such services to a particular individual in Cuba.

Internet Services and Exports (§ 515.578) – The export or reexport of Internet-related services incident to communication over the Internet continues to be authorized (e.g., messaging, chat, email, social networking, photos/movies, web browsing and blogging) and has been expanded to include domain registration and web hosting, except for the promotion of tourism. This includes providing free and widely available Internet services to otherwise prohibited officials or organizations. The CACR also now authorize software design, business consulting and IT management services related to or in support of items exported or reexported under EAR license exception CCD; foreign items that are not subject to the EAR but are reexported to Cuba and would meet the CCD criteria if subject to the EAR; and publicly available software not controlled by the EAR for that reason. Such items also may be imported back into the United States.

Imports of Cuban Goods and Services (§ 515.560, 578 & 582) – Imports of certain goods and services produced by independent Cuban entrepreneurs (as identified by the State Department on a list to be issued) are authorized under CACR § 515.582. Section 515.578 permits import to the United States of consumer electronics or software eligible for license exception CCD (or which would be eligible if U.S. controlled) and publicly available software not subject to the EAR. Finally, persons returning to the United States after authorized travel to Cuba may import merchandise not to exceed \$400 in value, including up to \$100 in alcohol or tobacco products.

Travel and Travel Services (§ 515.560, 572 & 580) – Tourist travel still is not permitted, but general licenses are available for twelve categories of travel: (1) family visits; (2) official business of U.S./foreign government and intergovernmental organizations; (3) journalistic activities; (4) professional research and meetings (e.g., telecommunications, agricultural and medical sales); (5) educational activities; (6) religious activities; (7) public performances, clinics, workshops and competitions; (8) support for the Cuban people; (9) humanitarian; (10) private foundations and research/educational institutes; (11) export/import or transmission of information or informational materials; and (12) certain export transactions which may be authorized under the EAR. The per diem rate for authorized travelers will no longer apply. All transactions ordinarily incident to travel within Cuba, including payment of living expenses and the acquisition in Cuba of goods for personal use, are authorized. Travel Service Providers (TSPs) and Carrier Service Providers (CSPs) are now authorized under a general license to provide travel services to persons who self-identify as qualifying under the regulations. The prior special licenses and annual reporting requirements no longer apply, but businesses operating under the new general licenses will need to maintain careful records.

Finally, U.S. insurance companies are authorized to issue global health, life or travel insurance policies to cover non-Cuban residents traveling to or within Cuba.

Banking and Credit Cards in Cuba (§ 515.560, 571, 579 & 584) – U.S. depository institutions are permitted to open correspondent accounts at Cuban financial institutions to support financial transactions permitted under the CACR. Authorized travelers to Cuba may use U.S. credit, debit and stored value cards, and instruments such as checks, drafts and travelers' checks. U.S. financial institutions are authorized to process such transactions, and U.S. persons providing such services may rely on the traveler with regard to compliance unless they know or have reason to know that the transaction is not authorized. The revised CACR also permit depository institutions to process transfers for authorized business in Cuba of third-country official missions; intergovernmental organizations in which there is U.S. participation or observer status; and employees, grantees, contractors of the same or their co-habitant family members.

Remittances (§ 515.560 & 570) – Remittance levels for a single Cuban national have been raised from \$500 to \$2,000 per quarter (except for certain officials of the government or Communist party). Authorized travelers to Cuba may carry up to \$10,000 for remittances. Certain remittances may be made without limit for relatives who are students in Cuba; humanitarian projects in or related to Cuba; human rights, democracy or civil society groups related to Cuba; and support for the development of private business. Remittance forwarders and banks no longer require a specific license to process such remittances.

Other Support for Private Business (§ 515.570 & 575) – U.S. persons may make remittances without limit to individuals or privately owned entities “to support the development of private businesses, including small farms” (CACR § 515.570(g)(3)). This section does not authorize investment with respect to Cuba, thus the remittance cannot be used to obtain an ownership interest. Section 575(a) authorizes a broad general license for humanitarian projects, including transactions related to such projects as construction projects to benefit independent civil society groups; environmental projects; projects suitable for the development of small-scale private enterprise; agricultural and rural development that promotes independent activity; and micro financing projects, except for loans, extensions of credit or other financing prohibited by CACR 515. § 208.

Cuban Nationals in Third Countries or the United States (515.505 & 585) – Cuban nationals who take up permanent residence outside of Cuba are now considered unblocked parties under section 515.505(a)(2). U.S.-owned or controlled entities operating outside the United States are authorized to engage in services and financial transactions with Cuban individuals in third countries, regardless of residency. Banks are authorized to unblock any account that was blocked solely due to the prior status of a now unblocked person, provided they obtain adequate documentation. Cuban nationals were already eligible to be unblocked when moving to the United States. New section 515.571(a)(5) authorizes U.S. depository institutions to open and maintain accounts for Cuban nationals present in the United States with non-immigrant status, although such accounts must be closed prior to the Cuban national's departure or blocked.

Next Steps and Challenges

President Obama has directed the State Department to review Cuba's status as a “state sponsor of terrorism” over the next six months, and removal from that list could open the door to further potential export control changes. Congress, however, is divided on Cuba sanctions reform, and a number of senators and representatives have strongly criticized the Administration's policy. As discussed above, broader relaxation of the Cuba embargo will require congressional action. There are strong constituencies that will fight reform efforts, especially as the United States heads into a presidential election cycle.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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