

In Directional Shift, US Implements New Restrictions on Cuba

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On November 8, 2017, the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC), the U.S. Department of Commerce's Bureau of Industry and Security (BIS), and the U.S. Department of State announced coordinated actions to implement portions of the June 16, 2017, National Security Presidential Memorandum on Strengthening the Policy of the United States Toward Cuba (Cuba NSPM). These regulatory changes mark a break from the past two years of limited easing of U.S. sanctions on Cuba following President Obama's December 2014 announcement of changes in U.S. policy toward Cuba. In implementing the Cuba NSPM, OFAC published amendments to the Cuban Assets Control Regulations (CACR) to prohibit certain financial transactions with entities on a new List of Restricted Entities and Subentities (Cuba Restricted List), which the Department of State published the same day. OFAC's amendments to the CACR also change certain requirements for travel to Cuba and expand the definition of prohibited officials of the Government of Cuba. BIS announced a new licensing policy towards Cuban state-owned enterprises, agencies and other organizations that generate revenue for the state, and revisions to the applicability of three license exceptions.

OFAC

Financial Transactions

The amended regulations prohibit certain direct financial transactions with entities and subentities on the Cuba Restricted List. As part of the regulatory amendments, OFAC simultaneously modified many of its Cuba general licenses to provide that the general licenses do not authorize direct financial transactions with entities on the Cuba Restricted List. Affected general licenses include, among others, those related to establishing a physical presence and business presence in Cuba, the provision of financing for certain authorized exports, transactions related to information and informational materials, travel and the provision of travel services, and opening and maintaining bank accounts at Cuban financial institutions to engage in authorized travel-related transactions. OFAC also clarified that transactions involving parties on the Cuba Restricted List are not authorized even when they are ordinarily incident to authorized transactions where the terms of the applicable general or specific license specifically exclude such transactions.

The Department of State has published and will maintain the Cuba Restricted List, which identifies Cuban entities and subentities that the Department of State has determined "(1) are under the control of, or act for or on behalf of, the Cuban military, intelligence, or security services or personnel and (2) with which direct financial transactions would disproportionately benefit such services or personnel at the expense of the Cuban people or private enterprise in Cuba." The Cuba Restricted List includes hotels, tourist agencies and stores, as well as government ministries, entities directly serving the defense and security sectors and certain holding companies. These holding companies, including Grupo de Administración Empresarial S.A. (GAESA) and CIMEX S.A., control a considerable portion of Cuban business activity. Indeed, the Cuba Restricted List includes numerous GAESA and CIMEX subentities across a wide range of economic sectors. Unlike most OFAC sanctions, though — which extend by operation of law to entities owned, directly or indirectly, 50 percent or more by listed persons even if the entities are not themselves listed — entities owned or controlled by an entity on the Cuba Restricted List are not treated as restricted unless also included by name on the list.

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Certain exceptions apply to the regulations prohibiting direct financial transactions with entities and subsidiaries on the Cuba Restricted List. Significantly, OFAC has stated that “U-turn” payments do not fall within the scope of the prohibition. In addition, the Trump administration has indicated it does not wish to negatively impact U.S. businesses that have engaged in lawful commercial opportunities and, to that end, most Cuba-related transactions, including commercial engagements, initiated prior to November 9, 2017 (or the date an entity or subsidiary is otherwise added to the Cuba Restricted List), will continue to be permitted even if an entity or subsidiary on the Cuba Restricted List is involved. OFAC also has provided guidance that while a financial institution is expected to do its normal due diligence with respect to a transaction involving Cuba or a Cuban national, to the extent a transaction involves an entity or subsidiary on the Cuba Restricted List, a financial institution can rely on the statements of its customer that the transaction is authorized, unless it knows or has reason to know the transaction is not authorized.

Travel and Related Transactions

OFAC also announced new restrictions on travel and related transactions. The new restrictions focus on educational travel, people-to-people travel and travel to provide support for the Cuban people.

Educational Travel

The amended regulations generally revert to the authorizations that were in effect on January 27, 2011, for educational travel to Cuba and impose certain additional requirements for subsequently authorized educational travel to require that such travel be conducted under the auspices of an organization that is a person subject to U.S. jurisdiction. In most situations, those traveling to Cuba in reliance on this general license must be accompanied by a person subject to U.S. jurisdiction who is an employee, paid consultant, agent or other representative of the sponsoring organization. Certain unaccompanied travel that was previously authorized and for which the traveler completed at least one travel-related transaction prior to November 9, 2017, remains authorized.

People-to-People Travel

The amended regulations also reverse one of the changes made by the Obama administration to allow individuals to travel from the United States to Cuba under a “people-to-people” authorization without having to travel under the auspices of a sponsoring organization. Under the amended regulations, OFAC is imposing similar organizational sponsorship requirements as those implemented for educational travel. Additionally, people-to-people travel-related transactions authorized by the amended regulations must

be consistent with a full-time schedule of activities in Cuba that enhances contact with the Cuban people, supports civil society in Cuba or promotes the Cuban people’s independence from Cuban authorities and that results in meaningful interactions with individuals in Cuba. Certain unaccompanied people-to-people travel for which the traveler completed at least one travel-related transaction prior to President Donald Trump’s announcement of the changes on June 16, 2017, remains authorized.

Support for the Cuban People

The amended regulations also modify the general license for travel to provide support for the Cuban people and related transactions. Specifically, the general license now expressly requires a full-time schedule of activities that enhances contact with the Cuban people, supports civil society in Cuba or promotes the Cuban people’s independence from Cuban authorities and that results in meaningful interactions with individuals in Cuba. Along with this requirement, OFAC added regulatory notes clarifying that staying in a room at a rented accommodation in a private Cuban residence (*casa particular*), eating at privately owned Cuban restaurants (*paladares*) and shopping at privately owned stores run by self-employed Cubans (*cuentalpropista*) are examples of activities that qualify for the support for the Cuban people travel authorization. The notes explain, however, that additional activities are necessary to meet the requirement for a full time schedule.

Definition of Prohibited Officials of the Government of Cuba

The amended regulations expand considerably the definition of “prohibited officials of the Government of Cuba.” Prohibited officials of the Government of Cuba are carved out from authorizations provided by certain general licenses and now include a much broader list of office holders. The revised definition corresponds to that which was in place prior to October 17, 2016.

Under the new regulations, prohibited officials of the Government of Cuba include ministers and vice ministers; members of the Council of State and the Council of Ministers; members and employees of the National Assembly of People’s Power; members of any provincial assembly; local sector chiefs of the Committees for the Defense of the Revolution; director generals, sub-director generals and higher of all Cuban ministries and state agencies; employees of the Ministry of the Interior; employees of the Ministry of Defense; secretaries and first secretaries of the Confederation of Labor of Cuba and its component unions; chief editors, editors and deputy editors of Cuban state-run media organizations and programs, including newspapers, television and radio; and members and employees of the Supreme Court.

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Bureau of Industry and Security

In conjunction with OFAC's amendments to the CACR, BIS has published a rule, effective November 9, 2017, that makes a minor adjustment to its licensing policy toward Cuba and amends the applicability of certain license exceptions available for the export and re-export of items to Cuba.

Cuba Licensing Policy

Except for certain categories of items enumerated in the Export Administration Regulations (EAR), BIS has a general policy of denial for applications to export or re-export items subject to the EAR, unless the transactions are eligible for a license exception. Since January 2016, BIS has implemented a case-by-case licensing policy for applications to export or re-export items destined for Cuba to "meet the needs of the Cuban people." BIS, however, retained a general policy of denial for exports and re-exports to meet the needs of the Cuban people if the end user is a state-owned enterprise, agency or other organization that primarily generated revenue for the state, including Cuban military, police, intelligence and security services. The new BIS amendment clarifies that applications for the export or re-export of items for use by entities or subsidiaries identified by the Department of State on the Cuba Restricted List also will face a general policy of denial, unless such transactions are determined to be consistent with the Cuba NSPM. Given that the Cuba Restricted List focuses heavily on state-owned enterprises with ties to the military, police, intelligence and security services, we expect this amendment is unlikely to have more than a marginal impact on current licensing policy.

License Exceptions

BIS has amended the applicability of three of the license exceptions available for exports and re-exports of U.S. items to Cuba: Gift Parcels and Humanitarian Donations (GFT), Consumer Communications Devices (CCD) and Support for the Cuban People (SCP). The EAR identifies Cuban individuals and entities that are ineligible recipients of exports or re-exports under these license exceptions. The new BIS amendment revises the EAR list of ineligible Cuban recipients to conform with OFAC's updated list of prohibited officials of the Government of Cuba.

The amendment also broadens the scope of license exception SCP to include most items for use by the Cuban private sector for private sector economic activities. The EAR no longer enumerates the items eligible for license exception SCP. Instead, with the exception of medicine, medical devices and agricultural commodities, which are ineligible for license exception SCP and are subject to separate licensing frameworks, most items that are categorized as EAR99 or controlled only for anti-terrorism reasons are now eligible for license exception SCP. However, this exception does not apply to items used primarily to generate revenue for the state or otherwise contribute to the operation of the state, such as through the construction or renovation of state-owned buildings.

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