

United States Further Eases Cuba Trade Embargo and Terminates Burma/Myanmar Sanctions; Recent Developments in U.S. Sanctions Against Iran and Russia

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International Trade Controls

Effective today, the U.S. Treasury Department's Office of Foreign Assets Control ("OFAC") has [amended the Cuban Assets Control Regulations](#) ("CACR") and the U.S. Commerce Department's Bureau of Industry and Security ("BIS") has [amended the Export Administration Regulations](#) ("EAR") to expand permissible dealings involving Cuba, further easing the longstanding U.S. trade embargo and continuing a policy shift that the Obama Administration [announced in December 2014](#).

Simultaneous with last Friday's announcement of these changes, President Obama issued a [Presidential Policy Directive](#) that outlines a policy of "normalization" as to U.S.-Cuba relations. The directive states that the embargo — elements of which remain in place — is "outdated" and renews calls for Congress to lift the remaining restrictions.

The most significant dealings authorized by today's amendments include retail sales of items for personal use directly to individuals in Cuba and the provision of services with respect to Cuban infrastructure, as well as a provision that permits U.S. companies and other persons subject to U.S. jurisdiction to negotiate and sign contracts for transactions in or involving Cuba, the performance of which is contingent on the further easing of sanctions or the issuance of licensing by the U.S. government. The amendments also expand authorizations involving goods from or destined for Cuba, and establish new authorizations for joint medical research projects between Cuba and the United States and allow the importation of and other dealings relating to Cuban-origin pharmaceuticals.

Despite these changes, the Cuba trade embargo has not been fully lifted. The remaining restrictions prohibit persons subject to U.S. jurisdiction from visiting Cuba as tourists, and prohibit most investment and dealings in Cuban property. "Persons subject to U.S. jurisdiction" to whom the Cuba sanctions apply include individual U.S. citizens or lawful permanent residents ("green card" holders), wherever located or employed; U.S. companies and their non-U.S. branches; non-U.S. persons when present in the United States; and non-U.S. companies owned or controlled by U.S. persons. Further, most items exported or reexported from the United States to Cuba continue to require Commerce Department authorization, although the latest regulatory changes expand certain license exceptions.

In addition to these new developments with respect to Cuba, OFAC has taken a number of other actions recently that are outlined below, including repealing U.S. sanctions against Burma,

sanctioning a wide range of individuals and entities associated with Russia or Ukraine, and issuing additional guidance on U.S. sanctions against Iran.

Cuba Developments

Easing of Cuba Trade Controls Restrictions

OFAC's revisions to the CACR relax prior restrictions primarily through the addition of new general licenses and the expansion of existing general licenses, thus allowing various types of activity by persons subject to U.S. jurisdiction that previously required a specific license from OFAC. OFAC issued updated [Frequently Asked Questions Related to Cuba](#) and [travel guidance](#) to explain the changes in greater detail.

Similarly, BIS's revisions to the EAR expand existing license exceptions to permit additional exports and reexports to Cuba of certain items that are subject to the EAR. BIS updated its [Cuba Frequently Asked Questions](#) to provide additional detail on these changes.

The revisions cover a wide range of activities, a number of which may prove quite significant for multinational companies:

- **Retail Sales to Cuban Consumers:** Exports from the United States to Cuba and reexports from third countries to Cuba of consumer goods subject to the EAR are now authorized pursuant to License Exception Support for the Cuban People ("SCP"), provided that the sales are made directly to individuals in Cuba for personal use by the purchaser or his or her immediate family (excluding certain Cuban government, military, and political officials). In practice, this authorization likely will primarily benefit internet retailers who have the capacity to sell items directly to individual consumers in Cuba, although the new authorization is not limited to online sales. Goods covered by the authorization include non-sensitive items classified as EAR99 or controlled on the Commerce Control List ("CCL") only for anti-terrorism reasons, which together comprise nearly all products that would be sold to consumers for personal use. Non-U.S.-origin goods that do not contain more than 25% U.S. content would not be subject to the EAR, and hence not eligible for export under this license exception, unless such goods had been imported into the United States, rendering them subject to the EAR and eligible for sale to Cuba under the new authorization.

Previously, License Exception SCP and other EAR license exceptions authorized more limited product sales to Cuba for specific purposes, including items in support of telecommunications and the free flow of information, as well as certain items for private sector construction, agriculture, and entrepreneurial undertakings. However, this new authorization for retail sales covers a broader range of consumer products for a more general purpose.

- **Contingent Contracts:** Persons subject to U.S. jurisdiction are now authorized pursuant to a new general license in the CACR to enter into contingent contracts for transactions that are still prohibited by the sanctions against Cuba. Such contracts are now permissible if they condition performance (including making deposits, receiving payments, and providing goods or services) on either the U.S. government licensing the transaction provided for in the contract or changes in applicable law so that licensing is no longer required. In addition, all transactions ordinarily incident to the negotiation of

and entry into such contingent contracts are now authorized. “Contingent contracts” covered by the new general license include executory contracts, executory pro forma invoices, agreements in principle, executory offers capable of acceptance such as bids or proposals in response to public tenders, binding memoranda of understanding, and other similar agreements.

This change affects companies in a wide range of industries that may have interest in preparing for further rollback of U.S. sanctions against Cuba. Persons subject to U.S. jurisdiction may now negotiate and enter into agreements relating to sectors of the Cuban economy that are generally off limits — including tourism and oil and gas — in anticipation of the eventual repeal of such sanctions.

The freedom to negotiate and enter into contingent contracts will allow companies to explore in greater and more concrete detail business opportunities that would require licensing, potentially allowing more companies to take advantage of the Administration’s new receptivity to licensing commercial dealings between the United States and Cuba.

Travel related to the negotiation of contingent contracts authorized by this section is authorized by a general license for travel to Cuba for professional meetings, subject to compliance with the terms of that general license.

- Cuban Infrastructure: Persons subject to U.S. jurisdiction are now authorized under the CACR to provide to Cuba or Cuban nationals services related to developing, repairing, maintaining, and enhancing Cuban infrastructure that directly benefit the Cuban people, subject to any export or reexport licensing requirements under the EAR. For the purposes of this authorization, infrastructure includes systems and assets used to provide the Cuban people with goods and services produced or provided 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. The authorization specifically calls out the example of projects related to the environmental protection of U.S., Cuban, and international air quality, waters, and coastlines, but is not limited to not-for-profit or environmental activities. Rather, the authorization covers commercial and non-commercial services.
- Travel: While tourist travel by persons subject to U.S. jurisdiction continues to remain off-limits, OFAC has removed a restriction that previously prohibited travel to Cuba for professional meetings related to the promotion of tourism. Such travel is now permissible, subject to certain limitations and restrictions. In addition, OFAC authorized persons subject to U.S. jurisdiction to make remittances to third-country nationals for travel by those nationals to, from, and within Cuba, if such travel would be authorized for persons subject to U.S. jurisdiction by OFAC general licenses (e.g., is not tourist travel or other types of prohibited travel).
- U.S. Imports of Items Destined for Cuba, and Imports of Items Previously Exported to Cuba: Through a new note in the CACR, OFAC removed what previously was a significant limitation on authorized reexports from the United States to Cuba of items from third countries. The new note states that “the importation into the United States of items from a third country for exportation to Cuba pursuant to a license or other authorization by the Department of Commerce” is authorized as ordinarily incident to the subsequent U.S. export. This note appears to reflect a departure from the position, set

forth in a notice on the BIS web site, that such imports into the United States for subsequent export/reexport to Cuba would in some cases require an OFAC license.

In the same CACR section, OFAC has authorized the importation into the United States or a third country of items that were previously exported or reexported to Cuba pursuant to BIS authorization. This new OFAC authorization also permits persons subject to U.S. jurisdiction to service and repair such items. Exporting or reexporting to Cuba replacement items or items that have been repaired or serviced is not covered by this new authorization and must be separately authorized by BIS (including through existing general licenses or license exceptions). OFAC also has authorized some limited travel to Cuba in connection with the sales or contract negotiation, accompanied delivery, installation, leasing, servicing, or repair in Cuba of such items.

- Medical Research: Persons subject to U.S. jurisdiction are now authorized to engage in joint medical research projects with Cuban nationals. The new authorization covers both non-commercial and commercial research, and permits all transactions incident to joint research, including opening and maintaining bank accounts in Cuba for conducting authorized research. However, the new authorization does not permit the establishment of a business or physical presence in Cuba. It also does not authorize travel to Cuba in support of such research; however, a separate general license does authorize travel to Cuba for professional research, which would include joint medical research projects. In addition, any exports to Cuba in support of such research could require separate licensing from BIS.
- Cuban-Origin Pharmaceuticals: Persons subject to U.S. jurisdiction may now engage in transactions incident to obtaining U.S. Food and Drug Administration (“FDA”) approval of Cuban-origin pharmaceuticals. This authorization covers a broad range of activities relating to FDA approval, including participation in discovery and development, pre-clinical research, clinical research, regulatory review, regulatory approval and licensing, regulatory post-market activities, and importation of the pharmaceutical for FDA-approval-related purposes. Likewise, once a pharmaceutical product is FDA-approved, persons subject to U.S. jurisdiction are also authorized to import the product and subsequently market, sell, and distribute it in the United States. Persons subject to U.S. jurisdiction also may open and maintain bank accounts in Cuba for conducting authorized dealings involving Cuban-origin pharmaceuticals.
- Vessels: OFAC amended a previous restriction that prohibited non-U.S. vessels from entering a U.S. port for purposes of loading or unloading freight if the vessel had called in the prior 180 days on a Cuban port. This prohibition now no longer applies to vessels that delivered to Cuba items that, if subject to the EAR, would be classified as EAR99 or controlled on the EAR’s CCL only for anti-terrorism reasons. As a practical matter, this change should allow freight ships to move more easily between the United States and Cuba, though restrictions still remain on vessels that have engaged in certain types of trade with Cuba.
- Imports of Cuban-Origin Items for Personal Use: In January 2015, OFAC relaxed the longstanding prohibition on imports by travelers returning to the United States from Cuba, allowing travelers to bring home in their accompanied baggage \$400 in goods for personal use, of which \$100 could be alcohol and tobacco products. The new amendments to the CACR have removed those monetary value limitations entirely.

Similarly, the amendments also permit the import into the United States as accompanied baggage of Cuban-origin merchandise acquired in third countries, again without value limitations. OFAC also removed a separate prohibition on non-U.S. travelers importing Cuban-origin alcohol and tobacco products into the United States as accompanied baggage. Significantly, in all cases, the Cuban-origin goods must be imported only for personal use (including to be given as personal gifts), and normal limits on duty and tax exemptions will apply. Commercial imports of Cuban-origin alcohol, tobacco, and most other products are still prohibited.

- **Aviation:** Finally, under the amended CACR, persons subject to U.S. jurisdiction are authorized to provide qualified services to Cuba and Cuban nationals to ensure the safety of civil aviation and the safe operation of commercial aircraft. In addition, BIS amended License Exception Aircraft, Vessels and Spacecraft (“AVS”) to allow cargo laden on board an aircraft to transit Cuba, so long as the cargo departs Cuba with the same aircraft, is not removed from the aircraft for use while in Cuba, and is not transferred to another aircraft in Cuba. License Exception AVS already authorizes such temporary sojourn to Cuba of cargo aboard vessels.

In addition to the range of newly authorized activities described above, OFAC and BIS have also narrowed the group of prohibited Cuban government officials and Cuban Communist Party members for which many authorizations (such as CACR general licenses and EAR license exceptions) are not applicable. Together, these prohibited groups now include only members of Cuba’s Council of Ministers, flag officers of Cuba’s Revolutionary Armed Forces, and members of Cuba’s Politburo. Previously, this group was much broader, capturing a range of senior civil servants, labor union officials, senior employees of state-run media organizations, members and employees of Cuba’s Supreme Court, and senior Communist Party officials. The narrowing of this group of prohibited officials and party members makes a broader range of authorized trade available with government and party officials who are not members of the Council of Ministers or Politburo or flag officers in the armed forces.

President Calls for “Normalization” in U.S.-Cuba Relations

Simultaneously with OFAC and BIS announcing these amendments to their regulations, President Obama issued a new Presidential Policy Directive on Cuba. The Directive articulated the Administration’s commitment to “normalization” of U.S.-Cuba relations and highlighted “opportunities to advance U.S. interests and shift away from an embargo, which is an outdated burden on the Cuban people and has impeded U.S. interests.”

The Directive walks a fine line between making clear the Administration’s intent to ease the embargo and acknowledging that Congress has passed a series of statutes “requiring that the embargo not be suspended or terminated unless the President determines that a transition or democratically elected government has come to power in Cuba.” Despite those statutory requirements, the Directive announces that the United States “will not pursue regime change in Cuba” and will continue to press Congress to end the embargo. Indeed, in a statement on the Directive, the President noted that he intends to engage with Cuba broadly enough to make the increased connectivity of the two countries “irreversible.”

The Directive announced six U.S. objectives as part of a move towards normalization, including (1) increased government-to-government interaction; (2) expanded people-to-people linkages through exchanges in education, culture, business, science, environment, technology, and

sports; (3) expanded commerce; (4) Cuban economic liberalization and reform; (5) greater Cuban government respect for human rights, fundamental freedoms, and democratic values; and (6) additional Cuban integration into international and regional legal and diplomatic systems.

Other Recent Sanctions Developments

Burma Sanctions Regulations Terminated; Significant Reduction in Burmese SDNs

On October 7, 2016, the longstanding U.S. economic sanctions regime imposed against Burma (Myanmar) was terminated by Executive Order. As a result, all property and interests in property that were previously blocked pursuant to the Burmese Sanctions Regulations (“BSR”) are unblocked; the ban on U.S. imports of Burmese-origin jadeite and rubies has been revoked; remaining OFAC restrictions on banking or financial transactions with Burma have been lifted; and requirements to file reports on certain Burmese investments have been removed (and are now voluntary). Moreover, all individuals and entities who had, until October 7, been listed by OFAC on its List of Specially Designated Nationals and Blocked Persons (“SDN List”) pursuant to the Burma sanctions program have been delisted, opening up business opportunities with more than 100 individuals and entities.

While important symbolically, the removal of the Burma sanctions followed a multi-year process in which U.S. and EU sanctions had been substantially eased in response to democratic reform in Burma, as described in our [prior e-alert](#).

It is important to note, however, that Burmese individuals or entities who are designated on the SDN List pursuant to other sanctions programs have *not* been removed from the SDN List. This means that more than 30 Burmese individuals and entities remain on the SDN List, most under the authority of the Foreign Narcotics Kingpin Sanctions Regulations, with two listed pursuant to the North Korea Sanctions Regulations.

OFAC Provides Additional Iran Sanctions Guidance

Also on October 7, OFAC provided additional guidance about its Iran sanctions through updates to its [Iran-related frequently asked questions](#) (“FAQs”), posted to the OFAC web site. The new and revised responses relate to sanctions changes implemented following the implementation in January 2016 of the Joint Comprehensive Plan of Action (“JCPOA”), as described in [our prior e-alert](#).

Specifically, OFAC clarified (in FAQ C.7) that foreign financial institutions (including foreign-incorporated subsidiaries of U.S. financial institutions) may process transactions denominated in U.S. dollars and maintain outside the United States U.S. dollar-denominated accounts involving Iran, Iranian nationals, or the Iranian government, so long as those transactions do not involve SDNs, the Islamic Revolutionary Guard Corps and its designated agents or affiliates, or certain other sanctionable activities. Importantly, however, the guidance notes that foreign financial institutions must continue to ensure that such transactions do not involve U.S. persons, including U.S. financial institutions and their non-U.S. branches. Accordingly, transactions with Iran that are not authorized by the U.S. government still cannot be carried out in U.S. dollars if U.S. financial institutions will process or clear the transaction, as is often the case in U.S.-dollar transactions.

OFAC also explained (in FAQ C.15) that U.S. financial institutions are not prevented from transacting with, including opening and maintaining correspondent accounts with, foreign financial institutions that in turn have correspondent banking relationships with non-SDN Iranian banks. Again, however, U.S. banks are not permitted to process Iran-related transactions unless the transactions are authorized by OFAC or exempt from the sanctions.

With respect to General License H, OFAC further clarified (in FAQ K.19) that, under this general license, a U.S. person may establish or alter, more than once, the operating policies and procedures of a U.S. entity or its owned or controlled non-U.S. entity to allow the non-U.S. entity to do business with Iran, so long as the changes are not aimed at facilitating a transaction between or involving the U.S.-owned or -controlled non-U.S. entity and an Iranian party. Thus, while it is clear from this and prior OFAC guidance that such policies and procedures can be changed repeatedly, they cannot be altered if the purpose of the change is to carry out — or remove obstacles to — a particular Iran-related transaction.

Finally, OFAC provided, in three FAQs, additional guidance on due diligence relating to non-U.S. persons dealing with Iranian entities. First, OFAC explained in FAQ M.10 that non-U.S. persons are not necessarily subject to sanctions if they engage in transactions with an entity that is not identified on the SDN List but which is minority owned, or controlled in whole or part, by an Iranian SDN. However, OFAC recommends “caution” in such circumstances to ensure that any such transactions do not involve Iranian or Iran-related persons on the SDN List.

In FAQ M.11, OFAC provided additional guidance on due diligence procedures for non-U.S. persons, beyond checking the SDN List, which OFAC said is “generally . . . expected” but “not necessarily sufficient.” Specifically, in addition to checking the SDN List, OFAC recommends that such persons consult with their local regulators regarding “due diligence expectations in their domestic jurisdictions” and consider “best practices of the particular industry at issue.”

The same advice was generally given in updated FAQ M.12 as it pertains to non-U.S. financial institutions, although OFAC clarified that it is generally acceptable for such institutions to accept the due diligence results provided by their customers as to parties that are not the financial institutions’ own clients, so long as the financial institutions have no reason to know that their customers’ due diligence was insufficient.

Further Expansion of Ukraine-Related Sanctions

In contrast with the policy direction with respect to Cuba, Burma, and Iran, in early September, OFAC demonstrated a renewed commitment to the imposition of sanctions against individuals and entities who support or contribute to the ongoing unrest in Ukraine. Specifically, on September 1, 2016, OFAC added 37 Russian and Ukrainian individuals and entities to the SDN List, thereby prohibiting U.S. persons from virtually all transactions or dealings with those individuals and entities, and entities in which they own, individually or in the aggregate, an interest of 50% or more. Among the notable additions were PJSC Mostotrest (the largest Russian heavy construction company), CJSC ABR Management (manager of Bank Rossiya’s banking group assets), multiple shipyards (including the “Morye” and “Zaliv” shipyards in Crimea, and the “Zvezdochka” ship repair center with locations in both Russia and Crimea), and OJSC Sovfracht (a significant multimodal transport group which owns parts of multiple port terminals and has developed stevedoring, freight brokerage, and forwarding lines of business).

In addition, OFAC added more than 100 additional entities to the [Sectoral Sanctions Identification \(“SSI”\) List](#), which imposes certain industry-specific sanctions against entities in the energy, defense, and financial services sectors that are identified on the SSI List or are owned, individually or in the aggregate, 50% or more by one or more SSI List parties. The newly added entities were principally subsidiaries of the Bank of Moscow, Gazprombank, and Gazprom, companies that were already identified on the SSI List.

Related to these steps, BIS added [more than 80 companies](#) to its Entity List under the authority of the Ukraine -related Executive Orders, thereby prohibiting most exports and reexports to those entities of a broad range of commodities, software, and technology that are subject to U.S. export control jurisdiction. The majority of these additions (51 out of 81) were subsidiaries of or related to Gazprom, while the others primarily were entities either in the arms trade or that are based in Crimea.

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We are following these sanctions developments closely and will provide further updates on future developments of note.

With respect to the Cuba, Covington has launched a [Cuba Working Group](#) to assist clients in assessing and complying with changes in U.S. sanctions, taking advantage of new business opportunities that may develop with respect to Cuba, shaping additional policy changes by the Administration or Congress, and preserving U.S. claims regarding Cuban property.

Covington also has deep experience advising on the broadening of sanctions against Russia and the increasingly complex mix of OFAC authorizations and guidance regarding Iran.

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