

U.S. Government Tightens Cuba Sanctions

November 14, 2017

International Trade Controls

On Thursday, November 9, 2017, the U.S. Departments of Treasury and Commerce published regulatory amendments that impose new restrictions on financial, travel, and trade-related transactions with Cuba by persons subject to U.S. jurisdiction. These new measures implement President Trump's National Security Presidential Memorandum ("NSPM") of June 16, 2017, which announced a roll back of some of the measures implemented during the Obama Administration to ease the U.S. sanctions against Cuba. President Trump's NSPM was described in a [prior client alert](#).

More specifically, the U.S. Treasury Department's Office of Foreign Assets Control ("OFAC") has [amended](#) the Cuban Assets Control Regulations ("CACR," 31 C.F.R. Part 515) to restrict authorized educational travel to Cuba, including significant limits for so-called "people-to-people" travel, and to impose new restrictions on direct financial transactions with entities that are under the control of, or act for or on behalf of, Cuban military, intelligence, or security services or personnel. The U.S. State Department has published a list of these restricted Cuban entities, referred to as the "[Cuba Restricted List](#)." Significantly, existing commercial engagements with Cuba Restricted List entities that were entered into before the new rules came into effect are generally grandfathered and may continue.

In parallel, the U.S. Commerce Department's Bureau of Industry and Security ("BIS") has announced a general policy to deny license applications to export or reexport U.S.-regulated items to entities on the Cuba Restricted List. At the same time, however, BIS also [amended](#) the U.S. export controls codified in the Export Administration Regulations ("EAR," 15 C.F.R. Part 730 *et seq.*) to expand a license exception to authorize a broader range of exports and reexports of items subject to U.S. jurisdiction to Cuba for use by the Cuban private sector for private sector economic activities.

The Treasury Department has issued a [fact sheet](#) summarizing these changes, and both [OFAC](#) and [BIS](#) have published new frequently-asked-question guidance further clarifying the scope of the changes.

Cuba Restricted List

The most consequential regulatory change for U.S. companies and their owned or controlled non-U.S. affiliates pursuing business opportunities in Cuba is the designation by the U.S. State Department of more than 180 Cuban entities—including more than 80 hotels and other entities connected to the tourism industry—on the new Cuba Restricted List. The State Department has concluded that transactions with these parties disproportionately benefit the Cuban military, intelligence, or security services at the expense of the Cuban people or private Cuban enterprise. As directed by the NSPM, OFAC has amended the CACR to prohibit most new

direct financial transactions with parties on the Cuba Restricted List unless specifically licensed by OFAC. Importantly, this prohibition does not extend to entities that are owned, controlled, or part of entities on the Cuba Restricted List but that are not themselves on the list. However, the State Department indicated that it could update the list in the future.

The prohibition applies to “persons subject to U.S. jurisdiction,” which includes U.S. companies and their non-U.S. branches; individual U.S. persons (U.S. citizens or lawful permanent residents), wherever located or employed; non-U.S. entities owned or controlled by U.S. companies or other U.S. persons; and foreign persons when present in the United States.

A person engages in a direct financial transaction that is subject to this prohibition by acting as the originator on a transfer of funds whose ultimate beneficiary is a party on the Cuba Restricted List, or as the ultimate beneficiary on a transfer of funds whose originator is a party on the Cuba Restricted List. This prohibition does not apply to participation in financial transactions as intermediaries who are *not* acting as the originator or beneficiary on the transfer of funds at issue, such as U.S. banks that are processing so-called “U-turn” transactions that originate and terminate outside the United States, where both the originator and beneficiary are not persons subject to U.S. jurisdiction.

Notably, the scope of this new prohibition has been limited by grandfathering provisions that permit travel-related transactions and other commercial engagements with entities on the Cuba Restricted List, provided that such transactions were initiated, or the commercial engagements were in place, prior to the date that the party was listed. Although these grandfathering provisions provide significant benefits to companies that have existing contracts and commercial arrangements with Cuba Restricted List parties, these regulatory changes may still impact those arrangements. For example, while a U.S. company would remain authorized to continue constructing a hotel under a preexisting contract with a listed entity, the new prohibition could prevent the U.S. company from hiring new subcontractors that are themselves listed entities to complete the project, or from entering into a new management agreement with a listed entity for the operation of the hotel. Likewise, a travel services provider with an existing contract with a listed hotel would not be barred from continuing to book reservations, make payments, or accept commissions, but U.S. travelers would not be able to pay for lodging in listed hotels unless those travel transactions were initiated before November 9.

In parallel, BIS announced a general policy to deny licenses to authorize the export or reexport of items subject to the EAR to entities on the Cuba Restricted List.

Educational Travel

Also significant are OFAC’s new regulatory changes to restrict the scope of authorized educational travel to Cuba under the CACR. Most notably, OFAC has amended the CACR to no longer authorize *individual* “people-to-people” educational travel to Cuba.

Under a 2016 loosening of Cuba travel restrictions by the Obama Administration, a general license in the CACR authorized travelers to engage in people-to-people educational travel to Cuba on their own (*e.g.*, engage in self-directed travel) so long as they maintained records demonstrating that they engaged in a full-time schedule of activities intended to enhance contact with the Cuban people, support civil society in Cuba, or promote the Cuban people’s independence from Cuban authorities. However, OFAC has now amended this general license

to authorize travelers subject to U.S. jurisdiction to engage in people-to-people travel only under the auspices of an organization that is subject to U.S. jurisdiction, and when accompanied by a person subject to U.S. jurisdiction who is a representative of the sponsoring organization. Also, as was previously the case, the traveler must maintain a full-time schedule of qualifying activities.

Individual people-to-people travel remains authorized only where (1) the traveler had already completed at least one travel-related transaction (such as purchasing a flight or reserving accommodations) prior to the President's June 16, 2017 announcement of the new sanctions measures; and (2) any follow-on travel-related transactions initiated on or after November 9, 2017 (such as payments to a hotel) do not involve any new direct financial transaction with a party on the Cuba Restricted List.

In addition to people-to-people travel, the CACR authorize various other categories of educational travel to Cuba. The new regulatory changes also tighten these provisions and now require that travelers subject to U.S. jurisdiction engaging in authorized educational travel of other types do so under the auspices of an organization that is subject to U.S. jurisdiction. Further, the travelers must be accompanied by a person subject to U.S. jurisdiction who is a representative of the sponsoring organization, unless the traveler is an employee, student, or other representative of the sponsoring institution and obtains a certification letter from the sponsoring organization.

Besides educational travel, various other types of travel to Cuba by persons subject to U.S. jurisdiction continue to be authorized by the CACR, generally so long as they do not involve prohibited dealings with entities on the Cuba Restricted List. This includes, for example, the CACR general license authorizing travel related to professional meetings and research in Cuba, which may authorize many kinds of business travel to Cuba, and travel related to support for the Cuban people, which can include qualified organization or individual travel that involves a full-time schedule of activities that enhance contact with the Cuban people, support civil society in Cuba, or promote the Cuban people's independence from Cuban authorities, and which will result in meaningful interaction with individuals in Cuba.

OFAC has signaled an intention to aggressively enforce these (and other) restrictions on authorized travel under the CACR.

Expansion of Definition of Prohibited Cuban Officials

OFAC and BIS also have expanded the definition in the CACR and EAR of "prohibited officials of the Government of Cuba," effectively restoring the definition to its 2016 version. The Obama Administration had limited that term to members of the Council of Ministers and flag officers of the Revolutionary Armed Forces. As amended, the term once again includes a much more expansive list of officials and job categories. Several general licenses in the CACR and license exceptions in the EAR expressly exclude transactions for or involving prohibited officials of the Government of Cuba. This includes, among other authorizations, License Exceptions Gift Parcels and Humanitarian Donations ("GFT") and Consumer Communications Devices ("CCD") in the EAR, which authorize certain exports/reexports of gift parcels and consumer electronic devices (such as personal laptops and mobile phones) to Cuba, but which do not authorize exports/reexports of these items to prohibited Cuban government officials or certain other restricted end users.

Private Sector Exports and Reexports

While the changes described above all are intended to restrict dealings with Cuba by persons subject to U.S. jurisdiction or involving items subject to U.S. jurisdiction, BIS also has amended the EAR in a manner that could expand the range of potential transactions with Cuba involving such items.

In particular, BIS simplified and expanded a license exception—License Exception Support for the Cuban People (“SCP”)—authorizing certain exports and reexports of items to Cuba for use by the Cuban private sector. License Exception SCP previously authorized exports and reexports to Cuba only for specified purposes, such as to construct or renovate privately-owned buildings, for use in private-sector agricultural activities, or for use by private-sector entrepreneurs. The scope of License Exception SCP has been expanded to now authorize the export or reexport to Cuba of any items subject to the EAR that are classified in the least-sensitive “EAR99” category or are controlled for anti-terrorism (“AT”) reasons only, “for use by the Cuban private sector for private sector economic activities,” except for items that would be used to primarily generate revenue for the state or contribute to the operation of the state, including through the construction or renovation of state-owned buildings. The exception does not apply to medicines, medical devices, and agricultural commodities (the export and reexport of which are governed by statute).

While the regulatory changes described above are significant, it is notable that many aspects of the Obama Administration’s efforts to normalize relations with Cuba remain in place. The U.S. embassy in Havana remains open, although with reduced staffing due to recent alleged acoustic attacks on U.S. diplomats. Specific licenses previously granted to companies in the travel and other sectors have not been revoked and remain in effect. And, while new restrictions have been imposed on educational travel as described above, authorization for educational travel has not been eliminated, and other travel authorizations in the CACR remain available. Additionally, rather than eliminate categories of trade with Cuba that were previously authorized, such as authorized exports/reexports to Cuba in support of Cuba’s nascent private sector, the regulatory changes apparently expand those authorizations in certain respects.

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Covington has deep experience advising clients on the legal, policy, and practical dimensions of international sanctions, including with respect to Cuba. We will continue to monitor developments in this area, and are well-positioned to assist clients in understanding how these recent announcements may affect their business operations.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our International Trade practice:

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