

Client Alert

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Shifting Course: Expanding the Scope of Permissible Cuba Transactions

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The Treasury Department's Office of Foreign Assets Control ("**OFAC**") has issued its first set of amendments to the Cuban Assets Control Regulations ("**CACR**") to begin implementing a major policy shift in United States–Cuba relations, as announced by the President on December 17, 2014. Concurrently, the Commerce Department's Bureau of Industry and Security ("**BIS**") amended the Export Administration Regulations ("**EAR**") to authorize certain exports to Cuba. These amendments became effective on January 16, 2015. Although these amendments represent the liberalization of certain Cuba sanctions, it is important to note that the basic sanctions in effect against Cuba remain in place.

The CACR amendments authorize a wide range of activities pursuant to general licenses. These include: (1) certain categories of travel to Cuba (excluding general tourism) and related services; (2) U.S. financial institutions establishing correspondent accounts at Cuban financial institutions to facilitate the processing of authorized transactions; (3) expanding permissible telecommunications activities; (4) increasing the amount of remittances that may be sent to Cuba; and (5) permitting non-U.S. subsidiaries of U.S. companies to engage in certain transactions with Cuban nationals located outside of Cuba.

The EAR amendments: (1) create a new License Exception Support for the Cuban People ("**License Exception SCP**") to authorize the export and re-export of certain items to Cuba that are intended to improve the living conditions of the Cuban people, support independent economic activity, strengthen civil society in Cuba, and improve the free flow of information to, from, and among the Cuban people; (2) amend the existing License Exception Consumer Communications Devices ("**License Exception CCD**"), thereby authorizing sales of certain communications items to eligible end-users in Cuba; and (3) amend the License Exception Gift Parcels and Humanitarian Donations ("**License Exception GFT**"), authorizing the export or re-export of multiple gifts in one shipment. Additionally, BIS now has a general policy of approval for exports to Cuba of environmental-protection items.

The U.S. embargo in effect against Cuba was, prior to these amendments, one of the most comprehensive sanctions regimes in effect. The Cuba sanctions are applicable not only to U.S. companies, but foreign subsidiaries of U.S. companies, as well as U.S. citizens and permanent resident aliens wherever located. The CACR and EAR amendments represent the greatest relaxation of the Cuba sanctions since their implementation more than 50 years ago. Highlighted below are certain of the more significant changes resulting from the amendment.

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FINANCIAL SERVICES

Correspondent Accounts: OFAC has added a general license authorizing U.S. depository institutions (including financial institutions) to open correspondent accounts at Cuban financial institutions to facilitate authorized transactions. However, Cuban banks are not generally licensed to open such accounts at U.S. banks.

Credit/Debit Card Use: Authorized travelers in Cuba are permitted to use their credit or debit cards issued by a U.S. financial institution for transactions authorized under the CACR. Thus, U.S. financial institutions can enroll Cuban merchants and process such transactions. It is important for travelers to confirm with their financial institution before traveling to Cuba that their credit or debit card can in fact be used in Cuba, and the establishments at which it can be used.

Rejected and Permitted Financial Transactions: U.S. depository institutions are authorized to reject funds transfers in which Cuba or a Cuban national have an interest (rather than blocking the transaction) that originate and terminate outside the United States, provided that: (1) neither the originator nor the beneficiary is a person subject to U.S. jurisdiction; and (2) certain prohibited individuals do not have an interest in the transfer. However, U.S. depository institutions can process such funds transfers, provided that the underlying transaction would be authorized pursuant to the CACR if the originator or beneficiary were a U.S. person.

Remittances: The limits on generally licensed periodic remittances that may be sent by a U.S. person to a Cuban national, other than a prohibited official of the government of Cuba or a prohibited member of the Cuban Communist Party, have been raised from \$500 per quarter to \$2,000 per quarter. U.S. banking institutions, U.S.-registered brokers or dealers in securities, and U.S.-registered money transmitters are permitted to process authorized remittances to Cuba, subject to certain recordkeeping and reporting requirements.

TELECOMMUNICATIONS

Telecommunications: To further the policy objectives of providing efficient and adequate telecommunications services between the United States and Cuba, OFAC has generally authorized transactions that establish mechanisms to provide commercial telecommunications services linking third countries and Cuba and in Cuba.

Persons subject to U.S. jurisdiction may provide additional services incident to Internet-based communications and related to certain authorized exportations and re-exportations of communications items. The range of such services has been expanded to coincide with changes to the EAR, and such services can now be provided for a fee to certain end-users. For example, transactions incident to providing fee-based Internet communications services such as email or other messaging platforms, social networking, VOIP, webhosting, or domain-name registration are now authorized in most circumstances.

Services related to many kinds of software (including applications) used on personal communications devices such as personal computers and cell phones are also authorized, along with other services related to the use of such devices. In addition, OFAC has authorized services such as cloud storage, software design, business consulting, and the provision of IT management and support related to the use of hardware and software exported or re-exported to Cuba under the BIS License Exception CCD.

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TRADE – PERMISSIBLE U.S. EXPORTS

New License Exception – Support for the Cuban People: License Exception SCP was implemented to support improved living conditions and independent economic activity in Cuba. This license exception authorizes the export and re-export of commercially sold or donated: (1) building materials, equipment, and tools for use by the private sector to construct or renovate privately owned buildings, including privately owned residences, businesses, places of worship, and buildings for private-sector social or recreational use; (2) tools and equipment for private-sector agricultural activity; and (3) tools, equipment, supplies, and instruments for use by private-sector entrepreneurs, such as auto mechanics, barbers, hairstylists, and restaurateurs. License Exception SCP also authorizes the export and re-export to Cuba of certain items for human rights organizations, individuals, or nongovernmental organizations that promote independent activity intended to strengthen civil society. To improve the free flow of information to, from, and among the Cuban people, this License Exemption also authorizes the export and re-export to Cuba of certain items for telecommunications, including access to the Internet, use of Internet services, and infrastructure creation and upgrades. Moreover, License Exception SCP authorizes the export and re-export to Cuba of certain items for use by news media personnel and U.S. news bureaus engaged in the gathering and dissemination of news to the general public. It is important to note that items eligible for export and re-export to Cuba under these provisions of License Exception SCP are limited to those designated as “EAR 99” (i.e., items subject to the EAR but not specified by any Export Control Classification Number, or controlled only for antiterrorism reasons).

In addition, to strengthen civil society in Cuba, License Exception SCP authorizes the export and re-export to Cuba of certain *donated* items for use in scientific, archaeological, cultural, ecological, educational, historic-preservation, or sporting activities. License Exception SCP also authorizes the *temporary* export of certain items by persons departing the United States for their use in the same set of categories, or for their use in their professional research (limited to research directly related to the traveler’s profession, professional background, or area of expertise) and must be returned to the United States within two years unless consumed in Cuba, or unless the exporter has applied for and obtained, prior to the expiration of the two-year period, a license from BIS authorizing the items to remain in Cuba longer than two years. It is important to note that items eligible for export under these two provisions of License Exception SCP may not relate to the development, production, use, operation, installation, maintenance, repair, overhaul, or refurbishing of any item enumerated or otherwise described on the United States Munitions List or on the Commerce Control List (except for items controlled solely for anti-terrorism reasons).

Expansion of License Exception – Consumer Communications Devices & Gift Parcels and Humanitarian Donations: License Exception CCD was originally implemented on September 8, 2009, to help enhance the free flow of information to and from Cuba. At the time, License Exception only CCD authorized the export and re-export to Cuba of certain *donated* consumer communications devices that are widely available for retail purchase and that are commonly used to exchange information and facilitate interpersonal communications, including computers, communications equipment, and related items, such as personal computers, mobile phones, televisions, radios, and digital cameras, as well as certain telecommunications and information security–related software. This rule has been amended to remove the donation requirement in License Exception CCD, thereby allowing export or re-export of eligible items for commercial sale or donation to eligible recipients in Cuba.

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At the time it was implemented, License Exception GFT excluded from eligibility consolidated shipments of multiple parcels for delivery to individuals residing in a foreign country, thereby requiring parties exporting multiple gift parcels in a shipment to obtain individual validated licenses. This amendment removes this requirement and allows the export and re-export of multiple gift parcels in a single shipment, pursuant to License Exception GFT.

New Licensing Policy – Environmental Protection: This rule amends the licensing policy for Cuba to add a general policy of approval for exports and re-exports of items necessary for the environmental protection of U.S. and international air quality, waters, and coastlines, including items related to renewable energy or energy efficiency.

OTHER TRANSACTIONS

Humanitarian Activities: The CACR contains a general license (incorporating prior specific licensing policy and authorizations) permitting certain travel-related and other transactions that are related to humanitarian projects in or related to Cuba. These authorized humanitarian projects include medical and health-related projects, construction projects intended to benefit legitimately independent civil society groups, environmental projects, projects involving formal or non-formal educational training (specific to entrepreneurship and business, civil education, journalism, advocacy and organizing, adult literacy, or vocational skills), community-based grassroots projects, projects suitable to the development of small-scale private enterprise, projects related to agricultural and rural development that promote independent activity, and micro financing projects (excluding loans, extensions of credit, or other financing involving confiscated property the claim to which is owned by a U.S. national).

Transactions with Cuban Nationals Located Outside Cuba: U.S.-owned or controlled entities in third countries may now provide goods and services to Cuban nationals in third countries, provided that the transaction does not involve a commercial exportation, directly or indirectly, of goods or services to or from Cuba.

Payment for Authorized Transactions: The CACR has long permitted the export of U.S.-origin items to Cuba pursuant to a BIS license, provided that the payment terms were “cash in advance.” Prior to the CACR amendments, it was necessary for the U.S. exporter to have the cash before shipment. To allow expanded financing options for authorized exports to Cuba, cash payment can now be received after shipment but before transfer of title and control to the Cuban party.

Insurance Coverage: U.S. insurance companies can now offer global insurance policies that cover third-country nationals traveling to Cuba.

TRAVEL

General Licenses for Specific Activities: While the amendments to the CACR do not fully permit travel to Cuba, they permit travel to Cuba for authorized purposes. Travel-related transactions are permitted by general license for travel related to the following 12 activities, subject to criteria and conditions in each general license: (1) family visits; (2) official business of the U.S. government, foreign governments, and certain intergovernmental organizations; (3) journalistic activity; (4) professional research and professional meetings; (5) educational activities; (6) religious activities; (7) public performances, clinics, workshops, athletic and other competitions, and exhibitions; (8) support for the Cuban people; (9) humanitarian projects; (10) activities of private foundations, or research or educational institutes; (11) exportation, importation, or transmission of information or informational

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materials; and (12) certain authorized export transactions. U.S. companies, travel agents, and airlines are permitted to provide authorized travel and carrier services.

The per-diem spending limitation while traveling in Cuba previously imposed no longer applies, and there is no specific dollar limit on authorized expenses. Authorized travelers may engage in transactions ordinarily incident to travel within Cuba, including the payment of living expenses and the acquisition in Cuba of goods for personal consumption there. Other expenditures not directly incident to the traveler's authorized activities in Cuba are not authorized. In addition, for most categories of authorized travel, the traveler's schedule of activities must not include free time or recreation in excess of that consistent with a full-time schedule in Cuba for the authorized activity.

Travelers are authorized to acquire in Cuba, and import as accompanied baggage into the United States, merchandise with a value not to exceed \$400 per person, provided that no more than \$100 of the merchandise consists of alcohol or tobacco products and the merchandise is imported for personal use only.

Significantly, travel for tourist activities remains prohibited.

CONCLUSION

While the amendments to CACR and EAR represent a significant easing of the sanctions, it is important to emphasize that the bulk of the Cuba sanctions remain in place. Thus, persons and entities engaging in business in Cuba or with Cuban persons will need to remain aware of the remaining sanctions, and have appropriate compliance procedures to prevent engaging in prohibited transactions that could result in the imposition of potentially significant fines.

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