

Client Alert

International Trade & Litigation Practice Group

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The Obama Administration Revises the Cuba Sanctions Regulations to Expand Trade Opportunities While Certain Law Makers Question the Administration's Basis for These Actions

On January 15, the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") released important updates to the Cuban Assets Control Regulations ("CACR"). The U.S. Department of Commerce's Bureau of Industry and Security ("BIS") simultaneously amended its Export Administration Regulations ("EAR") related to Cuba. These amendments took effect on January 16, 2015 and follow through on President Obama's announcement, previously reported by King & Spalding in December 2014, that the United States would begin normalizing its relations with Cuba.

While the Obama Administration has taken regulatory steps to implement its policy of engagement with Cuba, lawmakers have raised questions as to the legality of the President's authority to take these actions given other U.S. statutes. For example, Senators Dan Coats (R-Ind.) and Marco Rubio (R-Fla.) recently asked Secretary Lew of the Treasury Department to clarify the legal authority of the Administration to authorize the opening of correspondent bank accounts, the use of U.S. debit and credit cards in Cuba, the investment in telecommunications infrastructure, and other actions reflected in the updated regulations.

King & Spalding will continue to monitor the situation as further guidance on these new rules becomes available. In the meantime, a summary of key features of the regulatory actions taken by OFAC and BIS is set forth below.

The BIS Amendments Make Changes to the EAR Designed to Support Engagement with the Cuban People

BIS has made several amendments to make it easier for items subject to the EAR to be exported from the United States or reexported from third countries when those items will be used to promote civil society, support private sector entrepreneurial endeavors, and foster communications with the Cuban people. Key features of these amendments include the following:

1. Addition of License Exception SCP (Support for the Cuban People)

BIS added a new License Exception SCP which authorizes, subject to certain conditions, the export and reexport of the following items:

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- Commercially sold or donated materials, equipment, and tools for construction or renovation of privately owned buildings;
- Commercially sold or donated tools and equipment for support of agricultural projects;
- Commercially sold or donated tools, equipment, supplies, and instruments used in private sector entrepreneurial endeavors;
- Donated items for use in scientific, archaeological, cultural, ecological, educational, historic preservation, or sporting activities or items temporarily exported from the U.S. for such activities;
- Items for use by human rights organizations, individuals, or non-governmental organizations that are working independently from the Cuban government on projects intended to strengthen civil society;
- Commercially sold or donated items for telecommunications; and
- Certain items for use by news media personnel and U.S. news bureaus.

Generally, to be eligible for License Exception SCP, all of the items listed above must be for private sector projects and must not be subject to export controls (*i.e.*, EAR99 items) or controlled on the Commerce Control List only for anti-terrorism reasons.

2. Issuance of a New Licensing Policy for Environmental Protection

BIS's amendments to the EAR add a general policy of approval for the export and reexport 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).

3. Expansion of Existing License Exception Consumer Communications Devices (CCD)

BIS previously amended the EAR in 2009 to authorize the donation of certain identified hardware and software, such as certain consumer computers, monitors, network access controllers, mobile phones, and consumer software, to allow private sector end-users in Cuba to communicate with each other and the rest of the world. The new amendments remove the donation requirement in License Exception SCP, thereby allowing the export or reexport of eligible items for donation *or* commercial sale to eligible recipients in Cuba.

OFAC's Amendments to the CACR Make it Easier to Engage in Financial and Travel Transactions in Cuba

Like BIS's changes, OFAC's amendments to the CACR are designed to promote private sector endeavors intended to support Cuban civil society and foster greater communication between the island and the rest of the world. Key features of OFAC's amendments include the following:

1. Expansion of Authorized Transactions Necessary to Support Certain Exports of Goods and Services to Cuba

- OFAC revised the regulatory interpretation of "cash in advance" from "cash before shipment" to "cash before transfer of title and control" to expand the available financing options for authorized exports to Cuba;
- OFAC added a general license authorizing transactions, including payments, necessary to support the provision of telecommunications services to private Cuban citizens; and

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- OFAC added a general license authorizing transactions that establish facilities to provide commercial telecommunications services in Cuba and to link third countries and Cuba.

2. Expansion of Travel to Cuba for Certain Purposes

- OFAC authorized travel-related transactions and other transactions incident to activities within the 12 existing authorized categories of travel, including for educational, journalistic, religious, and humanitarian purposes and for professional meetings. Tourist travel remains generally prohibited;
- OFAC amended the regulations to permit persons subject to U.S. jurisdiction, including travel agents and airlines, to provide authorized travel and carrier services, and certain entities to forward authorized remittances, subject to certain conditions; and
- OFAC added a provision allowing U.S. insurance providers to issue global insurance policies to non-Cuban residents to provide health, life, or travel insurance coverage, even if events giving rise to claims covered under the policies occur while the individual is traveling to, from, or within Cuba.

3. Increase in Remittances

- OFAC raised from \$500 to \$2,000 per quarter the limits on remittances that may be sent to Cuban nationals;
- OFAC generally authorized remittances for humanitarian projects, support for the Cuban people, and development of private business in Cuba; and
- OFAC raised to \$10,000 the total amount of remittances that a traveler may carry to Cuba.

4. Additional Authorizations for Financial Transactions

- OFAC authorized the use of U.S. credit and debit cards in Cuba for travel-related and other transactions and enabled U.S. financial institutions to enroll merchants and process such transactions;
- OFAC authorized certain micro-financing activities and entrepreneurial and business training designed to directly benefit the Cuban people;
- OFAC authorized depository institutions to open correspondent accounts at Cuban financial institutions to facilitate the processing of authorized transactions; and
- OFAC authorized U.S. financial institutions to process U-turn transactions in which neither the originator nor beneficiary of the funds transfer is a person subject to U.S. jurisdiction. OFAC also authorized financial institutions to reject certain funds transfers not authorized under the regulations, instead of blocking them as previously required.

5. Expansion of Third-Country and Other Provisions

- OFAC authorized persons subject to U.S. jurisdiction to sponsor and participate in third-country professional meetings and conferences that are attended by Cuban nationals;
- OFAC authorized U.S.-owned or -controlled entities in third countries to provide, with some limitations, goods and services to Cuban nationals in third countries;

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- OFAC allowed for accounts of Cuban nationals who have permanently relocated outside of Cuba to be unblocked;
- OFAC authorized funds transfers through the United States for the personal expenditures of certain persons related to third-country official missions in Cuba or certain intergovernmental organizations in Cuba;
- OFAC authorized foreign vessels to enter the United States after engaging in certain trade with Cuba; and
- OFAC amended the regulations to permit the provision of certain goods and services to Cuban national sailors sequestered aboard ships in U.S. ports.

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