

International Trade Alert

December 22, 2017

Key Points

- On November 9, 2017, the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC), the U.S. Department of State, and the U.S. Department of Commerce's Bureau of Industry and Security (BIS) took coordinated actions to tighten U.S. sanctions against Cuba, pursuant to President Trump's "National Security Presidential Memorandum on Strengthening the Policy of the United States Toward Cuba" (the "**Presidential Memorandum**") issued on June 16, 2017.
- Opportunities for commercial engagement remain available to U.S. companies with interests and strategic opportunities in Cuba. However, new restrictions on certain entities and persons in the country imposed by the Trump administration will require persons subject to U.S. jurisdiction to engage in enhanced diligence to ensure compliance with these measures.
- OFAC **amended** the Cuban Assets Control Regulations (CACR) to prohibit persons subject to U.S. jurisdiction¹ from engaging in direct financial transactions with entities and sub-entities identified on a new list—the **Cuba Restricted List**. OFAC also tightened restrictions on some areas of generally authorized travel and expanded the scope of individuals deemed to be "prohibited officials of the Government of Cuba."
- BIS issued **related amendments** implementing a general policy of denial for license applications to export items subject to the Export Administration Regulations (EAR) for use by entities and sub-entities on the Cuba Restricted List. Additionally, BIS expanded the scope of License Exception Support for the Cuban People (SCP) to encourage exports to Cuba for use in Cuban private-sector economic activities.



¹ Persons subject to U.S. jurisdiction include U.S. citizens, residents, persons within the United States, entities organized under the laws of the United States, and entities owned or controlled by the foregoing. 31 C.F.R. § 515.329.

Treasury, State and Commerce Implement Regulations Pursuant to the Trump Administration's Cuba Policy

The Cuba Restricted List

The Cuba Restricted List identifies entities and sub-entities that the Department of State has determined to be “under the control of, or act for or on behalf of, the Cuban military, intelligence, or security services or personnel” and with whom direct financial transactions would “disproportionately benefit such services or personnel at the expense of the Cuban people or private enterprise in Cuba.”

Listed entities include the ZEDM, two Cuban ministries, more than 80 hotels in districts across the island, two tourist agencies, five marinas, 10 stores in Old Havana, and more than 30 entities that directly serve the Cuban defense and security sectors. Also on the list are five major Cuban holding companies—GAESA, Grupo de Turismo Gaviota, Compañía Turística Habaguanex S.A., UIM and Corporación CIMEX—as well as several of their subsidiaries in industries ranging from fashion to beverage manufacturing. The hotels included on the Cuba Restricted List do not include the Cubanacan and GranCaribe hotels or hotels for which U.S. persons previously received licenses from OFAC. The Department of State has stated that it will update the Cuba Restricted List periodically.

Limitation on Scope of Affected Entities: Unlike the OFAC list of Specially Designated Nationals and Blocked Persons and other sanctions lists maintained by OFAC, entities or sub-entities that are owned or controlled by an entity or sub-entity on the Cuba Restricted List maintained by the Department of State **are not** treated as restricted, unless they are also specifically named on the Cuba Restricted List. This limitation is noteworthy in contrast with the broader reach of other sanctions measures.

Prohibition on Direct Financial Transactions with Entities on the Cuba Restricted List

A new provision of the CACR ([31 C.F.R § 515.209](#)) prohibits persons subject to U.S. jurisdiction from engaging in direct financial transactions with the entities and sub-entities designated on the Cuba Restricted List. A person engages in a “direct financial transaction” when acting as the originator on a transfer of funds whose ultimate beneficiary is on the Cuba Restricted List or by acting as the ultimate beneficiary on a transfer of funds whose originator is on the Cuba Restricted List, including transactions by wire transfer, credit card, check or cash. Indirect transactions with a listed entity where the U.S. person is neither the originator nor a beneficiary on a transfer of funds are not prohibited.

Grandfathering of Activities Initiated Prior to Release of the New OFAC Regulations: Importantly, the new prohibition on direct transactions with entities on the Cuba Restricted List does not apply to travel-related transactions initiated prior to the listing of an entity or sub-entity on the Cuba Restricted List. Further, the prohibition does not apply to transactions related to commercial engagements in place prior to such listing, including transactions outlined in contingent or other types of contractual arrangements agreed upon and authorized prior to the issuance of the new regulations. Additionally, consistent with OFAC's general scope of authority and provisions in the Presidential Memorandum, OFAC retains authority under the amended regulations to issue specific licenses authorizing direct financial transactions involving

parties on the Restricted List where such action is determined to be consistent with the policy set out in the Presidential Memorandum.

Educational Support for the Cuban People and People-to-People Travel

OFAC has amended the general license for education activities at [31 C.F.R. § 515.565\(a\)](#) and the people-to-people general license at § 515.565(b) to conform with changes described in the Presidential Memorandum:

- *Changes to Educational Travel.* Persons subject to U.S. jurisdiction who wish to travel to Cuba under the educational activities general license are now generally required to travel under the auspices of an organization that is a person subject to U.S. jurisdiction, and they must also be accompanied by a person subject to U.S. jurisdiction who is a representative of the sponsoring organization.
- *Changes to People-to-People Travel.* Persons subject to U.S. jurisdiction who wish to travel under the people-to-people general license are similarly required to travel under the auspices of an organization that is a person subject to U.S. jurisdiction and that sponsors such exchanges to promote people-to-people contact, and they must be accompanied by a person subject to U.S. jurisdiction who is a representative of the sponsoring organization. Importantly, individual people-to-people travel is no longer authorized.
- *Changes to Support for the Cuban People Travel.* Persons subject to U.S. jurisdiction who wish to travel under the support for the Cuban people general license must engage in activities to promote independent activity intended to strengthen civil society in Cuba, or activities of organizations aimed at improving human rights or promoting democracy in Cuba. In addition, this general license now requires that such U.S. travelers must have a full-time schedule of activities that results in meaningful interaction with individuals in Cuba and that enhances contact with the Cuban people, supports civil society in Cuba, or promotes the Cuban people's independence from Cuban authorities. Notably, the regulations offer examples of qualifying activities under this general license. For instance, eating at privately owned Cuban restaurants, shopping at privately owned stores and staying in a room in a private Cuban residence where a U.S. person will have breakfast each morning and engage with the Cuban host to learn about Cuban culture will qualify for this general license if the U.S. traveler completes his or her full-time schedule of other qualifying activities.

Grandfathering Provisions: These new amendments to educational and people-to-people travel also include “grandfathering” provisions that authorize travel that was previously authorized under these general licenses if the traveler completed at least one travel-related transaction, such as booking a flight or hotel, before November 9, 2017 (with respect to educational travel), and June 16, 2017 (with respect to people-to-people travel).

Return to Previous Definition of Prohibited Officials

OFAC has revised the definition of the term “prohibited officials of the Government of Cuba” to include individuals who were previously removed by the Obama administration on October 17, 2016. Multiple general licenses under the CACR (e.g., those related to telecommunication services, legal services and

personal remittances) exclude certain transactions involving “prohibited officials of the Government of Cuba” from the scope of transactions otherwise permitted by these general licenses.

Under the change, “prohibited officials of the Government of Cuba” will once again include the following individuals: Ministers and Vice-Ministers; members of the Council of State; members of 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 and 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; or members and employees of the Supreme Court (Tribuno Supremo Nacional). Following the changes implemented by the Obama administration in October 2016, the term applied only to members of the Council of Ministers and flag officers of the Revolutionary Armed Forces.

Changes to BIS Export Authorizations

The corresponding rulemaking from BIS implements three main changes:

- *Expansion of License Exception SCP.* BIS has broadened the scope of items eligible for a provision of License Exception SCP that authorizes certain exports for use by the Cuban private sector for private sector economic activities. Whereas previously this provision applied only to certain listed categories of items, such as tools and equipment, it now authorizes the export and reexport of all items subject to the EAR (except medicines, medical devices and agricultural commodities) designated as EAR99 or controlled on the Commerce Control List for antiterrorism reasons only. To be eligible for this license exception, the item must be intended for private-sector use or private-sector economic activity and must not be used to generate revenue for the state or contribute to state operations, including through the construction or renovation of state-owned buildings.
- *Policy of Denial for Entities on Cuba Restricted List.* Applications to export or reexport items subject to the EAR for use by entities or sub-entities identified on the new Cuba Restricted List will be subject to a policy of denial, unless such transactions are determined to be consistent with the policies set forth in the Presidential Memorandum.
- *Additions to List of Ineligible Officials.* The list of ineligible Cuban government officials in License Exceptions Gift Parcels and Humanitarian Donations, Consumer Communications Devices and SCP has been amended to include OFAC’s additions to the list of “prohibited officials of the Government of Cuba” referred to above.

Limitations on the Rollback of Obama-Era Sanctions Revisions

Despite these changes, opportunities for U.S. companies to pursue commercial activities in Cuba remain open and unaffected by the Trump administration’s revisions to the OFAC regulations. First, persons subject to U.S. jurisdiction continue to be permitted to participate in Cuba-related transactions authorized by general and specific licenses, including direct financial transactions with persons on the Cuba

Restricted List that are ordinarily incident to, and necessary to give effect to, a licensed transaction, unless explicitly excluded from the terms of the applicable general or specific license. Furthermore, BIS continues to maintain license exceptions and favorable licensing policies for the export or reexport of items subject to the EAR to Cuba (including, but not limited to, medicines and medical devices, items to ensure the safety of civil aviation, certain telecommunications items and items to meet the needs of the Cuban people). In addition, the new restrictions on direct financial transactions with persons on the Cuba Restricted List include a “grandfathering” exception for preexisting travel-related and commercial transactions that was expressly provided in order to prevent negative impacts on U.S. businesses with preexisting activities, as discussed above.

Significance of Changes to the OFAC Regulations

These changes to the CACR in the first year of the Trump administration, rhetoric aside, amount to a limited tightening of U.S. sanctions on Cuba. However, the current U.S. sanctions framework is still far more permissive and permeable than U.S. sanctions on Cuba were only a few years ago, in the months leading up to the Obama administration’s actions that culminated in the reopening of the U.S. Embassy in Havana and Cuban Embassy in Washington, D.C. The new restrictions imposed by the Trump administration will require persons subject to U.S. jurisdiction who engage in, or are contemplating, otherwise authorized transactions or travel involving Cuba to engage in additional diligence to ensure that their activities comply with the new rules. However, despite the stated shift in U.S. policy announced by the Trump administration, the breadth of activities that remain authorized still provides substantial latitude for U.S. companies to pursue commercial opportunities in Cuba as part of a longer and larger strategy for this market and the broader regional market of which it is a key part.

Many of the restrictions outlined above—including those related to travel, direct financial transactions with entities on the Cuba Restricted List and the expansion of the list of “prohibited officials of the Cuban government”—conform with changes described in the Presidential Memorandum. However, it should be noted that there are members of Congress who have advocated for further tightening of Cuba sanctions. These include Sen. Marco Rubio (R-FL), who has criticized implementation of the administration’s new policy and asserted that the Cuba Restricted List omits certain entities and sub-entities that are part of the Cuban military, intelligence or security sectors. Accordingly, it is foreseeable that these members will continue to press for the addition of further entities to the Cuba Restricted List and will ensure that relevant agencies fully implement the Presidential Memorandum.

Although these new regulatory changes are not intended to affect current specific licenses granted by OFAC and BIS, it remains to be seen how the new Cuba policy may affect the renewal of existing licenses or the approval of new licenses related to Cuba, especially including any involving entities on the Cuba Restricted List. We can expect that, among other factors, OFAC and BIS will review such applications based on the policy interests articulated in the Presidential Memorandum, including the administration’s interest in not negatively impacting American businesses for engaging in lawful commercial opportunities, advancing Cuban human rights, encouraging the growth of a Cuban private sector, protecting the national security and public health and safety of the United States, and advancing the understanding of the United

States regarding scientific and environmental challenges. How diplomatic relations evolve, pending changes in Cuba's leadership in 2018 and other factors that are difficult to predict, can also be expected to shape the way in which U.S. sanctions law and policy develop further in the year ahead.

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