

International Trade

June 20, 2017

Key Points

- On Friday, June 16, the Trump administration announced new changes to U.S. policy towards Cuba, and instructed the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) and U.S. Department of Commerce's Bureau of Industry and Security (BIS) to "initiate a process" to adjust current regulations regarding transactions with Cuba within 30 days. Accordingly, it remains to be seen when new regulations will be issued, although it is likely some months away.
- Until the policy changes announced on Friday are implemented through new regulations, the established OFAC Cuba sanctions regulations remain in effect and unchanged.
- The administration has emphasized that its policy changes are not intended to disrupt existing business. On the day of the announcement of the policy changes, OFAC issued initial guidance stating that its forthcoming regulations will be prospective and will not affect authorized existing business or specific licenses.
- Anticipated regulatory changes include the prohibition of direct financial transactions with certain listed entities (to be identified by the Department of State) that are under the control of, or act for or on behalf of, the Cuban military, intelligence or security services or personnel. Cuba's Grupo de Administracion Empresarial S.A. (GAESA), an entity affiliated with the Cuban military that owns or controls many hotels, restaurants, marinas and banks in Cuba, together with its affiliates, subsidiaries and successors, are expected to be listed among the prohibited entities.
- Other anticipated regulatory changes include the prohibition of individual people-to-people travel to Cuba and stricter scrutiny on authorized travel to enforce adherence to the statutory ban on tourism to Cuba.



Cuba Sanctions: President Trump Announces Tightening of U.S. Sanctions While Maintaining Certain Sanctions Relief Implemented by the Obama Administration

On June 16, 2017, the Trump administration issued a national security [presidential memorandum](#) entitled “Strengthening the Policy of the United States Towards Cuba” (the “Presidential Memorandum”). Related to this announcement, the White House issued a [Cuba Fact Sheet](#), OFAC issued a new set of [Frequently Asked Questions](#) (FAQs) and the Department of Transportation also issued a new set of FAQs relating to the President’s announcement.

The administration characterized its new Cuba policy in terms of rolling back many of the Obama administration’s policies. President Trump stated, when announcing the policy change, “I am canceling the last administration’s completely one-sided deal with Cuba.”¹ However, the policy objectives announced in the Presidential Memorandum have many similarities to existing U.S. policy. Many of the actions implemented by the Obama administration to normalize relations with Cuba appear to remain unaltered, including general licenses that allow companies to maintain a business and/or physical presence in Cuba under certain circumstances, expanded authorization for certain categories of travel to Cuba, and license exceptions and favorable licensing policy to allow the flow of certain kinds of U.S.-origin goods to Cuba that advance a policy to “support the Cuban people.”

Ultimately, the impact of the Trump administration’s policy changes will largely depend on the more concrete form that they take in implementing regulations. The Presidential Memorandum and guidance issued on June 16, 2017, leaves substantial room for interpretation in policy implementation and licensing.

Stated Trump Administration Cuba Policy

The Presidential Memorandum sets forth the following stated U.S. policy objectives towards Cuba, among others:

- ending economic practices that disproportionately benefit the Cuban government or its military, intelligence, or security agencies or personnel at the expense of the Cuban people
- ensuring adherence to the U.S. statutory ban on tourism to Cuba
- supporting the U.S. statutory economic embargo of Cuba
- amplifying efforts to support the Cuban people through the expansion of Internet services, free press, free enterprise, free association and lawful travel
- encouraging the growth of a Cuban private sector independent of Cuban government control

¹ White House, Office of the Press Secretary, “Remarks by President Trump on the Policy of the United States Towards Cuba” (June 16, 2017).

- protecting the national security and public health and safety of the United States
- supporting United States agriculture and protecting plant and animal health
- advancing the understanding of the United States regarding scientific and environmental challenges
- facilitating safe civil aviation.

Anticipated Regulatory Changes

To implement the policy announced on Friday, the administration has instructed the heads of relevant departments and agencies to begin the process of adjusting current regulations regarding transactions with Cuba by July 16, 2017, as follows:

Prohibition on direct financial transactions with the Cuban military, intelligence and security services

The Presidential Memorandum orders the Secretaries of Treasury and Commerce to adjust current regulations to prohibit “direct financial transactions” with designated entities that are under the control of, or act for or on behalf of, the Cuban military, intelligence, or security services or personnel. The memorandum also directs the Secretary of State to identify and publish a list of entities (and so-called subentities) that will be subject to these restrictions. As an example, the memorandum specifically identifies GAESA, an entity affiliated with the Cuban military that owns or controls many hotels, restaurants, marinas and banks in Cuba, and its affiliates, subsidiaries and successors, to be added to this new list. However, the Presidential memorandum does not specify whether the list to be developed by the State Department will constitute the full, exclusive list of entities that are subject to these restrictions, or whether OFAC or the State Department might extend such restrictions to un-listed entities that are owned or controlled by listed entities.

Importantly, the Presidential Memorandum specifies a number of significant exceptions that will apply to restrictions imposed by the Administration’s new policy. Perhaps most significant, it provides that the new restrictions relating to Cuba’s military, intelligence and security services will not prohibit transactions with prohibited entities that are deemed to be consistent with U.S. policy and that, among other objectives, relate to:

- U.S. federal government operations, including Naval Station Guantanamo Bay and the United States mission in Havana
- U.S. programs to support building democracy in Cuba
- air and sea operations that support permissible travel, cargo or trade
- expansion of direct telecommunications and Internet access for the Cuban people
- sale of agricultural commodities, medicines and medical devices to Cuba
- sending, processing, or receiving of authorized remittances to Cuba
- activities that otherwise further the national security or foreign policy interests of the United States

- activities or transactions that are required by U.S. law.

In light of the general role of the Cuban military, intelligence and security services in many areas of the Cuban economy, these prohibitions on direct financial transactions with prohibited entities in the military, intelligence and security sectors (and their subsidiaries, affiliates and successors) may make it difficult for U.S. businesses in Cuba. Pending the issuance of the forthcoming regulations, it is difficult to gauge how such restrictions will be reconciled with the policy that the new policy should not disrupt existing business activities.

Restrictions on travel

FAQs issued by both OFAC and the Department of Transportation on June 16, 2017 confirm that U.S. airlines remain authorized to serve Cuba and that restrictions on travel will not take effect until regulations are issued by OFAC. Accordingly, travel-related arrangements that were or are made prior to the issuance of the forthcoming regulations will be permitted.

However, the Presidential Memorandum directs the Secretary of the Treasury to rescind the general license issued under the Obama administration for individual people-to-people travel to Cuba, reverting back to the pre-2016 requirement that people-to-people travel be conducted “under the auspices of an organization subject to the United States” and that travelers be “accompanied by a representative of the sponsoring organization.” As previously required, travelers to Cuba under the people-to-people authorization will also be required to: (i) maintain 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 (ii) meaningfully interact with individuals in Cuba.

In conjunction with these provisions, the Presidential Memorandum orders the Secretary of the Treasury to maintain the existing record-keeping requirements on travel to Cuba under established regulatory provisions and to “regularly audit” travel to Cuba, indicating that OFAC may engage in more rigorous auditing and scrutiny of Cuba-related travel to ensure that it is consistent with the applicable general license or specific license. Accordingly, U.S. persons engaging in travel to Cuba should take care to ensure their activities are consistent with the relevant OFAC license applicable to their travel and maintain a “full and accurate record of each transaction engaged in” with respect to Cuba for a period of five years, including retention of copies of receipts, travel itineraries and other records.

Prohibited officials of the Government of Cuba

The Presidential Memorandum orders the Secretary of the Treasury to (i) expand the current definition of “prohibited officials of the Government of Cuba,”² who are officials with whom U.S. persons and persons in the United States are generally prohibited from engaging in transactions and (ii) limit the availability of specific licenses and general licenses with respect to transactions with such officials.

² Currently, the term only includes members of the Council of Ministers and flag officers of the Revolutionary Armed Forces. See 31 CFR 515.337.

The Presidential Memorandum directs the Secretary of the Treasury to designate the following as “prohibited officials of the Government of Cuba”: Ministers and Vice-Ministers, members of the Council of State and 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 (MININT); employees of the Ministry of Defense (MINFAR); secretaries and first secretaries of the Confederation of Labor of Cuba (CTC) and its component unions; chief editors, editors and deputy editors of Cuban state-run media organizations and programs, including newspapers, television and radio; and members and employees of the Supreme Court (Tribuno Supremo Nacional).

In light of the general role of the Cuban state in most areas of the Cuban economy, such officials may simultaneously hold positions in state-owned companies. However, based upon OFAC guidance issued on June 16 and OFAC practice in connection with similar prohibitions in other U.S. sanctions programs, such restrictions on activities with the prohibited government officials should not result in blanket restrictions against activities involving entities or institutions with which they are associated or in which such officials hold positions solely because of that association.

Cuba Internet access task force

The Presidential Memorandum also orders the Secretary of State to convene a task force, to include relevant departments and agencies (including the Office of Cuba Broadcasting), as well as non-governmental and private-sector entities, on the technological challenges and opportunities for expanding Internet access in Cuba. The task force is instructed to consider federal government support of programs and activities to encourage freedom of expression through independent media and Internet freedom in Cuba.

Implementation of Regulatory Changes and Open Questions

Timing of new regulations not specified

The Trump administration’s announced changes will not take effect until the issuance of new regulations. The Secretaries of Treasury and Commerce are instructed to “*initiate* a process to adjust current regulations” by July 16, 2017. The White House has not publicly set forth a timeline for *enactment* or *implementation* of the regulatory changes. Michael Anton, Deputy Assistant to the President for Strategic Communications, confirmed when discussing the new policy changes, “We don’t have a hard date for when all of those regulations will be published.”³ OFAC has stated only that it expects to issue its regulatory amendments “in the coming months.”⁴

³ White House, Office of the Press Secretary, “Press Gaggle Aboard Air Force One en route Miami, Florida” (June 16, 2017).

⁴ Department of the Treasury, Office of Foreign Assets Control, no. 1, “Frequently Asked Questions on President Trump’s Cuba Announcement” (June 16, 2017).

Policy against disruption of existing authorized business activities

The Trump administration has emphasized that the policy changes towards Cuba are not intended to disrupt existing authorized business activities. In OFAC FAQs published on June 16, 2017, the agency confirmed this point, stating that the forthcoming regulations will be prospective in effect and will not affect existing contracts and specific licenses. Additionally, OFAC confirmed that authorized commercial engagements in place prior to issuance of the new regulations will be permitted, even if they entail direct financial transactions with entities related to the Cuban military, intelligence, or security services that may be implicated by the new policy changes.

It remains to be seen how the new policy will be applied to applications for the renewal of specific licenses previously issued by OFAC. Based on the plain language of the Presidential Memorandum, it appears that renewal of specific licenses for ongoing activities previously authorized by OFAC should be approached in a manner consistent with the Administration's assurance that its new policy towards Cuba is not intended to disrupt existing authorized business activities. Ultimately, such licensing determinations will be made by OFAC on a discretionary basis, in consultation with other relevant U.S. agencies, within the general scope of OFAC's established authority.

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