

Client Update

U.S. Further Relaxes Cuba Sanctions

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Building on the Cuba sanctions relief implemented in January of this year, the U.S. Treasury Department's Office of Foreign Assets Control (OFAC) and the U.S. Commerce Department's Bureau of Industry and Security (BIS) announced further changes in their Cuba embargo regulations effective September 21, 2015. Although the core prohibitions of the Cuba trade embargo remain in place, the recent changes expand many of the categories of trade and travel that are permitted under the January amendments and eliminate some of the practical barriers to conducting transactions authorized by those amendments.

ESTABLISHING A PHYSICAL PRESENCE IN CUBA

One important change to the OFAC regulations is that U.S. companies will now be able to maintain a physical presence in Cuba in support of most authorized transactions without the need to obtain a specific license from OFAC. In particular, exporters of goods authorized for export (such as food, medicine or telecommunications equipment), providers of mail, parcel, travel or communications services and religious or educational institutions are now permitted to establish offices or other facilities in Cuba to facilitate their authorized transactions. In connection with that presence, the companies may lease physical space, secure related goods and services, engage in marketing, and hire Cuban and U.S. employees. Companies providing telecommunications or Internet-based services have, in addition, been authorized to establish joint ventures, subsidiaries, franchises, licensing arrangements and other business relationships in Cuba for the purpose of providing and marketing those services. News media organizations no longer need a specific license to engage in transactions in Cuba related to the gathering and dissemination of news to the general public, including the establishment and operation of news bureaus in Cuba.

Companies and other organizations with a physical presence in Cuba are authorized to open and maintain bank accounts in Cuba to facilitate authorized transactions. BIS has made a corresponding change to the Export Administration Regulations to allow the export or reexport of items to Cuba in support of establishing, maintaining or operating an authorized physical presence.

U.S. companies and their subsidiaries should take careful note, however, that the authorization to establish a physical presence applies only to operations in support of specific categories of authorized transactions. It remains forbidden, for example, to open an office in Cuba to explore business opportunities involving types of transactions not authorized by U.S. law. The new authorization to establish subsidiaries, franchises, joint ventures and licensing arrangements applies only to telecommunications services and Internet-based services, not to the sale of most other types of services or goods.

TELECOMMUNICATIONS AND INTERNET SERVICES, SOFTWARE AND EQUIPMENT

OFAC has expanded its authorization for persons subject to U.S. jurisdiction to provide services to Cuba in connection with authorized exports of telecommunications equipment to Cuba. The authorized services now include training on the installation, repair or replacement of the items, in addition to software design, business consulting and information technology management (including cloud storage). The authorization applies to services in connection with telecommunications-related goods exported from the United States to Cuba under a license or license exception, as well as goods exported to Cuba from a third country that would have qualified for an applicable license exception if they had been exported from the United States.

Separately, OFAC has authorized importation of mobile applications (“apps”) from Cuba, as well as hiring individuals in Cuba to work as app developers. At the same time, BIS has authorized the export of merchandise and software to individuals and private-sector organizations in Cuba for use in developing communications software. BIS also has specified that no license is required for the release to Cuban nationals of a technology or source code that is classified as EAR99 (that is, not subject to any special export controls). BIS also has amended the authorization for exporting consumer communications devices to include lending or leasing as well as selling or donating such equipment.

In addition, OFAC has eliminated a restriction, introduced in January, on the provision of e-mail, social networking and other Internet-based communications services to organizations controlled by the Government of Cuba or the Cuban

Communist Party. That means, for example, that U.S. companies should now be able to provide those types of services to Cuban state-owned enterprises. Internet-based services for certain individual officials of the Government and Communist Party, however, remain prohibited unless the services are available to members of the general public at no cost to the user.

FINANCIAL AND OTHER SERVICES FOR CUBAN NATIONALS OUTSIDE OF CUBA

In January, OFAC authorized foreign subsidiaries of U.S. companies to provide goods and services to individual Cuban nationals who are present in third countries. The recent amendments now extend this authorization to U.S. companies themselves. They also authorize the opening, maintenance and closing of bank accounts for Cuban nationals in third countries, as long as the accounts are not accessed from within Cuba or used to facilitate exports to or imports from Cuba.

This means that U.S. companies will be able to conduct ordinary business dealings with individual Cuban nationals outside of Cuba, even if those individuals do not meet the criteria for being “unblocked nationals” under the regulations. However, the regulations continue to prohibit U.S. companies and their subsidiaries from engaging in most transactions that involve the exportation of goods or services from any country to Cuba. In addition, transactions with Cuban enterprises and organizations, as opposed to individuals, generally remain prohibited.

The new regulations also allow financial institutions in the United States to open, maintain, access and close bank accounts for individual Cuban nationals lawfully present in the United States. Such an account may remain open if the accountholder leaves the United States, but the accountholder may not access funds in the account from outside the United States. The existing cap on the amount of withdrawals for living expenses in the United States has been eliminated. The regulations also have been amended to clarify that nonscheduled emergency medical services may be provided to Cuban nationals in the United States.

OFAC also has issued a general authorization for funds transfers on behalf of Cuban diplomatic missions in the United States. This should help to eliminate some of the remaining difficulties encountered by the Cuban Embassy in Washington, D.C., in conducting banking transactions in the United States.

TRAVEL-RELATED TRANSACTIONS

The January 2015 amendments eliminated, in most cases, the requirement to obtain a specific license from OFAC before traveling to Cuba for one or more of the purposes authorized by the statute. However, tourist travel to Cuba by persons subject to U.S. jurisdiction remains prohibited.

Reflecting the expectation that some authorized travelers will be in Cuba on a fairly long-term basis, the September 2015 amendments now allow most categories of authorized travelers to be accompanied by or visited by family members and close relatives while in Cuba. In addition, the recent amendments allow authorized travelers to open, maintain and close bank accounts in Cuba.

OFAC's September amendments also authorize vessels to provide travel to Cuba by sea, and associated lodging, without the need to obtain a specific license. Similar authority had been extended to air carriers in January. BIS has made a corresponding amendment to its regulations, authorizing the temporary sojourn of vessels in Cuba for authorized passenger and cargo transactions, and has specified that aircraft on a temporary sojourn in Cuba must not remain for more than seven days.

REMITTANCES, GIFTS AND BEQUESTS

The cap on donative remittances to individuals in Cuba has been eliminated. Persons subject to U.S. jurisdiction are now permitted to make monetary gifts to individuals in Cuba in an unlimited amount. Remittances that were previously blocked by U.S. financial institutions on the ground that they exceeded the former limit of \$2,500 per quarter have now been unblocked and may be returned to the sender.

Also, for the first time, remittances from Cuba to the United States are authorized. In addition, personal gifts valued at \$100 or less—which must not include tobacco or alcohol—may be sent from Cuba to the United States. OFAC also has unblocked decedents' estates, allowing persons subject to U.S. jurisdiction to receive inheritances from Cuba and Cuban nationals to receive inheritances from the United States.

BIS has now authorized the exportation or reexportation to Cuba of items to be given away for free as gifts for promotional purposes, such as pens, notepads, hats, T-shirts and similar items.

PAYMENT FOR LEGAL SERVICES TO CUBAN NATIONALS

Prior to the recent changes, OFAC's regulations allowed U.S. lawyers and law firms to provide certain types of legal services to Cuban nationals, such as representation in proceedings before U.S. courts or administrative agencies or advice on the requirements of and compliance with U.S. law. However, receipt of payment for those services required a specific license in most cases. Under the new regulations, a specific license is no longer required to receive payment for authorized categories of legal services. However, the payment must not involve the debiting of a blocked account or the transfer of blocked property. In addition, if the client is a prohibited official of the Cuban Government or Cuban Communist Party, the funds must originate from outside the United States. Legal services outside the authorized categories remain prohibited without a specific license.

MEDICAL EVACUATION FROM CUBA

In the past, OFAC has approved, on an expedited basis, requests by U.S. companies to provide emergency medical evacuation of travelers from Cuba. The new regulations now authorize transactions necessary for such evacuations, and related medical services, without the need for a specific license. The authorization applies regardless of the traveler's nationality or the purpose of his or her travel to Cuba.

NEW CATEGORIES OF EDUCATIONAL ACTIVITIES

The scope of authorized educational activities has been expanded. Among other things, U.S. providers may now provide standardized testing and related preparatory services to Cuban nationals, wherever located; U.S. providers may provide Internet-based courses at the undergraduate level or below to Cuban nationals, wherever located; and U.S. institutions may establish academic exchange programs with Cuban universities and collaborate with them on joint non-commercial research projects.

EXPORTS FOR CIVIL AVIATION SAFETY

BIS has updated its regulations to reflect that it will consider, on a case-by-case basis, license applications for export and reexports of items to Cuba to ensure civil aviation safety. This may include, for example, aircraft parts and components, weather equipment, airport safety equipment and passenger-screening equipment.

TEMPORARY EXPORTS AND REEXPORTS

In January, BIS adopted a license exception authorizing temporary exports of certain items from the U.S. to Cuba for use in scientific, archeological, cultural, ecological, educational, historic-preservation or sporting activities, or in the traveler's professional research. BIS has now expanded the license to apply to temporary exports of items for use in authorized professional meetings, as well as temporary reexports of items to Cuba from third countries. However, BIS has added a requirement that the items remain in the traveler's effective control.

BIS also has added new categories of authorized temporary exports and reexports, including tools of the trade used in providing authorized services, kits of replacement parts or components for authorized exports or third-country exports, commodities or software for demonstration at trade shows, and shipping containers used for authorized exports or reexports. In most cases, the items must remain under the effective control of the exporter and must not be exported for more than one year. However, the license exception for export of kits of replacement parts and components allows one-for-one replacement of parts or components in Cuba.

OTHER CHANGES AND CLARIFICATIONS

OFAC and BIS have made a number of amendments to clarify uncertainties and ambiguities or to correct errors and oversights. These include the following:

- OFAC has clarified, with specific examples, that transactions necessary and ordinarily incidental to licensed transactions are authorized (subject to certain exceptions);
- OFAC has made explicit that disaster relief and historical preservation constitute authorized humanitarian projects;
- BIS has specified that its export and reexport license exceptions for Cuba apply only to items that are classified as EAR99 (that is, not subject to any special controls) or that are controlled for antiterrorism reasons only; and
- Both OFAC and BIS have made other technical, conforming and clarifying amendments, including corrections to BIS's regulations to reflect Cuba's removal from the list of state sponsors of terrorism.

LIMITATIONS AND RECORDKEEPING REQUIREMENTS

In all cases, the text of the relevant OFAC or BIS regulation should be consulted to confirm that a contemplated transaction, export or reexport is authorized. Even when a transaction is authorized, certain recordkeeping and reporting

requirements may apply. For example, records of all transactions with Cuba that are authorized by an OFAC general license must be kept for a minimum of five years and made available to OFAC for inspection upon request.

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