

US Implements Additional Measures to Liberalize Cuba Sanctions

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US Sanctions Team: [Richard Burke](#), [Nicole Erb](#), [Claire DeLelle](#), [Kristina Zissis](#), [Cristina Brayton-Lewis](#), [Tanya Hanna](#)

On September 21, 2015, the United States further amended existing regulations to implement the changes announced by President Obama on December 17, 2014 liberalizing US sanctions and export controls targeting Cuba. As a result, the US Department of the Treasury's Office of Foreign Assets Control (OFAC) amended its existing economic sanctions regulations and the US Department of Commerce's Bureau of Industry and Security (BIS) amended its export control regulations relating to Cuba. The amended regulations, which became effective on Monday, September 21, 2015, revise and expand upon prior regulatory changes issued by OFAC and BIS on January 16, 2015 (the "January 2015 amendments") to implement President Obama's Cuba policy.¹

According to the United States, the purpose of the additional changes is to further engage and empower the Cuban people by further easing sanctions related to travel, telecommunications and Internet-based services, business operations in Cuba, and remittances. In particular, OFAC sanctions pertaining to Cuba were liberalized for the following purposes: to authorize certain types of travel to Cuba and the provision of related services; to expand the general licenses for telecommunications and Internet-based services; to authorize certain persons subject to US jurisdiction to establish a physical presence in Cuba; to allow certain persons subject to US jurisdiction to open and maintain bank accounts in Cuba; to allow certain financial transactions, including remittances to Cuba; to authorize persons subject to US jurisdiction to provide goods and services to Cuban nationals located outside of Cuba; and to allow several other activities related to legal services, humanitarian projects, and educational services. US export controls were also eased to authorize the export and reexport of certain items to Cuba.

Although the measures reflect further liberalization of US economic and trade policy toward Cuba, they do not lift the Cuba embargo, and many transactions between the US or persons subject to the jurisdiction of the US and Cuba continue to be prohibited. Rigorous review of contemplated transactions is essential to ensuring compliance with BIS and OFAC amended regulations.

¹ See the January 2015 White & Case alert [here](#).

Amendments to OFAC's Cuban Assets Control Regulations

Travel and Related Services

Persons subject to US jurisdiction are now authorized to provide carrier services by vessel between the United States and Cuba without the need for specific licenses from OFAC, and to provide certain lodging services aboard such vessels in connection with such transportation. In addition, persons subject to US jurisdiction and persons traveling with them who share a common dwelling are now allowed to visit a close relative located in Cuba, or accompany a close relative traveling to Cuba for certain authorized purposes.² OFAC also has amended the regulations to allow all authorized travelers to open, maintain, and close bank accounts in Cuba in order to access funds for authorized transactions while located in Cuba.

Telecommunications and Internet-Based Services

Subsidiaries, joint ventures, and other business relationships with Cuban individuals and entities

OFAC has expanded the existing general license for telecommunications facilities to authorize persons subject to US jurisdiction to establish and maintain a business presence in Cuba—including through subsidiaries, branches, offices, joint ventures, franchises, and agency or other business relationships with Cuban individuals or entities—in order to provide authorized telecommunications services.

Similarly, OFAC has amended its existing regulations authorizing the exportation and reexportation to Cuba of certain Internet-based services, such as email, web hosting, and information technology management services (including cloud storage). The amendments authorize persons subject to US jurisdiction to establish a business presence in Cuba for the purpose of engaging in activities related to the importation or exportation of such services.

In addition, OFAC has authorized persons subject to US jurisdiction to enter into licensing agreements related to certain authorized telecommunications and Internet-based services and to market such services³; and unblocked all entities, offices or other sub-units established to provide authorized telecommunications and Internet-based services.⁴

Mobile applications

The importation into the United States of Cuban-origin mobile applications is now authorized. In addition, persons subject to US jurisdiction are now authorized to employ Cuban nationals for purposes of developing such mobile applications.

Additional internet-based services and services related to additional authorized exports

In the January 2015 amendments, OFAC authorized certain services related to items exported pursuant to the US Department of Commerce's License Exception Consumer Communications Devices (CCD); certain non-US-origin items located outside the United States; and certain software not subject to the Export Administration Regulations (EAR). Such services include software design, business consulting, information technology management, and other services to install, repair, and replace such items. OFAC has amended its regulations in order to:

- Expand the permitted services to include training related to the installation, repair, or replacement of such items;

² Such authorized purposes are limited to those specified in: (i) 15 C.F.R. § 515.562 (official government business), (ii) 15 C.F.R. § 515.563 (journalistic activity); (iii) 15 C.F.R. § 515.564(a) (professional research); (iv) 15 C.F.R. §§ 515.565(a)(1) through (4) and (6) (educational activities); (v) 15 C.F.R. § 515.566 (religious activities); (vi) 15 C.F.R. § 515.575 (humanitarian projects); or (vii) 15 C.F.R. § 515.576 (activities of private foundations or research or educational institutes).

³ Specifically, persons subject to US jurisdiction may enter into licensing agreements pertaining to the services specified in 31 C.F.R. §§ 515.542(b) through (d) and 31 C.F.R. § 515.578(a), and market such services.

⁴ Authorized services are those specified in 31 C.F.R. § 515.542 (telecommunications) and 31 C.F.R. § 515.578 (internet-based services).

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- Authorize the provision of services related to exports of consumer communications devices not eligible for License Exception CCD, but authorized pursuant to an individual license from the Department of Commerce;
 - Authorize the provision of services related to exports authorized pursuant to the Commerce Department's License Exception Support for the Cuban People (SCP); and
 - Authorize the provision of services related to all such items that have been exported to Cuba from a third country.

OFAC also has eliminated a restriction that prohibited persons subject to US jurisdiction from providing certain Internet-based services⁵ to organizations administered or controlled by the Government of Cuba or the Cuban Communist Party. However, OFAC has maintained the restriction on provision of such services to prohibited officials of the Government of Cuba and prohibited members of the Cuban Communist Party.

Physical Presence in Cuba

The following persons subject to US jurisdiction are now authorized to establish a physical presence, such as an office or other facility, in Cuba to facilitate authorized transactions:

- News bureaus;
- Exporters of certain goods authorized for export to Cuba;⁶
- Providers of authorized mail and parcel transmission services and cargo transportation services;
- Providers of telecommunications or internet-based services;
- Entities organizing or conducting certain educational activities;
- Religious organizations; and
- Providers of travel and carrier services.

In addition, OFAC has unblocked any entity, office, or other sub-unit established pursuant to the authorization described above, and authorized the above individuals and entities to open and maintain bank accounts at financial institutions in Cuba for use for authorized transactions, and to close such accounts.

Financial Transactions

Remittances

OFAC has eliminated the following quantitative limits on remittances to Cuba:

- The US\$2,000 limit on donative remittances provided to Cuban nationals within any consecutive three-month period;
- The US\$10,000 limit on remittances carried by authorized travelers to Cuba; and
- The US\$3,000 limit on remittances carried by blocked Cuban nationals permanently resident in Cuba who are departing the United States.

In addition to eliminating the above limitations, OFAC has issued a new general license authorizing the unblocking and return of certain previously blocked remittances. Prior to the January 2015 amendments, banks were required to block remittances exceeding the then-US\$500 per quarter limit on authorized periodic remittances to non-family members (the January 2015 amendments increased this limit to US\$2,000 per quarter.) The new general license issued by OFAC authorizes the unblocking and return of any such remittances, provided that they would be authorized under the current regulations.

⁵ Such services are those specified in 31 C.F.R. § 515.578(a)(1).

⁶ Specifically, this authorization covers exporters of goods authorized for export to Cuba pursuant to 31 C.F.R § 515.533 or § 515.559.

Similarly, OFAC has added a new general license authorizing the unblocking and return of certain previously blocked funds transfers. Pursuant to the new general license, any depository institution may unblock and return previously blocked funds transfers that could have been rejected or processed pursuant to OFAC regulations governing: certain wire transfers⁷; official business of the US government and certain intergovernmental organizations⁸; or funds transfers for third-country official missions and certain intergovernmental organizations⁹, provided that such transfers could be rejected or processed under current regulations.

In addition, OFAC has added a new general license authorizing remittances from Cuba or from Cuban nationals located in third countries to the United States, provided that the remitter is not a prohibited official of the Government of Cuba or a prohibited member of the Cuban Communist Party.

Account access for Cuban nationals present in the United States

OFAC has expanded an existing authorization that allows depository institutions to open and maintain accounts for Cuban nationals who are present in the United States. Specifically, OFAC has added an authorization for depository institutions to maintain these accounts (as opposed to blocking them) while the Cuban-national account holder is located outside the United States, provided that the account holder may only access the account while lawfully present in the United States. In addition, OFAC has removed the US\$250 cap on payments from blocked accounts held by Cuban nationals in the United States, provided that such payments are to be used for living expenses.

Commercial Transactions

Persons subject to US jurisdiction are now authorized to provide goods and services to Cuban national individuals located in a third country, provided that the transaction does not involve a commercial exportation, directly or indirectly, of goods or services to or from Cuba. In addition, OFAC has authorized banking institutions to open, maintain, and close accounts for such Cuban nationals located in a third country, provided that such accounts are used only while the Cuban national is located outside of Cuba; and may not be used for transactions that involve a commercial exportation of goods or services to or from Cuba.

Legal Services

OFAC has revised existing regulations to generally authorize receipt of payment for the provision of authorized legal services to Cuba or a Cuban national, other than payments from prohibited officials of the Government of Cuba and prohibited members of the Cuban Communist Party. Previous regulations required receipt of payment for such services to be specifically licensed. In addition, OFAC has added a general license to authorize payments from funds originating outside the United States for the provision of authorized legal services to or on behalf of prohibited officials of the Government of Cuba and the Cuban Communist Party.

In addition, OFAC has authorized all transactions, including payments, ordinarily incident to the receipt of the following legal services from Cuba or from a Cuban national: legal advice and counseling on the requirements of, and compliance with, the laws of Cuba or any jurisdiction within Cuba, provided that such advice and counseling relate to authorized transactions. The receipt of any other legal services from Cuba or a Cuban national requires the issuance of a specific license.

Gift Imports Sent to the United States

OFAC has generally authorized the importation into the United States of merchandise from Cuba or Cuban-origin merchandise from a third country, provided that the value of the merchandise is less than US\$100; the merchandise is of a type and in quantities normally given as gifts between individuals; the merchandise is sent and not carried by a traveler; and the merchandise is not alcohol or tobacco products.

⁷ See 31 C.F.R. §§ 515.584(d)(1) or (d)(2).

⁸ See 31 C.F.R. § 515.562(b).

⁹ See 31 C.F.R. § 515.579(b).

Educational Activities

OFAC has expanded an existing general license to allow additional educational activities that are authorized in other sanctions programs administered by OFAC. The newly authorized educational activities are sponsorship or co-sponsorship of certain noncommercial academic events related to Cuba; establishment of academic exchanges and joint noncommercial academic research projects with academic institutions in Cuba; provision of standardized testing services; and provision of Internet-based courses to Cuban nationals, wherever located, provided that the course content is at the undergraduate level or below.

Humanitarian Projects

OFAC has amended the list of humanitarian projects authorized under an existing general license to explicitly include projects related to disaster relief and historical preservation.

Cuban Official Missions

Depository institutions are now authorized to operate accounts for, extend credit to, and process funds transfers on behalf of the official missions of the Government of Cuba to the United States, the official missions of the Government of Cuba to international organizations in the United States, and employees thereof.

Cuba Export Control Restrictions: Amendments to BIS Regulations

A number of corresponding liberalizations have been made to US export controls through amendments to the EAR. These changes include expansions of existing license exceptions that are available for Cuba, including License Exception Support for the Cuban People (SCP)¹⁰ and License Exception Consumer and Communications Devices (CCD); extended availability for Cuba of License Exception Aircraft, Vessels and Spacecraft (AVS); a new licensing policy for Civil Aviation Safety; a more favorable scope of License Requirements for Deemed Exports and Reexports; technical corrections to License Exception Agricultural Commodities (AGR); and conforming changes to the definition of “US person.”

License Exception Support for the Cuban People (SCP) (Section 740.21 of the EAR)

License Exception SCP has been expanded to facilitate engagement between the United States and the Cuban people; the free flow of information to, from, and among the Cuban people; and independent economic activity generated by Cuba's private sector. Specifically, the expanded version of License Exception SCP:

- Clarifies that the original version of this exception was inadvertently limited to exports and reexports of items sold or donated to authorized end users in Cuba, but has now been broadened to cover other types of exports and reexports, such as leased or loaned items for use by eligible end users;¹¹
- Authorizes the export and reexport of certain commodities and software to individuals and private sector entities in Cuba for use in software development that will improve the free flow of information or support private sector activities;¹²
- Authorizes the export and reexport to Cuba of certain items for use by eligible US persons to establish, maintain, or operate a physical presence in Cuba;¹³
- Authorizes the export and reexport to Cuba of certain items to be given away for free as gifts for promotional purposes;¹⁴

¹⁰ The License Exception SCP authorizes a number of different exports and re-exports without a license of items that are either classified as EAR99 or controlled on the Commerce Control List (CCL) *only* for anti-terrorism reasons, and that also meet certain criteria.

¹¹ See 15 C.F.R. §§ 740.21(b) and (d)(1).

¹² The “private sector activities” are those specified in 15 C.F.R. § 740.21(b).

¹³ “Eligible” US persons are described in 15 C.F.R. §§ 740.21(e)(1)-(2). For example, to be eligible under 15 C.F.R. § 740.21(e)(2), the end-users must be authorized by OFAC to provide telecommunications services and establish telecommunications facilities pursuant to 31 C.F.R. §§ 515.542(b)-(e), or to provide internet-based services pursuant to 31 C.F.R. § 515.578.

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- Authorizes certain temporary (not to exceed one year) exports and reexports to Cuba of EAR99 items and items controlled on the CCL only for antiterrorism reasons;¹⁵
 - Modifies the prior authorization allowing temporary exports of eligible items to Cuba from the United States for use in scientific, archeological, cultural, ecological, educational, historic preservation, or sporting activities, or in the traveler's professional research, to allow both temporary exports and reexports of eligible items for the aforementioned eligible end-uses by travelers departing from the United States or a foreign country as long as the items remain under the traveler's "effective control."¹⁶ The amendments also add "professional meetings" to the list of eligible end-uses.¹⁷

License Exception Consumer Communications Devices (CCD) (Section 740.19 of the EAR)

Like the expansion of License Exception SCP, existing License Exception CDD was also unintentionally limited to exports and reexports of items sold or donated to authorized end users in Cuba. It has therefore been amended to cover other types of exports and reexports, such as leased or loaned items for use by eligible end users.

License Exception Aircraft, Vessels and Spacecraft (AVS) (Sections 746.2 and 740.15 of the EAR)

The amendments also make additional sections of License Exception Aircraft, Vessels and Spacecraft (AVS) available for Cuba and amend existing Cuba-specific provisions. Specifically, under License Exception AVS, the following are now authorized for Cuba: certain exports and reexports of equipment and spare parts for permanent use on vessels and aircraft departing the United States; exports of certain ship and plane stores for use on board vessels and aircraft departing the United States; and exports and reexports of vessels on temporary sojourn.¹⁸ License Exception AVS has also been amended to provide that only certain categories of vessels, when engaged in specified activities, are eligible for the license exception when destined for Cuba. The types of vessels and activities eligible for temporary sojourn to Cuba include:¹⁹ cargo vessels for hire for use in the transportation of items; passenger vessels for hire for use in the transportation of passengers and/or items; and recreational vessels destined for Cuba that are for use in connection with travel authorized by OFAC.

Licensing Policy for Civil Aviation Safety (Section 746.2(b)(6) of the EAR)

To ensure safety in civil aviation and safe operation of commercial passenger aircraft, a Licensing Policy for Civil Aviation has been created. The policy provides that license applications for exports or reexports of items to ensure the safety of civil aviation, including the safe operation of commercial passenger aircraft, will be considered on a case-by-case basis.

¹⁴ See 15 C.F.R. § 740.21(e)(3) for more information on the types of items eligible for export or reexport under this provision.

¹⁵ See 15 C.F.R. § 740.21(f) for more information on the types of exports and reexports that are authorized pursuant to this provision.

¹⁶ "Effective control" is defined in 15 C.F.R. § 772.1.

¹⁷ See 15 C.F.R. § 740.21(c)(2) for the complete list of eligible end-uses.

¹⁸ See 15 C.F.R. §§ 740.15(b) and (d). Under paragraph (a) of License Exception AVS (available at 15 C.F.R. § 740.15(a)), which was previously available for Cuba, certain exports and reexports of aircrafts on temporary sojourn were already authorized. This provision now includes a note prohibiting an *aircraft* exported or reexported to a country pursuant to this paragraph (for example, Cuba) from remaining in that country for more than seven consecutive days before it departs for the United States or a country to which it may be exported without a license.

¹⁹ Paragraph (d) of License Exception AVS (available at 15 C.F.R. § 740.15(d)) now includes a note prohibiting a *vessel* exported or reexported to a country pursuant to this paragraph (for example, Cuba) from remaining in that country for more than 14 consecutive days before it departs for the United States or a country to which it may be exported without a license.

License Requirements for Deemed Exports and Re-exports (Section 746.2 of the EAR)

The license requirements for deemed exports and reexports have been amended to remove the licensing requirement for the deemed export or reexport of technology or source code designated as EAR99. Licenses are still required, however, for the release of technology or source code on the CCL to Cuban nationals in the United States or a third country.

License Exception Agricultural Commodities (AGR) (Section 740.18 of the EAR)

The correction to License Exception AGR changes the *de minimis* level for Cuba under this scheme to 25 percent from 10 percent.

Although the amended regulations both expand existing authorizations and implement new ones, it is important to note that the Cuba trade embargo still remains in effect. Companies doing business or wishing to do business with Cuba therefore should continue to monitor these developments closely to ensure compliance. Penalties for noncompliance can be severe.

White & Case LLP
701 Thirteenth Street, NW
Washington, District of Columbia 20005-3807
United States

T +1 202 626 3600

USsanctions@whitecase.com

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