

CLIENT ALERT

Treasury and Commerce Implement New U.S. Cuba Policy

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President Obama's new course in U.S. Cuba Policy took shape yesterday with the release of the final rules amending the Cuban Assets Control Regulations (CACR) and the Export Administration Regulations (EAR), providing industry with the new "rules of the road" when conducting transactions in or with Cuba.

The new rules announced by the Office of Foreign Assets Control (OFAC) and the Commerce Department's Bureau of Industry and Security (BIS) individually provide as follows.

Office of Foreign Assets Control

OFAC published significant revisions to the CACR in order to implement the new policy. OFAC has also posted updated FAQs on the changes. Provided below are highlights.

Financial Transactions - U.S. depository institutions are authorized to:

- Establish correspondent accounts at Cuban Financial Institutions (FI);
 - Note that this does not work in reverse (Cuban FIs are not authorized to establish accounts in the U.S.).
- Process and pay all authorized credit and debit card transactions (discussed below); and
- Reject (rather than block) any funds transfer from a non-U.S. to non-U.S. location as long as (1) the originator/beneficiary is not a U.S. person and (2) a prohibited official of the Government of Cuba or a prohibited member of the Cuban Communist Party does not have an interest in the underlying transaction.

Travel Services:

- Previous restrictions on travel service providers requiring authorization are removed.
- U.S. persons are authorized to provide travel services in connection with travel-related transactions permitted under the CACR.
 - This includes the provision of carrier services by aircraft from, to, or within Cuba; but
 - The carrier must retain a certification from each traveler regarding their authorization to travel.

NOTE: Before U.S. carriers will be able to establish connections under the new authority, they will require authorization from the U.S. Department of Transportation (DOT). DOT has issued a Notice deferring the activation of any existing unused scheduled authority to serve Cuba, as well as any new applications to serve Cuba until further Order of the Department.

Non-U.S. Entities Owned or Controlled by U.S. Entities:

- Non-U.S. entities owned or controlled by a U.S. entity are now permitted to provide goods and services to Cuban national *individuals* located outside of Cuba provided the transaction would not result in a direct or indirect export to Cuba.

Telecommunications infrastructure including between third countries and Cuba and satellites:

- **Authorization for Contracts with Cuba:** The CACR now authorizes entering into contracts with Cuban telecommunications providers and/or Cuban nationals "for telecommunications services provided to particular individuals in Cuba" as long as the party is not a prohibited official of the Government of Cuba or a prohibited member of the Cuban Communist Party;
- **Telecommunications Facilities:** (new provisions in underline) The CACR has been expanded to provide a general license for transactions, including payments, incident to the establishment of facilities including fiber-optic and satellites, to provide telecommunications services linking the United States or third countries to Cuba;
- **Definition of Telecommunications Services:** (new provisions in underline) OFAC expanded the definition of telecommunications services to include the following (new terms are underlined): data, telephone, telegraph, internet connectivity, radio, television, news wire feeds, and similar services, regardless of the medium of transmission, including transmission by satellite; and
- **Notice Requirement:** Any entity using these new authorities must provide OFAC reports within 30 days of starting and then again semi-annually regarding the total amount of all payments made in the previous six months.

Imports:

- OFAC authorized the importation of \$400 of Cuban-origin items by authorized U.S. travelers. Up to \$100 of those imports can be alcohol or tobacco products;
- Non-U.S. person travelers arriving in the U.S. can import \$100 of alcohol or tobacco from Cuba; and
- U.S. persons are authorized to import certain goods and services "produced by independent Cuban entrepreneurs" as determined by the State Dept. The State Department will post its determinations at a future time to www.state.gov/e/eb/tfs/spi/.

Exports from the U.S. to Cuba:

- **Cash in Advance:** The definition will now cover "payment before the transfer of title or control to" the Cuban person rather than before shipment;
- **Confirming/Advising:** U.S. financial institutions are authorized to confirm or advise financing provided by a non-U.S. person for all authorized exports, rather than just for agricultural products.

Internet-Based Services

- The previous limitation to "personal" communications has been removed; and

- The authorization now covers export/re-export of services including "software design, business consulting, and IT management" related to certain enumerated items.

Bureau of Industry and Security

To implement the Administration's new policy related to exports and re-exports, BIS updated several parts of the EAR. A new License Exception was created, two others were expanded, and licensing policy was eased for telecommunications and exports intended to strengthen civil society in Cuba. Last, a new policy exception was created for environmental protection. Specifically, BIS (1) created a new License Exception "Support for the Cuban People (SCP)", (2) expanded the scope of the existing License Exception for Consumer Communications Devices (CCD), (3) expanded the scope of the existing License Exception for Gift Parcels and Humanitarian Donations (GFT), and (4) expanded the scope of the existing Licensing Policy for Cuba:

(1) BIS created a new License Exception *Support for the Cuban People (SCP)* designed to streamline the export and re-export of commodities in support of three goals specified by the President in December.

- **Support improved living conditions and independent economic activity in Cuba** – SCP authorizes the export and re-export of commercially sold or donated:
 - Building materials, equipment, and tools for use by the private sector to construct or renovate privately-owned buildings, places of worship and buildings, or for private sector social use;
 - Tools and equipment for private sector agricultural activity; and
 - Tools, equipment, supplies, and instruments for use by private sector entrepreneurs'.
- **Strengthen civil society in Cuba** – SCP authorizes the export and re-export to Cuba of:
 - Items donated for use in scientific, archaeological, cultural, ecological, educational, historic preservation, or sporting activities;
 - Items for *temporary* export by persons departing the United States for their use in certain types of approved travel and subject to certain conditions; and
 - Certain items to human rights organizations, individuals, or non-governmental organizations that promote independent activity intended to strengthen civil society.
- **Improve the free flow of information to, from, and among the Cuban people** – Authorizes the export and re-export to Cuba of certain items:
 - Either sold or donated for telecommunications, including access to the Internet, use of Internet services, infrastructure creation and upgrades; and
 - Certain items for use by news media personnel and U.S. news bureaus.

SCP is however subject to two exceptions:

- SCP only covers items classified as EAR99 or controlled on the Commerce Control List (CCL) for only anti-terrorism (AT) reasons;
- SCP does not cover activities related to items on the United States Munitions List (USML) or the CCL, unless the only reason for control on the CCL is AT.

(2) Additionally, BIS expanded the *License Exception Consumer Communications Devices (CCD)*. Previously, CCD authorized the export/re-export of certain communications devices provided they were donated. BIS has removed that requirement, thereby authorizing the commercial sale of listed items to eligible customers in Cuba. BIS also:

- Made several minor technical revisions in order to track more precisely current technical specifications for certain items and to state explicitly that some items must be consumer items to be eligible for this license exception; and
- Revised the references to Export Control Classification Number (ECCN) 5A992 in certain CCD paragraphs to focus on ECCN 5A992.c, which covers the type of encryption found in modern personal computers.

This section has three limitations. Specifically, it does not authorize: (1) U.S.-owned or -controlled entities in third countries to engage in re-exports of foreign-produced commodities to Cuba for which no license would be issued by the Treasury Department pursuant to the CACR (31 CFR 515.559); (2) exports to any destination other than Cuba; and (3) exports to Prohibited Officials in the Cuban Government, the Cuban Communist Party, and organizations they administer or control.

(3) License Exception *Gift Parcels and Humanitarian Donations (GFT)* was also expanded to:

- Remove the note that excludes from eligibility consolidated shipments of multiple parcels for delivery to individuals residing in a foreign country.

(4) Finally, the *Licensing Policy for Cuba* (specifically, the exceptions to the licensing policy of denial) were simplified and expanded:

- Telecommunications items may be authorized to Cuba on a case-by-case basis;
- Applications for certain commodities and software may be approved to human rights organizations, or to individuals and non-governmental organizations that promote independent activity intended to strengthen civil society in Cuba;
- Commodities and software may be approved for export to U.S. news bureaus (no re-exports);
- Applications related to the environmental protection will generally be approved.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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