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U.S. Eases Sanctions Against Cuba¹

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On January 16, 2015 and again on September 21, 2015, the Obama Administration issued revisions to the Export Administration Regulations (“EAR”) and the Cuban Assets Control Regulations (“CACR”), administered by the Commerce Department’s Bureau of Industry and Security (“BIS”) and Treasury Department’s Office of Foreign Assets Control (“OFAC”), respectively, easing U.S. sanctions against Cuba. The U.S. and Cuba have also reestablished diplomatic ties and opened respective embassies in Havana and Washington. These revisions amount to the greatest changes in U.S.-Cuba foreign policy in decades. We explain here the changes and their implications.

The United States has maintained a comprehensive embargo against Cuba for decades, and that embargo remains in place and will remain in place unless and until Congress takes action to repeal the laws establishing the embargo. Short of that, however, the Administration does have some flexibility in how the embargo is administered, and has used this flexibility to usher in some relatively slight but still significant and historic changes. Currently, all exports to Cuba still generally require a license, but the recent changes to the sanctions created a number of license exceptions, meaning that certain eligible transactions are authorized without any further affirmative permission from the government.

The new authorizations facilitate limited non-tourist travel to Cuba, as well as commercial transactions in certain industry sectors, as explained more below, and the flow of information to, from, and within Cuba. The liberalization is intended to support Cuba’s private sector and civil society in the areas of agriculture, construction, environmental protection, consumer electronics, software and telecommunications, and travel. However, there are significant limitations on all of the new authorizations, so we advise proceeding with extreme caution, and only after carefully confirming that all of the terms and conditions of each new authorization are satisfied. (Please note that we have not attempted to describe all license terms and conditions here, and this summary does not constitute a legal opinion or advice regarding a particular transaction. One should refer to the applicable regulations and agency guidance before proceeding with any transaction involving Cuba.)

1. Promoting Cuba’s Private Sector

As with other U.S. sanctions regimes, BIS and OFAC share responsibility for administration of the Cuba sanctions. BIS has primary licensing authority for exports and reexports of items to Cuba, while authorization from OFAC is required for services and other activities by U.S. persons involving Cuba and

¹This paper contains general legal guidance on the matters discussed herein, but should not be construed as legal opinions on the application of this guidance to any specific facts or circumstances. Opinions provided herein are solely those of the authors.

Cuban nationals. The mechanism BIS used for most of its new export-related authorizations was establishment of a new License Exception SCP (Support for the Cuban People), and the expansion of License Exception CCD (Consumer Communications Devices). OFAC, where necessary, made coordinated changes to its CACR to add or expand General Licenses.

Under the new License Exception SCP, U.S. companies may now export and reexport items described below, but only for use in Cuba's private sector. The "private sector" includes private for-profit ventures and private non-profit organizations and charities, but not any enterprise that is government owned, operated or controlled, and the items eligible for export ***must be classified EAR99***, meaning the items do not appear on BIS's Commerce Control List, or are controlled for Anti-Terrorism ("AT") reasons only. It is worth noting that the Cuban private sector is in its infancy, and exporters need to be certain that there is no Cuban government involvement in the transaction.

- Agriculture Items – Tools and equipment for use in private sector agricultural activity.
- Construction Items – Materials, equipment, and tools for use by the private sector to construct or renovate privately-owned buildings, such as residences, businesses, places of worship, etc.
- Items for Private Sector Entrepreneurs – Tools, equipment, supplies, etc., for use by private sector entrepreneurs, such as auto mechanics, barbers, and restaurateurs.
- Tools of Trade and Related Items – For up to one-year, items used as tools of trade to install, service or repair other items, provided the other items were exported/reexported to Cuba legally, and provided they are owned and exclusively used by individuals or private sector entities, as well as kits of replacement parts or components, and items for exhibition or demonstration at trade shows.

Physical Presence – OFAC and BIS also made coordinated changes to authorize the exports/reexports of items necessary to allow the establishment and operation of a physical presence in Cuba, such as an office or other facility, provided the physical presence is only to facilitate *other authorized transactions*. For example, news bureaus, travel services providers, exporters of authorized goods, providers of authorized mail and parcel and cargo transportation services, telecom providers, educational service providers, religious organizations, etc., may now set up and operate offices in Cuba. The authorized individuals and entities may also open and maintain bank accounts at banks in Cuba for use in the related authorized transactions. Companies interested in setting up a physical presence have raised concerns about whether the CACR authorizations are broad enough to cover obtaining insurance coverage and certain other ancillary transactions, so it may be wise to consult with OFAC regarding the scope of the general license. As a practical matter, it may be difficult to find U.S. banks who are willing to engage in funds transfers with a Cuban institution. As indicated below, such transfers are now authorized, but it appears that many major banks have been slow to take advantage of the liberalization.

2. *Promoting Civil Society in Cuba*

License Exception SCP also authorizes the export and reexport to Cuba of the items described below for use in specified activities to strengthen civil society in Cuba. OFAC changes to promote civil society are also described.

- Donated Items – Items donated for use in scientific, archaeological, cultural, ecological, educational, historic preservation, or sporting activities.
- Temporary Exports/Reexports for Eligible Activities, Including Professional Research and Meetings – Items temporarily (up to 2 years) exported or reexported by travelers for their use in scientific, archaeological, cultural, ecological, educational, historic preservation, or sporting

activities, or for their use in the traveler's professional research or meetings directly related to the traveler's profession, professional background or area of expertise.

- Human Rights Organizations, Individuals and NGOs – Items to human rights organizations, individuals or non-governmental organizations (“NGOs”) that promote independent activity to strengthen civil society.
- OFAC Authorized Humanitarian Projects – OFAC has authorized medical and health-related projects, micro-financing projects, disaster relief projects, historical preservation projects, and projects to meet basic human needs.
- Educational Activities – OFAC also generally authorized projects involving educational training to Cubans on the following topics: entrepreneurship and business, civil education, journalism, advocacy and organizing, adult literacy, or vocational skills, community-based grassroots projects, projects suitable to the development of small-scale private enterprise. U.S. and Cuban universities may also now engage in academic exchanges and may collaborate on non-commercial academic research.

3. Promoting Improved Communications

License Exception SCP or new provisions of existing License Exception CCD, regarding Consumer Communication Devices, now authorize export and reexport to Cuba of certain items intended to improve the free-flow of information to, from, and within Cuba, as follows:

- Telecommunications and Internet – Items for telecommunications, including access to the Internet, use of Internet services, infrastructure creation and upgrades. Unlike with other areas of liberalization, eligible end-users are not limited to those in the private sector, in recognition of the fact that the Cuban Government owns and operates the telecommunications infrastructure in Cuba.
- Software Development and Mobile Apps – Items to individuals and private sector entities in Cuba that will be used to develop software to enhance the free flow of information or support authorized private sector activities. In a related change, OFAC authorized the employment of Cuban nationals to develop mobile apps for the enhancement of the free flow of information, and the importation of the apps into the United States. U.S. companies and their foreign affiliates may also provide assistance to Cuban or third parties in the development process for items within the scope of the authorization, such as the modification of consumer telecommunications equipment to operate safely and effectively within the Cuban telecommunications networks.
- News Media – Items for use by news bureaus and/or certain news media personnel engaged in the gathering and dissemination of news to the general public.
- Consumer Communications Devices – License Exception CCD now authorizes exports and reexports of consumer communications devices, including certain computers, printers, modems, mobile phones and similar consumer grade items, for use by independent NGOs or individuals, excluding the Cuban Government, Communist Party, and certain specified individuals in the government or the party.
- OFAC Telecommunications-Related Changes – Telecommunications between the United States and Cuba were already generally authorized prior to these recent changes. However, OFAC made some significant changes to clarify and expand the Cuba telecommunications exemption, which now reads: “General license for telecommunications facilities. Transactions, including payments, incident to the establishment of facilities, including fiber-optic cable and satellite facilities, to provide telecommunications services linking the United States or third countries and Cuba, including facilities to provide telecommunications services in Cuba, are authorized. Notably, the authorization now also authorizes U.S. persons and their owned or controlled foreign

affiliates to provide equipment and assistance with the establishment of telecommunications links between the United States and Cuba, between third countries and Cuba, and *within* Cuba.

The export/reexport to Cuba of “services incident to the exchange of communications over the Internet” to eligible end-users (generally excluding the Cuban Government and Communist Party, unless the services are widely available at no cost to the user) are also now generally authorized.

4. Measures to Promote Environmental Protection

Though items in support of environmental protection projects will still require a BIS export license, BIS established a new licensing policy in favor of such projects, so license applications should be treated favorably and thus granted.

5. Travel-Related Changes and Remittances

For the first time in many years, certain types of travel to Cuba will be generally authorized without the requirement of an OFAC license. Certain other related changes will make authorized Cuba travel much more practical and convenient.

- Previously Licensable Travel Now Generally Permitted – While continuing to prohibit travel for purely tourist activities, OFAC has now generally authorized without the need for a license travel-related transactions and other transactions incident to activities within the following 12 categories: 1) family visits; 2) official business of the U.S. or foreign governments, or of certain intergovernmental organizations; 3) journalistic activity; 4) professional research and professional meetings; 5) educational activities; 6) religious activities; 7) public performances, clinics, workshops, athletic and other competitions, and exhibitions; 8) support for the Cuban people; 9) humanitarian projects; 10) activities of private foundations or research or educational institutes; 11) exportation, importation, or transmission of information or informational materials; 12) certain export transactions that may be considered for authorization under the EAR with respect to Cuba or engaged in by U.S.-owned or controlled foreign firms. Authorized travelers are also authorized to make arrangements through any authorized service provider, and the CACR was also revised to generally authorize provision of such services.
- Safety of Civil Aviation – BIS has added a new licensing policy of case-by-case review (rather than policy of denial) for license applications for items to ensure the safety of civil aviation and safe operation of commercial aircraft, including airport safety/security equipment.
- Use of Bank Accounts and U.S. Credit/Debit Cards – It is now generally authorized for authorized travelers to maintain bank accounts with Cuban banks to use for authorized transactions, to use U.S. issued credit and debit cards in Cuba for authorized travel-related transactions, and for U.S. financial institutions to enroll merchants and process such transactions.
- Travel Per Diem Eliminated – Authorized travelers to Cuba will no longer be limited to the maximum State Department per diem allowance for Havana (currently \$188).
- Imports of Cuban Goods – Authorized travelers to Cuba are now generally authorized to import up to \$400 worth of Cuban origin goods (including up to \$100 in alcohol or tobacco products).

- Emergency Medical Services – OFAC is now generally authorizing air ambulances to travel to and from Cuba and to evacuate individuals requiring medical care, regardless of nationality or the purpose of the individual’s travel to Cuba.
- Remittances – OFAC amended the CACR, increasing from \$500 to \$2,000 per quarter, the limits on remittances which can be sent to Cuban nationals, and to generally authorize remittances for humanitarian projects, support for the Cuban people, and development of private business in Cuba, subject to certain limitations. The total amount of remittances a traveler may carry to Cuba was also increased from \$3000 to \$10,000

1.1.6. Gifts and Humanitarian Donations. BIS expanded License Exception GFT to allow consolidated shipments of multiple parcels for delivery to individuals. Previously, each package had to be mailed separately. EAR99 items may also be exported/reexported to be given away as gifts for promotional reasons. OFAC was also in a gift-giving mood, and is now authorizing the importation of items from Cuba, or Cuban origin items from elsewhere, intended as gifts, provided they are valued at less than \$100, are not alcohol or tobacco, are of a type and in quantities ordinarily given as gifts, and are not carried by a traveler.

1.1.7. Easing of Certain Financial Restrictions. In addition to those already mentioned above, OFAC made the following changes intended to facilitate authorized exports and other authorized transactions:

- Change to Cash in Advance Policy for Licensed Transactions – The use of already-existing licenses has been hampered by difficulties with trade financing, which essentially required the Cuban buyer to pay with cash in advance, rather than using letters of credit or other means of trade financing. Thus, OFAC amended the CACR to revise the regulatory meaning of “cash in advance” from “cash before shipment” to “cash before transfer of title and control,” to permit expanded financing options for authorized exports to Cuba, such as licensed agricultural and medical sales.

Financing for authorized exports may also be made by a banking institution located in a third country provided the institution is not a Specially Designated National, a U.S. citizen or permanent resident, or any entity organized under the laws of the United States.

- Authorization for Correspondent Accounts – OFAC established a new general license, subject to certain limitations, to authorize depository institutions to open correspondent accounts at Cuban financial institutions, to facilitate the processing of authorized transactions. We understand that at least one U.S. regional bank in Florida, Stonegate Bank, has established correspondent accounts with a Cuban bank, but it is not clear whether major national banks have also done so.
- Account Access for Cuban Nationals – Depository institutions may now maintain accounts for Cuban nationals present in the United States in a non-immigrant status for use while in the United States.
- Estate-Related Transactions – OFAC is now authorizing the unblocking of, and remittances related to, estates in which a Cuban national has an interest, including the unblocking of shares of a Cuban estate for a U.S. beneficiary and remittance of the estate of a person subject to U.S. jurisdiction to a Cuban national who is not a close relative.

- Payments for Legal Services – It is now generally authorized to receive payment for authorized legal services to Cuba or a Cuban national other than a prohibited Cuban Government official or Communist Party member, and to receive payment from outside the United States for the provision of authorized legal services to or on behalf of prohibited Cuban Government officials or Communist Party members. U.S. persons may also receive and make payments for legal services from Cuba or from Cuban nationals, subject to certain conditions.

1.1.8. Deemed Exports. BIS amended the EAR to make clear that no license is required for the deemed export/reexport to Cuban nationals in the United States or a third country of EAR99 technology or source code.

1.1.9. Transactions with Cuban Nationals Located Outside of Cuba. OFAC created a new General License to authorize all persons subject to U.S. jurisdiction to provide goods and services to Cuban national individuals located in a third country, and to allow banking institutions to open, maintain and close bank accounts for such Cuban nationals. OFAC also unblocked the accounts of Cuban nationals who have permanently relocated outside of Cuba.

1.1.10. Measures Promoting Diplomatic Relations with Cuba and Easing Third-Country Involvement in Cuba.

- Official Government Business – OFAC expanded an existing authorization to cover all Cuba-related transactions by employees, grantees, and contractors of the U.S. Government, foreign governments, and certain international organizations in their official capacities.
- Authorization of Certain Funds Transfers Through the United States – OFAC expanded an existing limited authorization to allow funds transfers through the United States for the personal expenditure of employees, grantees, and contractors, and persons who share a common dwelling as a family member of such employees, grantees, and contractors, of third-country official missions in Cuba or any intergovernmental organization in which the U.S. is a member of holds observer status in Cuba.
- Cuban Official Missions – To facilitate the reestablishment of diplomatic relations with Cuba, OFAC created a General License to authorize transactions with Cuban official missions and their employees in the United States.
- Foreign Vessels – OFAC amended an existing authorization to permit foreign vessels to enter the U.S. after engaging in certain trade with Cuba, without first stopping at a third-country port.

Notwithstanding these many changes, the balance of the extensive embargo against Cuba remains in place. This means that most transactions between the United States, or individuals or companies subject to U.S. jurisdiction, and Cuba continue to be prohibited. Moreover, given the relatively low income of most Cubans, the limited infrastructure due in part to the U.S. sanctions, and existing U.S. statutory limitations that cannot be relaxed through presidential action alone, opportunities for commercial exploitation of the Cuban market perhaps remain remote. Further, the history of harsh enforcement of the U.S. embargo, particularly against financial institutions, may have a chilling effect on the willingness of U.S. companies to take advantage of the liberalizations that have taken place.

Another important dynamic at play is domestic politics here in the United States. As long as Cuba is led by someone with the surname “Castro,” it will be far too politically easy for opponents of the Administration in Congress to oppose any further relaxation that must come via legislation. Thus, we

think that the legislative action necessary for further liberalization of the sanctions likely will be slow in coming. It also remains to be seen whether the next Administration will embrace and adopt its predecessor's stance toward Cuba.

Notwithstanding some reasons to temper our optimism, the liberalization may produce significant dividends to the United States in its foreign policy in general, especially in the Western Hemisphere, where the U.S. sanctions have served as an obstacle to U.S. leadership, and have facilitated the formation of anti-U.S. organizations and alliances. The liberalization should also promote coordination between Cuba and the United States in international enforcement matters, both bilaterally and regionally, especially in counter-narcotics enforcement, counter-terrorism, international trafficking in persons, and environmental enforcement.

The liberalization has led to the first meeting to discuss the claims settlement between the two countries. As the November 2016 U.S. Presidential election draws closer, more liberalization is likely as Cuba realizes it may be the last opportunity in some years, and the Obama Administration wants to solidify its legacy for improving bilateral relations and democracy and entrepreneurship opportunities for ordinary Cubans.

While these collective changes represent the biggest liberalization to the Cuba sanctions in decades, the practical implications are actually fairly slight with respect to general commercial relations, and do not greatly alter the Cuba sanctions landscape. The Cuba sanctions remain among the most restrictive U.S. sanctions regimes. The greatest impact probably will be felt by U.S. individuals with family in Cuba, who may now travel to Cuba more easily and without specific authorization from OFAC, and who are permitted to use U.S. issued credit cards while in Cuba, send larger remittances to Cuba, and bring back more Cuban origin goods than before. The liberalization in the commercial sector opens up only a narrow space for authorized activities to promote Cuba's virtually nonexistent private sector, as well as expansion of existing telecommunications and certain travel exemptions. Thus, the anticipated impact will be limited, although could be the first steps toward more significant rollbacks.

Readers who may be interested in a more comprehensive and detailed description and analysis of U.S. sanctions laws on Iran as well as other U.S. economic sanctions and export control laws and regulations are encouraged to obtain a copy of our firm's [U.S. Export and Reexport Compliance Guide \(free condensed Nov. 2013\)](#), as supplemented by our periodic detailed *Export Licensing Clients Memos* issued on a fee sharing basis. If interested in doing so or if you have any questions or require additional information concerning the current state of and future prospects for U.S. sanctions on Iran, please contact Michelle Roberts at mtroberts@bcr-dc.com.