

CLIENT ALERT

BIS and OFAC Cuban Regulations Amended to Expand Permitted Exports and Transactions

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On January 27, 2016, the Department of the Treasury's Office of Foreign Asset Controls published amendments to the Cuban Assets Control Regulations (the CACR) in the latest step toward revising the United States' foreign policy toward Cuba.

Additionally, the Department of Commerce's Bureau of Industry and Security (BIS) amended the Export Administration Regulations (EAR) on January 27, 2016, to expand the scope of permissible exports and reexports of items to Cuba.

The Cuban regulations have been amended repeatedly in the last year, following President Obama's announcement of the United States' new foreign policy toward Cuba. Prior amendments to the regulations made in the past year are summarized in the background section further below.

Export Licenses

Revisions to the Export Administration Regulations have liberalized the issuance of licenses for exports and reexports of a wide range of products. The purpose is to expand permitted exports to meet the needs of the Cuban people.

For several categories of items, the regulations now state that applications for licenses to export or reexport to Cuba "generally will be approved." Previously, these categories were subject to case-by-case analysis. These categories include:

- Telecommunications items;
- Commodities and software to strengthen civil society in Cuba;
- Commodities and software to U.S. news bureaus in Cuba;
- Certain agricultural items;
- Items necessary to ensure safe civil aviation; and

- Items necessary for environmental protection of air and water quality, including items related to renewable energy or energy efficiency.

In a change from its general policy of denial of licenses for all items, applications for exports and reexports of the following categories of items to Cuban state-owned enterprises, agencies, and other organizations that provide goods and services for the use and benefit of the Cuban people will now receive “case-by-case” review:¹

- Agricultural production;
- Artistic endeavors;
- Education;
- Food processing;
- Disaster preparedness, relief and response;
- Public health and sanitation;
- Residential construction and renovation and public transportation;
- Wholesale and retail distribution for domestic Cuban consumption;
- Construction of facilities for treating public water supplies;
- Construction of facilities for supplying energy to the Cuban people;
- Construction of sports and recreation facilities; and
- Construction of other infrastructure directly benefiting the Cuban people.

Additionally, applications for temporary exports or reexports of vessels and airplanes used to deliver humanitarian goods or services are now subject to case-by-case review.

However, the existing general policy of denial of export license applications remains in effect for items for use by state-owned enterprises, agencies, and other organizations engaged in tourism, extraction or production of minerals or other raw materials, and others that primarily generate revenue for the state. Similarly, the denial policy remains for items exported to the Cuban military, police, intelligence, and security services.

Financing for Exports

Previously, all licensed exports and reexports to Cuba had to be paid for either in cash in advance or through third-party financing. That restriction remains in place for agricultural items and commodities.² But it no longer applies to other categories of items. Businesses and individuals with a license to export may now use any means of financing in connection with the export. Additionally, depository institutions may provide financing for such exports. This includes issuing, negotiating, or paying letters of credit, accepting collateral for issuing letters of credit, and processing documents.

Travel to Cuba and Other Transactions

Travel to Cuba and travel-related transactions that are necessary to carry out any of the newly authorized export and business transactions are now authorized, thus eliminating the delay and uncertainty associated with applying for a specific license.

Carrier services by air, which were previously authorized to provide services, are now permitted to enter into agreements to facilitate those services, including arrangements for entry into blocked space, code-sharing, and leasing.

Transactions incident to authorized professional meetings and conferences in Cuba are also now authorized, which will improve the logistics of holding a meeting or conference in Cuba. And businesses may now advertise and promote their conferences in Cuba. However, other requirements on business travel remain, including that the traveler's business schedule while in Cuba not include excessive amounts of free time.

Similarly, transactions (including marketing) and travel incident to amateur and semi-professional sports competitions, public performances, clinics, workshops, exhibitions, and other competitions open to attendance by the Cuban public are authorized. Notably, a U.S. business's profits from such an event no longer have to be donated to an independent non-governmental organization in Cuba or a U.S.-based charity. Businesses are now permitted to advertise their competitions and performances and retain the profits from such events.

Background: Recent Prior Amendments

- On January 15, 2015, OFAC amended the CACR to broaden licenses for travel to Cuba and the provision of telecommunications services. It also authorized U.S. financial institutions to open correspondent accounts in Cuban banks and process credit card transactions for authorized transactions under the CACR. Additionally, under the amended regulations, U.S.-owned or controlled entities in foreign countries are authorized to provide goods and services to Cuban nationals outside of Cuba. The amendment also permitted U.S. insurers to provide coverage for individuals traveling to Cuba. Consumer communications devices, like personal computer and cell phones, no longer require a license. It also expanded the scope of what is considered authorized support for the Cuban people.
- On January 16, 2015, BIS created an Export License Exception: Support for the Cuban People (SCP). This amendment authorized, without a license, the export from the United States of certain categories of goods and technology to improve living conditions in Cuba. It also established a new policy of case-by-case basis review for the export and reexport of telecommunications items that previously were not allowed.
- On July 22, 2015, BIS implemented the removal of Cuba's designation as a state sponsor of terrorism, further expanding certain license exceptions for exports and reexports to Cuba.
- On September 18, 2015, OFAC further expanded authorized travel and telecommunications services. It also authorized businesses to maintain a physical presence in Cuba related to activity permitted under the CACR. The amendments additionally expanded the general license for educational activities, and standardized testing and Internet-based courses are now authorized, as are academic exchanges and joint non-commercial academic research with institutions in Cuba.
- On September 21, 2015, BIS published an additional rule expanding the scope of transactions eligible for the license exception SCP, to further enhance support for the Cuban people.

Conclusion

The CACR amendments are targeted and limited but should improve the utility of a general or specific license by authorizing Cuba-related transactions related to many of those licenses. Additionally, the amendments take a significant step in permitting non-cash payments for export and reexport sales to Cuba. Similarly, the revisions to the Export Administration Regulations will make it easier to obtain licenses for exports and reexports and will further open Cuba to American business and commerce. Under these amendments, U.S. businesses will find that the logistics of conducting approved business with and in Cuba, and exporting goods to Cuba, have become simpler and less expensive.

Given the complexity of the Cuba sanctions regulations, however, parties interested in doing business with Cuba should seek sound legal advice before taking action in this area.

¹ See below for restrictions on Cuban government entities that primarily generate revenue for the state or which are military, police, intelligence, and security-related.

² OFAC is required by statute to maintain the existing limitations on payment and financing terms for agricultural commodities and agricultural items.

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