

Recent Developments in U.S. Regulations Governing Transactions With Cuba

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The Department of Treasury's Bureau of Industry and Security (BIS), the Office of Foreign Asset Control (OFAC), and the Department of State issued rules, on November 9, amending requirements regarding transactions with Cuba. Those amendments implement the policy objectives announced in the June 16 National Security Presidential Memorandum, "Strengthening the Policy of the United States towards Cuba." Highlights of the changes are below:

Direct Financial Transactions

New restrictions are intended to prevent persons subject to U.S. jurisdiction from engaging in direct financial transactions with certain entities that are determined to be acting under control of, or on behalf of, Cuban military, intelligence, or security service personnel at the expense of Cuban people and private businesses. This narrows the scope of certain authorizations for exports and other transactions by requiring that such authorized transactions not involve these identified entities. The Department of State published and will periodically update the designated entity list, known as the "Cuba Restricted List." In a departure from other sanctions programs, only entities specifically named on the list will be restricted. Entities owned or controlled by an entity on the Cuba Restricted List will not be treated as restricted, unless also specifically listed.

Several OFAC general licenses were updated to note that transactions with those Cuba Restricted List entities will not be permitted even if incident to a transaction covered by such general license. OFAC noted that new specific licenses will clarify that such incidental transactions are prohibited without a license specifically authorizing dealings with a Cuba Restricted List entity.¹

Expansion of Export License Exception SCP

On November 9, BIS significantly broadened the export license exception for Support for the Cuban People (SCP).² Exports to Cuba from the United States or re-exports of U.S.-origin goods generally require a license from BIS, and are generally subject to a policy of denial. Several policies exist that make exceptions for certain types of goods or purposes of export.

Previously, license exception SCP allowed export without a license of certain items, such as tools and equipment, that were for (1) use by the private sector to construct or renovate privately-owned buildings, (2) private sector agricultural activities, or (3) use by private sector entrepreneurs. The recent amendments authorize export of goods generally, not limited to certain items,³ for use by the Cuban private sector for private sector economic activities. SCP also allows the export of items sold directly to individuals in Cuba for their personal use or their immediate family's personal use, except for export for sale to certain Cuban officials.

The SCP export license exception does not cover export of items that would be used to primarily generate revenue for the state or contribute to the operation of the state. The Cuban state is heavily connected to the tourist industry and other industries that might be private in other countries. The new Cuba Restricted Entity List includes a number of hotels, for example. Exporters using SCP must be diligent to ensure that proposed exports transactions would not contribute to or support the Cuban government.

Travel

The educational travel restrictions loosened by President Obama in January 2011 will also change. Most significantly, individual educational travel, also known as people-to-people travel, is no longer authorized. Previously, individual educational travel was authorized for people that were not enrolled in formal academic studies. Now, U.S. persons who travel to Cuba for people-to-people travel will need to be part of an organized group run by U.S. companies, and a representative of the group will need to accompany travelers. Visitors will be prohibited from staying at hotels identified on the Cuba Restricted List. However, existing arrangements made prior to November 9th are not affected.

While the new restrictions function to tighten travel, they are mostly aimed to prevent enriching those entities on the new Cuba Restricted List. Companies and travelers are urged to regularly check the Cuba Restricted List to ensure compliance.

If you have any questions about the changes to U.S. regulations regarding transactions with Cuba, please contact one of the Winston attorneys listed below.

¹ See amendments to 31 CFR Part 515 in 82 FR 51998.

² See amendments to 15 CFR § 740.21 in 82 FR 51983.

³ The items must be designated EAR99 (which is the designation for items not under specific export control classification) or controlled only for Anti-Terrorism (AT) reasons on the Commerce Control List (CCL). If the items are medicines, medical devices, or agricultural commodities, they are controlled by other statutes and regulations.

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