

## U.S. Continues Incremental Easing of Cuban Sanctions

### I. Overview

On September 21, 2015, the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") released revised [Cuban Assets Control Regulations](#) ("CACR") to continue implementing policy changes announced by President Obama on December 17, 2014<sup>1</sup> and initiated earlier this year on January 16, 2015. In a coordinated action, the U.S. Department of Commerce's Bureau of Industry and Security ("BIS") issued a [rule](#) updating U.S. export controls to facilitate permitted activities.<sup>2</sup> The revised regulations, effective September 21, 2015, continue to ease U.S. sanctions on Cuba, albeit modestly. General travel and tourism in Cuba remain prohibited to persons acting within U.S. jurisdiction, as does most commercial and financial activity.

The main impact of the new regulations is to further facilitate previously announced authorizations for travel and trade with Cuba, reducing friction encountered by those trying to take advantage of prior policy changes by addressing some of the most frequently encountered issues. Most notably, the new rules:

- Permit persons subject to U.S. jurisdiction to establish a physical presence in Cuba and hire Cuban staff (or send U.S. employees) to conduct authorized activities;
- Promote the provision of telecommunication, postal, and other communications services between the United States and Cuba, including by permitting the establishment of local companies, joint ventures, and other business arrangements in Cuba to provide and market telecommunications services;
- Slightly loosen certain restrictions on the existing twelve categories of authorized travel to Cuba;<sup>3</sup>

<sup>1</sup> 31 C.F.R. Part 515.

<sup>2</sup> 15 C.F.R. Part 740.

<sup>3</sup> The twelve categories, set out in 31 C.F.R. §515.560, are: (1) family visits; (2) official business of the U.S. government, foreign governments, and 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; and (12) certain export transactions that may be considered for authorization under existing Department of Commerce regulations and guidelines with respect to Cuba or engaged in by U.S.-owned or -controlled foreign firms. Each category is subject to detailed conditions and restrictions spelled out in the CACR.

- Facilitate remittance, inheritance, and similar transactions between Cuba and the United States;
- Encourage the development of messaging and other software aimed at promoting the free flow of information and the development of civil society; and
- Ease restrictions on the provision and use of bank accounts by Cuban nationals present in the United States and American nationals present in Cuba pursuant to OFAC authorization.

The primary sanctions on Cuba remain in place and are expected to do so over the medium term, in large part because congressional action would be required for more sweeping and permanent changes.

## II. Summary of Changes

OFAC's amendments to the CACR contain provisions to do the following:

- Expand the general license authorizing the provision of legal services to Cuba and Cuban nationals to permit the provision of a broad array of U.S. legal services and the receipt of payment for such services from most Cuban persons and entities;<sup>4</sup>
- Permit persons subject to U.S. jurisdiction<sup>5</sup> to travel to Cuba for market research, commercial marketing, sales negotiation, delivery, installation, or servicing of U.S. goods authorized for export to Cuba;<sup>6</sup>
- Allow persons subject to U.S. jurisdiction to establish a business presence in Cuba, including through joint ventures with Cuban entities, to provide certain telecommunications and internet-based services, as well as to enter into licensing agreements related to, and to market, such services;<sup>7</sup>
- Permit imports of merchandise from Cuba or Cuban-origin merchandise from a third country intended as gifts;<sup>8</sup>

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<sup>4</sup> Certain limitations related to payments from prohibited Cuban Government or Cuban Communist Party officials will apply. § 515.512.

<sup>5</sup> Under the CACR, this includes U.S. citizens, U.S. residents (including "green card" holders), entities organized under U.S. law, and entities owned or controlled by any of the foregoing. § 515.329.

<sup>6</sup> § 515.533.

<sup>7</sup> §§ 515.542; 515.578.

<sup>8</sup> Permissible gifts exclude alcohol and tobacco products, must be sent directly to the United States rather than being carried by a traveler, may not be valued at more than \$100, and must be items of a type and in quantities normally given as a gift. § 515.544.

- Permit persons subject to U.S. jurisdiction engaged in authorized travel to Cuba to maintain bank accounts there in order to facilitate authorized transactions (such as living expenses) while in Cuba;<sup>9</sup>
- Broadly permit transactions ordinarily incident and necessary to transactions permitted by a specific or general license;
- Allow close relatives<sup>10</sup> to visit or accompany authorized travelers for certain additional activities, including official government business, educational activities, journalistic activity, professional research, religious activities, humanitarian projects, and activities of private foundations or certain research or educational institutes;<sup>11</sup>
- Authorize additional educational activities involving Cuba and Cuban nationals, including the provision of standardized testing services and internet-based courses;<sup>12</sup>
- Authorize academic exchanges and joint non-commercial academic research with universities or academic institutions in Cuba;<sup>13</sup>
- Eliminate caps on family remittances to and from Cuba and remove most restrictions on the settlement of decedents' estates;<sup>14</sup>
- Authorize travel-related transactions in connection with educational activities;<sup>15</sup>
- Authorize persons subject to U.S. jurisdiction to carry U.S.-licensed passengers and cargo to Cuba by vessel, permit aircraft and vessels leaving the United States to remain in Cuba for up to 7 or 14 days, respectively, and permit vessels subject to U.S. jurisdiction to provide overnight lodging in Cuban ports and waters;<sup>16</sup>

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<sup>9</sup> § 515.560.

<sup>10</sup> A close relative is defined as someone related to a person by blood, marriage, or adoption – and who is no more than three generations removed from that person or a common ancestor with that person.

<sup>11</sup> § 515.561.

<sup>12</sup> § 515.565.

<sup>13</sup> *Id.*

<sup>14</sup> §§ 515.570; 515.523.

<sup>15</sup> § 515.571.

<sup>16</sup> § 515.572.

- Allow persons and entities subject to U.S. jurisdiction who engage in a number of categories of authorized activities<sup>17</sup> to establish and maintain a physical presence, such as an office, retail outlet, or warehouse, in Cuba and allow such persons and entities to:
  - Employ Cuban nationals,
  - Open and maintain bank accounts in Cuba;
  - Employ persons subject to U.S. jurisdiction in Cuba;
  - Market the Cuban presence; and
  - Engage in other transactions ordinarily incident to maintaining such a presence;<sup>18</sup>
- Expand the general license authorizing transactions related to specified humanitarian projects to include disaster relief and historical preservation;<sup>19</sup>
- Expand the authorization for the provision of services (including internet-based services) related to software and consumer communications devices exported to Cuba under U.S. license, including training related to the installation, repair, and replacement of those items;<sup>20</sup>
- Allow persons subject to U.S. jurisdiction to import Cuban-origin mobile applications into the United States and to hire Cuban nationals to develop them;<sup>21</sup>
- Unblock previously blocked remittances in excess of the prior periodic limits;<sup>22</sup>
- Generally authorize transactions with individuals who are Cuban nationals outside Cuba, provided that no direct or indirect commercial exportation of goods or services to or from Cuba is involved;<sup>23</sup>

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<sup>17</sup> This includes news bureaus; exporters of goods authorized for export or reexport to Cuba by Commerce and OFAC, such as agricultural products and materials for construction or renovation of privately-owned buildings; entities providing mail or parcel transmission services or certain cargo transportation services; providers of telecommunications or internet-based services; entities organizing or conducting educational activities; religious organizations; and providers of carrier and certain travel services.

<sup>18</sup> 31 C.F.R. § 515.573; 15 C.F.R. § 740.21.

<sup>19</sup> 31 C.F.R. § 515.575.

<sup>20</sup> § 515.578.

<sup>21</sup> *Id.*

<sup>22</sup> § 515.584.

<sup>23</sup> § 515.585.

- Expand the general license authorizing transactions with official missions of Cuba to the United States to include international funds transfers;<sup>24</sup>
- Authorize persons subject to U.S. jurisdiction to receive, and make payment for, certain legal services from Cuba or Cuban nationals;<sup>25</sup>
- Authorize the provision of air ambulance and other related emergency medical services to travelers in Cuba and the provision of nonscheduled emergency medical services to Cuban nationals in the United States;<sup>26</sup> and
- Make a number of technical and conforming changes to the CACR.

BIS's updated regulations largely clarify prior changes to license exceptions and licensing policies<sup>27</sup> and make conforming changes necessary to support the OFAC actions described above. Among other things, the BIS amendments:

- Expand the license exception for temporary sojourns of aircraft and vessels from the United States to Cuba (AVS);<sup>28</sup>
- Clarify that, following the removal of Cuba from the state sponsors of terrorism list, the level of *de minimis* U.S. content subjecting a foreign-made item to U.S. export controls is 25% for agricultural products as well as for other goods;<sup>29</sup>
- Expand the license exception for goods and technology to support the Cuban private sector (SCP) to permit the export of goods and services for the development of software that supports private sector activity or the free flow of information;<sup>30</sup>
- Permit the export of goods and technology to support the newly authorized offices or other physical presences in Cuba to be established by persons subject to U.S. jurisdiction;<sup>31</sup> and

<sup>24</sup> § 515.586.

<sup>25</sup> § 515.588.

<sup>26</sup> § 515.589.

<sup>27</sup> Notably, a July 22 BIS rule implemented the removal of Cuba from the list of state sponsors of terrorism, which did not end the general embargo against Cuba but made Cuba eligible for a number of license exceptions applicable to other countries. See 80 Fed. Reg. 43314 (Jul. 22, 2015).

<sup>28</sup> 15 C.F.R. § 740.15.

<sup>29</sup> The *de minimis* rules are complex, and there are exceptions to the general 25% rule. 15 C.F.R. § 740.18.

<sup>30</sup> § 740.21.

<sup>31</sup> *Id.*

- Establishes a new licensing policy favoring the granting of licenses to export items to be used for civil aviation safety and the safe operation of commercial passenger aircraft on a case-by-case basis.<sup>32</sup>

Generally, controlled “dual-use” items may not be exported under these authorizations; they are limited to U.S.-origin goods not subject to heightened controls (so-called “EAR99” items) or items controlled solely for antiterrorism reasons.

### III. Additional Guidance

OFAC simultaneously issued new [frequently asked questions](#) (“FAQs”) to provide additional clarification related to the revised Cuban Regulations. In the FAQs, which primarily focus on clarifying travel-related issues, OFAC emphasizes that most transactions between persons subject to U.S. jurisdiction and Cuba, such as tourist activities, remain prohibited. Persons subject to U.S. jurisdiction are prohibited from doing business or investing in Cuba unless licensed by OFAC. The loosening of restrictions on dealings with Cuba, together with the planned re-establishment of diplomatic relations, is an important symbolic and political step. While the President has substantial discretion to modify regulations and license specific activity, lifting the Cuban sanctions altogether would require statutory authorization, particularly in light of the codification of Cuban sanctions in the Helms-Burton Act.<sup>33</sup> BIS also updated its [FAQs](#) related to Cuba.

If you have any questions, please feel free to contact any of your regular contacts at the Firm, or [Paul Marquardt](#) of our Washington office, listed on our website at <http://www.clearygottlieb.com>.

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<sup>32</sup> § 746.2.

<sup>33</sup> The Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (Helms–Burton Act), Pub. L. 104-114, 110 Stat. 785, 22 U.S.C. §§ 6021–6091.

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