

# Obama Administration Takes Another Step to Ease Cuban Sanctions

November 2, 2016

On October 14, 2016, the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") and the Department of Commerce's Bureau of Industry and Security ("BIS") announced revisions to the [Cuban Assets Control Regulations](#) ("CACR") and the [Export Administration Regulations](#) ("EAR"), respectively, continuing the incremental easing of the U.S. embargo on Cuba. Simultaneously, the President announced a new [Presidential Policy Directive for U.S.-Cuba normalization](#) ("Cuba PPD"), which aims to underpin the Obama Administration's vision for normalizing relations with Cuba with government-wide guidance. However, the vision remains in important respects aspirational; statutory constraints on Cuba policy continue to limit the President's ability to end the Cuban embargo.

The regulatory changes, effective as of October 17, 2016, provide further modest expansions of permitted activity in Cuba. They also continue OFAC's efforts to provide guidance and remove practical obstacles to taking advantage of prior relief. Most notably, the changes facilitate:

- Research, development, and commercialization activities involving medical research in the Cuban pharmaceutical industry
- Provision of services related to infrastructure development and civil aviation safety in Cuba
- Direct sales of consumer goods to Cuba
- Easier use of existing authorizations, such as by permitting re-importation of goods previously exported to Cuba, easing restrictions on goods purchased by travelers, and relaxing restrictions on vessels and aircraft stopping in Cuba en route to other destinations.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

**WASHINGTON**  
2000 Pennsylvania Avenue, NW  
Washington, DC 20006-1801  
T: +1 202 974 1500  
F: +1 202 974 1999

**Paul Marquardt**  
+1 202 974 1648  
[pmarquardt@cgsh.com](mailto:pmarquardt@cgsh.com)



## 1. Summary of Changes to Cuban Regulations

OFAC and BIS made numerous changes to the CACR and EAR. The descriptions below provide a brief summary of the notable changes.

### — Health Care and Pharmaceuticals

- Joint medical research. OFAC expanded medical research opportunities by allowing persons subject to U.S. jurisdiction to participate in joint medical research projects with Cuban nationals.<sup>1</sup> The general license permits both commercial and non-commercial medical research.<sup>2</sup>
- Cuban-origin pharmaceuticals. OFAC issued a new authorization allowing for transactions incident to obtaining approval from the U.S. Food and Drug Administration (“FDA”) of Cuban-origin pharmaceuticals, as well as the import, marketing, sale, and distribution of FDA-approved Cuban-origin pharmaceuticals.<sup>3</sup>
- Bank accounts. OFAC also authorized U.S. persons engaged in these health-related activities to open and maintain bank accounts in Cuba. The accounts must be used solely for authorized transactions in connection with the health-related activities.<sup>4</sup>

### — Cuban Infrastructure Projects

- Services related to Cuban infrastructure. OFAC issued a new authorization that allows persons subject to U.S. jurisdiction to provide infrastructure-related services to Cuba or Cuban nationals, consistent with Department of Commerce licensing policy. The services include developing, repairing, maintaining, and enhancing Cuban infrastructure in public transportation, water management, waste management, non-nuclear electricity generation, electricity distribution, hospitals,

public housing, schooling, and environmental sectors.<sup>5</sup>

### — Sales of Consumer Goods and Export-related Transactions

- Sales of consumer goods to Cuba. BIS modified the Support for the Cuban People License Exception to allow for the export of certain consumer goods sold directly to eligible individuals in Cuba for their personal use.<sup>6</sup> This amendment covers, among other things, direct sales of eligible consumer products made by online retailers to eligible individuals in Cuba.<sup>7</sup>
- Export-related transactions. OFAC amended its general license permitting transactions incident to exports and reexports authorized by BIS by removing the reference to 100% U.S.-origin items.<sup>8</sup> The removal clarifies the circumstances in which an export or reexport authorized by BIS requires additional licensing by OFAC.

### — Civil Aviation – Supporting International Aviation and Passenger Safety

- Safety-related services. OFAC authorized persons subject to U.S. jurisdiction to provide civil aviation safety-related services to Cuba and Cuban nationals.<sup>9</sup>

### — Travel-related Transactions

- Professional research and professional meetings. OFAC modified its general license authorizing travel to Cuba for professional meetings or conferences by removing the restriction that the meetings

<sup>1</sup> See 31 C.F.R. § 515.547.

<sup>2</sup> See 81 Fed. Reg. 71372 (October 17, 2016).

<sup>3</sup> See 31 C.F.R. § 515.547.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* § 515.591 and 15 C.F.R. § 746.2(b).

<sup>6</sup> See 15 C.F.R. § 740.21(b)(4).

<sup>7</sup> See 81 Fed. Reg. 71365. Eligible products are those classified as EAR99 or subject only to anti-terrorism controls by BIS.

<sup>8</sup> See 31 C.F.R. § 515.533(a).

<sup>9</sup> *Id.* § 515.572.

could not be for the purpose of promoting tourism in Cuba.<sup>10</sup>

- Importation of Cuban-origin merchandise as accompanied baggage for personal use. OFAC removed the monetary value limitations on what authorized travelers may import from Cuba into the United States as accompanied baggage (including alcohol and tobacco products). Additionally, persons subject to U.S. jurisdiction may now import Cuban-origin merchandise acquired in third countries into the United States as accompanied baggage, without value limitations. In both cases, the Cuban-origin goods must be imported for personal use, and normal limits on duty and tax exemptions still apply.<sup>11</sup>
- Remittances. OFAC authorized remittances to third-country nationals for travel by third-country nationals to, from, or within Cuba, if the travel would be authorized by a general license (if conducted by a U.S. person); thus, for example, a Cuban living in the United States could remit funds to relatives living in Spain for the purpose of a family visit to Cuba.<sup>12</sup>

#### — Scholarships and Grants

- Grants, scholarships, and awards. OFAC expanded the authorization for grants, scholarships, and awards to Cuba or Cuban nationals. The authorization now includes grants, scholarships, and awards related to scientific research and religious activities.<sup>13</sup>

#### — Technical Improvements

- Imports of previously exported items. OFAC authorized the importation into the United States or a third country of items that were previously exported or reexported to

Cuba pursuant to a BIS or OFAC authorization. Items used to facilitate authorized business presences may now be imported into the United States for servicing or repair.<sup>14</sup>

- Contingent contracts. OFAC added a general license that authorizes persons subject to U.S. jurisdiction to enter into contingent contracts for transactions requiring a license from OFAC, if contract performance is made expressly contingent on obtaining authorization from OFAC and any other relevant Federal agency, or on authorization no longer being required.<sup>15</sup> Previously, even conditional contracts were prohibited until a license was obtained.
- Certain vessel transactions. OFAC issued a general license that waives the restriction prohibiting foreign vessels from entering a U.S. port to load or unload freight for 180 days after calling on a Cuban port for trade purposes if the items the vessel shipped to Cuba would, if subject to EAR, be designated as EAR99 or controlled on the Commerce Control List for anti-terrorism reasons only.<sup>16</sup>
- Transit of cargo. BIS modified its rules so that air cargo transiting to Cuba on temporary sojourn may now be eligible for the License Exception Aircraft, Vessels, and Spacecraft (meaning that no separate export license is needed to ship goods by air from the United States to a third country via Cuba).<sup>17</sup>
- Financing. OFAC has modified its rules to clarify that certain agricultural items

<sup>10</sup> *Id.* § 515.564(a).

<sup>11</sup> *Id.* § 515.560.

<sup>12</sup> *Id.* §§ 515.560 and 515.570.

<sup>13</sup> *See* 31 C.F.R. §§ 515.590, 515.565, and 515.575.

<sup>14</sup> 31 C.F.R. § 515.533. Items that have been serviced, repaired, or replaced must be separately authorized to be exported to Cuba pursuant to 31 C.F.R. § 515.533(a) or 515.559. *See* 81 Fed. Reg. 71373.

<sup>15</sup> *Id.* § 515.534.

<sup>16</sup> *Id.* § 515.550.

<sup>17</sup> *See* 15 C.F.R. § 740.15.

authorized by BIS for export or reexport to Cuba are not subject to restrictions on payment terms. Authorized exports and reexports to Cuba of certain agricultural commodities remain subject to the limited payment and financing terms of cash in advance or third-country financing.<sup>18</sup>

- **Prohibited Cuban officials.** OFAC narrowed substantially the group of Cuban government officials and members of the Communist party excluded from various general licenses to members of the Council of Ministers, flag officers of the Revolutionary Armed Forces, and members of the Politburo.<sup>19</sup>

### Additional Guidance

OFAC simultaneously issued revised [frequently asked questions](#) (“FAQs”) to provide additional clarifications related to the revised Cuban Regulations. The revised FAQs focus primarily on incorporating the new rules and clarifying existing general licenses. Notable topics include providing for electronic recordkeeping relating to travel transactions, clarifying that U.S. credit card networks may process transactions for third-country nationals traveling in Cuba as well as persons subject to U.S. jurisdiction traveling under general licenses, and noting explicitly that providing training in Cuba is considered ordinarily incident to authorized exports of goods to Cuba (subject to any BIS licensing requirements for exports of technology).

In addition, the Department of Treasury issued revised [guidance regarding travel between the United States and Cuba](#) (“Cuba Travel Guidance”). The revisions to the Cuba Travel Guidance focus primarily on the removal of the monetary value limitation on carrying as accompanied baggage Cuban-origin items for personal use.

<sup>18</sup> See 31 C.F.R. § 515.533(a).

<sup>19</sup> 31 C.F.R. § 515.337 and .338.

## 2. Summary of Presidential Policy Directive – U.S.-Cuba Normalization

The release of the Cuba PPD formalizes the Obama Administration’s commitment to advancing U.S.-Cuba relations in guidance to Federal agencies. The guidance (a) could be reversed by future administrations and (b) more importantly, does not overcome various statutory limits on changes to U.S. sanctions against Cuba, which significantly constrain the President’s ability to make substantial changes to the Cuban embargo without congressional action. Other significant issues, most notably claims, also remain unaddressed. However, the PPD does provide a formal framework for the changes that have been made to date and the strategy behind them, as well as broad guidance to Federal agencies implementing the strategy.

The Cuba PPD sets out goals for future normalization, to the extent permitted by law, in six areas, which include: government-to-government interaction; engagement and connectivity; expanded commerce; economic reform; respect for human rights; and Cuban integration into regional systems.

The descriptions below highlight the key elements of the Cuba PPD.

- **United States-Cuba Normalization.** The PPD states that U.S.-Cuba normalization is intended to support economic growth, stability, increased people-to-people ties, and respect for human rights and democratic values in the region. In the long term, the Cuba PPD sets forth the following goals:
  - Enhanced security of the United States and U.S. citizens at home and abroad;
  - A prosperous, stable Cuba that offers economic opportunities to its people;
  - Increased respect for individual rights in Cuba; and
  - Integration of Cuba into international and regional systems.

Over the past two years, significant progress has been made towards U.S.-Cuba normalization. Noteworthy steps include, among others:

- Reestablishing diplomatic relations;
- Concluding non-binding arrangements on environmental protection, marine sanctuaries, public health and biomedical research, agriculture, counternarcotics, trade and travel security, civil aviation, direct transportation of mail, and hydrography; and
- Implementing six sets of regulatory amendments to the Cuba sanctions program, which eased restrictions on travel, trade, and financial transactions.

However, despite significant progress, a series of statutes limits U.S. economic engagement with Cuba, precluding a complete lifting of restrictions on U.S. engagement with Cuba. The Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 and the Cuban Democracy Act of 1992 remain in force and serve as the cornerstone of the United States embargo against Cuba. Therefore, until the embargo is lifted, the policies and actions aimed toward the goal of U.S.-Cuba normalization will be constrained.

— **Six U.S. Objectives for the Medium-Term U.S.-Cuba Relationship.**

- **Government-to-Government Interaction.** Pursue high-level and technical engagement in areas of mutual interest, including agriculture, the economy and small businesses, transportation, science and technology, environment, climate, health, law enforcement, migration, national security, disaster preparedness and response, and counterterrorism. Build working relationships. Promote human rights and religious freedom. Normalize trade relations to extent permitted by law.
- **Engagement and Connectivity.** Continue people-to-people linkages through government and privately sponsored exchanges, including

those involving educational, cultural, business, science, environment, technology, and sports. Support the development of scheduled and chartered air and maritime services, to the extent permitted by law.

- **Expanded Commerce.** Expand opportunities for U.S. companies to engage with Cuba by pursuing policies enabling U.S. private sector engagement with Cuba's emerging private sector and with state-owned enterprises, to the extent permitted by the embargo.
  - **Economic Reform.** Support further economic reforms by the Cuban government by engaging in government-to-government dialogues to discuss options for macro- and microeconomic reform.
  - **Respect for Universal Human Rights, Fundamental Freedoms, and Democratic Values.** Encourage the Cuban government to respect human rights, support Cuba's emerging civil society, and encourage partners and nongovernmental actors to join in advocating for reforms.
  - **Cuban Integration into International and Regional Systems.** Expand dialogue with Cuba in organizations, such as the World Trade Organization and the World Customs Organization, encourage Cuba to move toward rules-based engagement, and encourage Cuba to bring its legal framework, particularly its commercial law, in line with international standards.
- **Policy Implementation.** To facilitate the implementation of the aforementioned policy goals, the Cuba PPD outlines the roles and responsibilities of various departments and agencies. Executive Branch agencies have been directed to focus on the following areas:
- Treasury
    - Implement changes to embargo and licensing policies;

- Engage public to explain and improve guidance; and
- Encourage reform of Cuba's economic and financial system.
- Commerce
  - Support the development of the Cuban private sector, entrepreneurship, commercial law, and intellectual property rights, as well as environmental protection;
  - Engage in outreach efforts to ensure that U.S. companies understand U.S. regulatory changes and how they provide new opportunities to obtain licenses or use license exceptions to increase authorized exports to Cuba; and
  - Engage in dialogue with the Cuban government about regulatory changes, the need for simplification of the Cuban import process, and transparency in Cuban business regulations.
- Agriculture
  - Increase U.S. food and agricultural exports to Cuba;
  - Work with the Cuban government to advance cooperation outlined in the U.S.-Cuba agricultural memorandum of understanding signed in March 2016; and
- Build the U.S.-Cuba trade and development relationship.
- State
  - Formulate U.S. policy toward Cuba;
  - Promote educational and cultural exchange; and
  - Lead the U.S.-Cuba Bilateral Commission and coordinate discussions on migration and claims.
- Defense
  - Expand the U.S. defense relationship with Cuba;
  - Support Cuba's inclusion in the inter-American defense system and regional security and defense conferences; and
  - Support the capacity of State and Homeland Security to address mass migration and maritime migration issues.
- Homeland Security
  - Combat terrorism and transnational organized crime;
  - Strengthen cross-border supply chains and travel systems to support people-to-people engagement; and
  - Facilitate lawful immigration and ensure the protection of refugees.
- Justice
  - Work with Cuban government to expand law enforcement cooperation and increase information sharing;
  - Work with Homeland Security to combat terrorism and transnational organized crime; and
  - Work with Cuban government to expand law enforcement cooperation.
- Health and Human Services
  - Collaborate with Cuba on issues related to public health and biomedical sciences; and
  - Exchange best practice for access to healthcare.
- Interior
  - Finalize arrangements related to wildlife conservation, terrestrial national protected areas, and seismic records; and
  - Cooperate with Cuba on issues related to marine protected areas.

- Transportation
  - Develop air and surface transportation links between the United States and 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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