

ARTICLE

OFAC Amends Its Cuba Regulations to Open Up Trade and Investment

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To read about the BIS amendments concerning export controls, click [here](#).

Today, the U.S. Treasury Department's Office of Foreign Assets Control (OFAC) and the U.S. Department of Commerce's Bureau of Industry and Security (BIS) announced the issuance of their eagerly awaited amendments to the Cuban Assets Control Regulations (CACR) and the Export Administration Regulations (EAR), respectively. These amendments implement the President's policy to significantly ease restrictions on U.S. trade and investment with Cuba, announced in December 2014. Effective January 16, 2015, these amendments lift restrictions that have stood for decades and offer opportunities for companies to do business with Cuba. To be sure, many restrictions and regulatory requirements remain, and U.S. companies entering Cuban markets must comply with various legal limitations. The following is a summary of key changes to OFAC's Cuba sanctions regulations:

Financial Institutions: OFAC issued amendments to its Cuba sanctions regulations that make some fundamental changes in the types of transactions with a Cuban interest that U.S. financial institutions can process. This in turn affects what many foreign banks can do as well. However, the amendments do not legalize all Cuba transactions, so financial institutions must ensure that their activities fall within the new licenses contained in the revised regulations.

- **Cuba Transactions for U.S. Banks:** The new regulations authorize a range of transactions between U.S. persons and Cuba that were formerly prohibited. Most transactions with a Cuban interest will still be illegal for U.S. banks, though.

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Accordingly, U.S. banks must continue to screen transactions and will need to adopt internal policies and procedures to enable them to review and analyze such transactions to determine whether they are now permissible.

To facilitate the ability of U.S. banks to process what is expected to be a much greater volume of authorized transactions involving Cuba, U.S. "depository institutions" (essentially banks and credit unions) are now authorized to open correspondent accounts with Cuban banks. The opening of correspondent accounts implies the ability to exchange SWIFT RMA keys, and the new regulations provide that banks can exchange authenticator keys. Of course, such correspondent accounts can only be used for transactions that are otherwise allowed under U.S. law but direct transactions between Cuba and the United States will enhance expanded trade and serve as an important opening in U.S. Cuba relations.

The new regulations also "unblock" Cuban nationals who have taken up permanent residence outside of Cuba, provided that (1) they can establish this through documentation demonstrating citizenship or lawful permanent residence in a third country, and (2) they are not prohibited officials of the Government of Cuba or prohibited members of the Cuban Communist Party. Significantly, proof of permanent residence can include evidence that the person has lived outside of Cuba for two years without interruption, in lieu of proof of formal permanent residence, even a sworn statement that the person does not intend to return to Cuba may suffice. U.S. banks can now legally process transactions involving such persons, and open accounts for them. Prior to this, the documentary requirements for opening such accounts was burdensome and often placed overseas branches and subsidiaries of U.S. banks in difficult conflict of law situations. In addition, U.S. banks can unblock any funds belonging to such persons that had been blocked solely because they were Cuban nationals.

- **Clearing Transactions:** The new regulations also make changes significant for banks within and outside of the United States. Transactions denominated in U.S. dollars are almost always cleared through U.S. banks. In the past, if a U.S. bank received a transaction with a Cuban interest (including a Cuban originator or beneficiary) from a foreign bank or its own overseas branch or subsidiary, the U.S. bank was required to block the funds involved and report the transaction to OFAC. The new regulations allow U.S. banks to reject rather than block a transaction involving a Cuban interest that begins and ends outside the United States. The rejected transaction would be reported to OFAC, but the funds would be returned to the originator. If the transaction would be allowable for a hypothetical U.S. originator or beneficiary—a family remittance sent to a relative in Cuba, for example—the U.S. bank could complete the transaction, provided that neither the originator nor the beneficiary was subject to U.S. jurisdiction.

These changes do not permit banks to process all transactions with a Cuban interest that are denominated in U.S. dollars. U.S. banks will be expected to continue to screen transactions to ensure compliance with OFAC regulations. A foreign bank attempting to clear a dollar-denominated transaction with a Cuban interest through the United States should at the least expect its U.S.

correspondent bank to request detailed information before processing any such transaction. Indeed, it is likely that U.S. banks will reject even "legal" Cuban transactions. Unlike the past, however, foreign banks will simply see such funds returned rather than blocked.

- **Credit Cards:** U.S. banks are authorized under the new amendments to process all transactions related to payments of credit cards, debit cards, stored value cards, checks, drafts, traveler's checks and similar instruments used by persons subject to U.S. jurisdiction under the new general license for Cuba travel or related specific licenses. Significantly, financial institutions may rely on the traveler for compliance with the license requirements. Practically speaking, this means that transactions by a U.S. credit card holder in Cuba to pay for travel related expenses or other purchases can be presumed by the bank to be permitted transactions by an authorized traveler. This presumption will open up the use of U.S.-issued debit and credit cards in Cuba. At present, Visa and MasterCard are widely accepted by merchants in Cuba, but U.S.-issued cards are not accepted. The removal of the current restrictions on U.S. cards will enable U.S. authorized travelers to visit Cuba without the need to carry large sums of cash.

OFAC has indicated that the broad authorization governing U.S. credit card use in Cuba includes authorization for U.S. banks to acquire merchants in Cuba, expanding further the financial ties between Cuba and the United States.

- **Financial Transactions by International Organizations and Third Country Missions:** The regulations authorize U.S. depository institutions to process funds transfers and maintain accounts for foreign embassies in Cuba and international organizations in which the United States is a member. This authorization covers transactions and accounts for official business as well as personal accounts for employees and their dependents. This general license replaces a host of specific licenses for this activity that created burdensome renewals and monitoring.

Remittances: The revised Cuban sanctions regulations significantly liberalize the limits on remittances to Cuba. The ceiling on remittances to individual Cuban nationals has been increased from \$500 to \$2,000 per quarter. The revised regulations also create a general license for persons subject to U.S. jurisdiction to make remittances for humanitarian projects, support for the Cuban people, and development of private business in Cuba. Such remittances formerly required a specific license. U.S. banks are authorized to forward such remittances to Cuba. Finally, the limit on the total amount of remittances that a licensed traveler can carry to Cuba has been raised to \$10,000. Persons making remittances in connection with travel to Cuba are required to keep records of these transactions.

The new general license for remittances, as well as the higher limits on remittance values, may lead to U.S. banks seeing more transfers of funds to Cuba. Yet, some restrictions on transfers to Cuba remain. Accordingly, banks should continue to scrutinize these transactions. In addition, any party who serves as a remittance forwarder (which might be a bank) must follow certain record keeping requirements.

Insurance: U.S. insurers legally may provide "global" life, health or travel insurance to persons who travel to or within Cuba, as long as covered individuals are "ordinarily resident in a country outside of Cuba." This authorization allows a U.S. insurer or its agents to provide covered services and pay covered claims. The new

regulations clearly allow U.S. insurers to provide global coverage both to: (a) U.S. persons whose Cuba travel is authorized under OFAC's regulations; and (b) non-U.S. persons who live outside Cuba. The rule's plain language even appears to allow coverage of U.S. persons whose Cuba travel *is not authorized under OFAC's regulations* (for example, purely tourist travel), although non-binding OFAC statements suggest that the agency may not have intended the rule to go so far.

Telecommunications Services: Transactions incident to the provision of telecommunications services involving Cuba, including the entry into roaming agreements, are authorized. "Telecommunications services" includes data, telephone, telegraph, internet connectivity, radio, television, news wire feeds, and similar services, including transmissions by satellite. U.S. entities must notify OFAC in writing within 30 days after commencing or ceasing to offer such services, and they also must furnish by January 15 and July 15 of each year semiannual reports providing the total amount of payments made to Cuba or a third country.

Telecommunications Facilities: Telecommunications providers are authorized to build infrastructure in Cuba to provide telecommunications and Internet services linking the United States or third countries and Cuba. U.S. entities are required to notify OFAC in writing within 30 days after commencing or ceasing to offer such services, and they also must furnish by January 15 and July 15 of each year semiannual reports providing the total amount of payments made to Cuba or a third country.

Internet-based Services: The new regulations authorize the exportation or reexportation to Cuba of Internet-based services, including instant messaging, chat and email, social networking, sharing of photos and movies, web browsing, blogging, web hosting (so long as it is not for the promotion of tourism). The also permit the provision of domain name registration services.

Consumer Communications Devices: The new rules amend the existing License Exception for Consumer Communications Devices (CCD) by eliminating the donation requirement, thereby authorizing sales of certain communications items to Cuba without a license. Specifically, the License Exception authorizes the export or reexport of consumer communications devices, including computers, mobile phones, televisions, radios, and digital cameras, that are widely available for retail purchase, as well as certain telecommunications and information security-related software. Cuba is the only eligible destination under this License Exception-it does not authorize U.S.-owned or -controlled entities in third countries to engage in reexports of foreign-produced commodities to Cuba.

Improving Communications: A new License Exception for Support for the Cuban People (SCP) authorizes the export and reexport to Cuba of certain items intended to improve the free flow of information to, from, and among the Cuban people. The items authorized under this exception include certain items for telecommunications, including access to the Internet, use of Internet services, infrastructure creation, and upgrades. The License Exception also authorizes the export or reexport to Cuba of certain items for use by news media personnel and by U.S. news bureaus engaged in the gathering and dissemination of news to the general public.

Payments for Exports: U.S. exports to Cuba generally require a license in advance. In addition, a condition for such exports has been that payment must be "payment of cash in advance," with the seller receiving payment before the goods were shipped. The new Cuba sanctions regulations have liberalized this controversial requirement significantly, bringing Cuba trade financing closer in line with normal banking practices. "Cash in advance" is now defined as "payment before the transfer of title to, and control of, the exported items to the Cuban purchaser." If payment terms specify that the Cuban buyer will obtain title to the goods only upon their arrival in Cuba, for example, the requirement would be satisfied if the seller received payment at any time up to that point.

Significantly, the new regulation further defines "cash in advance" as including financing by a third country bank (i.e., not U.S. or Cuban bank), so long as the bank is not an SDN or a U.S. person). Exports of U.S. goods to Cuba may now be financed through non-U.S. banks, with payment occurring under the terms of that financing (assuming of course the exports are otherwise legal under U.S. law). The regulations also specify that U.S. banks can confirm or advise (but still not issue) such financing. This means that U.S. exports to Cuba can now be made using letters of credit and other forms of financing issued by third country banks. This change could make it significantly easier to U.S. companies to sell goods to Cuba, as importer financing by letters of credit for such transactions, through non-U.S. banks, is now permitted. However, payments on open account would still require payment before title transferred to the Cuban buyer.

Importation of Goods: The per diem limitation on authorized travelers' spending in Cuba has been eliminated, and travelers can import up to \$400 worth of goods from Cuba (including up to \$100 in alcohol or tobacco products). Transactions, including payments, necessary to import certain goods and services produced by independent Cuban entrepreneurs, as determined by the U.S. Department of State, are now authorized.

Third-Country Effects: U.S.-owned or -controlled entities in third countries can provide goods and services to Cuban nationals in third countries, provided that the transaction does not involve a direct or indirect commercial exportation of goods or services to or from Cuba. While Cuban nationals located outside of Cuba are still considered blocked, OFAC has unblocked the accounts of Cuban nationals who can show that they have established permanent residency outside of Cuba. In addition, OFAC has issued two new general licenses in connection with third-country activities. These licenses authorize U.S. persons to sponsor and participate in third-country conferences that are attended by Cuban nationals, and to provide goods and services to Cuban sailors that are sequestered aboard ships in U.S. ports.

Travel to Cuba: OFAC has significantly expanded the authorization for travel to and from Cuba, as well as transactions normally incident to such travel. The expanded authorizations pertain to the 12 categories of activities previously included in the regulations, and, in general, such activities no longer require specific licenses from OFAC. The changes in each of these categories are highlighted below. Notably, tourist travel to Cuba continues to be prohibited.

- **Family visits:** In addition to being authorized to visit close relatives who are nationals of Cuba or certain U.S. government employees, individuals are now authorized to visit close relatives who are (1)

ordinarily resident in Cuba; (2) located in Cuba for more than 60 days for authorized educational activities; and (3) located in Cuba on official government/intergovernmental organization business.

- **Official Government Business:** In addition to government officials, whose travel was previously authorized, employees, contractors, and grantees of the U.S. Government, foreign governments, or intergovernmental organizations in which the United States is a member or holds observer status are now authorized to travel to Cuba on official business.
- **Journalistic Activities in Cuba:** While journalistic activities by individuals regularly employed as journalists or as supporting broadcast or technical personnel was and continues to be authorized, this authorization has been expanded to include travel for certain freelance journalists and broadcast and technical personnel supporting such freelance journalists.
- **Professional Research and Professional Meetings in Cuba:** Travel for professional research is now authorized provided it relates to the individual's profession, professional background, or area of expertise, including area of full-time graduate-level study. Similarly, travel for professional meetings is authorized provided the purpose of the meeting directly relates to the individual's profession, professional background, or area of expertise, and does not promote tourism in Cuba.
- **Educational Activities:** Previously authorized travel included travel directly incident to participation in certain structural educational programs, noncommercial academic research, formal courses of study, teaching, and sponsorship of Cuban scholars. In addition to such activities, travel for certain educational exchanges, sponsorship or co-sponsorship of noncommercial academic seminars or conferences, and facilitation of licensed educational activities in Cuba (subject to certain conditions) are now also authorized.
- **Religious Activities in Cuba:** Previously limited to religious organizations in the United States, OFAC now authorizes all persons subject to U.S. jurisdiction to travel to Cuba to engage in a full-time schedule of religious activities. Financial and material donations continue to be prohibited.
- **Public performances, clinics, workshops, athletic and other competitions, and exhibitions:** Travel for certain athletic competition by amateur or semi-professional athletes or athletic teams that previously required a license is now authorized. Similarly, travel for participation in public performances, clinics, workshops, certain athletic competitions, and exhibits in Cuba are also authorized provided the events meet specified conditions.
- **Support for the Cuban People:** Travel by human rights organizations, independent organizations designed to promote peaceful transitions to democracy, and organizations that promote activities to strengthen civil society in Cuba are now authorized.
- **Humanitarian Projects:** Travel related to certain humanitarian projects in or related to Cuba that are intended to directly benefit the Cuban people are now authorized. The types of projects authorized include, but are not limited to, medical- and health-related projects; environmental projects; projects involving formal and non-formal education training on topics such as entrepreneurship and business, journalism, and advocacy; agricultural and rural development; and certain micro-financing projects.

- **Activities of Private Foundations or Research or Educational Institutes:** OFAC now authorizes private foundations or research or educational institutes with established interests in international relations to travel to Cuba to collect information for noncommercial purposes.
- **Exportation, Importation, or Transmission of Information or Informational Materials:** Travel to/from Cuba that is directly incident to the exportation, importation, or transmission of information or informational materials is now authorized.
- **Certain Authorized Export Transactions:** Travel that is directly incident to the conduct of market research, commercial marketing, sales negotiation, delivery, servicing of items, or exports that are consistent with the Department of Commerce's licensing policy are now authorized.

Authorization to Provide Travel and Carrier Services: Individuals and entities are now authorized to provide aircraft carrier services to, from, or within Cuba for travel authorized by the new regulations. Employees, officials, consultants, or agents providing travel or carrier services are also authorized to travel to Cuba for professional meetings, such as those to discuss the arrangements for, and safety and security of, such flights. In addition, banking institutions are now authorized to provide services for the collection of remittances related to such services.