Revised U.S.-Cuba Sanctions Regulations Another (Small) Step for Obama Administration

The U.S. Department of the Treasury’s Office of Foreign Assets Control (OFAC) and the U.S. Department of Commerce’s Bureau of Industry and Security (BIS) have amended the Cuban Assets Control Regulations (CACR) and Export Administration Regulations (EAR), respectively, effective on September 21, 2015. These changes further align the CACR and EAR with President Obama’s policy shift towards engaging and empowering the Cuban people, which he announced on December 17, 2014.

Among the more significant measures, these new regulatory changes allow certain U.S. companies to establish offices in Cuba for the first time in decades, expand authorized travel and banking activities and eliminate limits on the amount of money that can be brought to Cuba. This is the second time OFAC and BIS are amending their regulations regarding trade with Cuba since the President’s announcement (see previous Sidley Update, here). The first round of changes took effect on January 16, 2015 and, as demonstrated below, the agencies’ new changes largely expand upon those amendments.

Travel and Related Services

The new amendments authorize persons subject to U.S. jurisdiction to provide carrier services by vessel and to provide certain lodging services aboard such vessels in connection with such transport. BIS license exception Aircraft, Vessels and Spacecraft (AVS) will be amended to authorize temporary sojourns to Cuba for certain categories of vessels and will authorize aircraft on temporary sojourn to remain in Cuba for up to 14 days.

In addition, the CACR now allow persons subject to U.S. jurisdiction and persons travelling with them who share a common family dwelling to visit a close relative in Cuba, or accompany a close relative traveling to Cuba pursuant to certain general licenses related to official government business, journalistic activity, professional research, educational activities, religious activities, humanitarian projects or activities of private foundations or research or educational institutes. Travelers wishing to visit or accompany an authorized traveler family member are no longer limited to visiting family members who will be travelling in Cuba for more than 60 days. The CACR are also amended to allow authorized travelers to open and maintain bank accounts in Cuba.

In the January 2015 round of amendments, OFAC created 12 categories of general license allowing travel to Cuba and authorized travel agents and airlines subject to U.S. jurisdiction to provide certain travel and air carrier services. Importantly, tourism travel to Cuba remains prohibited.
Telecommunications and Internet-Based Services

The January amendments expanded the commercial telecommunications links between Cuba and the United States by expanding the BIS license exception Support for the Cuban People (SCP) (discussed below) and authorizing persons subject to U.S. jurisdiction to provide services incident to internet-based communications and related to certain exports and reexports of communications items. The January amendments also expanded the BIS license exception Consumer Communication Devices (CCD) to authorize the sale of communication devices (e.g., personal computers, cell phones, televisions, etc.) and related services.

In its most recent notice, OFAC has expanded the list of services that may be exported to Cuba related to communications devices exported to Cuba under BIS license exception CCD. The new regulations now allow the export of training services related to the installation, repair or replacement of such items. In addition, OFAC has also licensed the export of services related to consumer communication devices exported to Cuba that are authorized by individual license (instead of qualifying for the CCD license exception).

BIS has also expanded the scope of the CCD license exception: while the January amendments extended its scope from consumer communications devices donated to Cuba to those that were donated or sold to Cuba, the new amendments make clear that the license applies to other types of transactions, such as leases or loans.

OFAC is also authorizing persons subject to U.S. jurisdiction to establish and maintain a business presence in Cuba, including through subsidiaries, franchises, joint ventures or other business relationships with Cuban persons, to provide telecommunications and internet-based services. OFAC is further authorizing licensing agreements to market such services. The import of Cuban-origin mobile applications is also now permitted, and U.S. persons may hire Cuban nationals to develop such mobile applications.

Exports in Support of the Cuban People

BIS expanded the scope of its license exception SCP. It will now authorize certain exports and reexports of items to Cuba for use in establishing, maintaining and operating a physical presence in Cuba. Eligible recipients of such goods include certain persons providing telecommunications or internet-based services, establishing telecommunications facilities, providing travel or carrier services, organizing or conducting educational activities or transporting authorized items between the United States and Cuba. As with the BIS’s CCD license exception, the SCP license exception will no longer be limited to sales or donations but will extend to support transactions such as leases and loans. In addition, license exception SCP will authorize certain temporary reexports from third-countries when the items are for use in scientific, archeological, cultural, ecological, educational, historic preservation, sporting activities or in the traveler’s professional research and meetings.

Before these new amendments, this license exception was limited to temporary exports by persons departing the United States. The SCP license exception will be further expanded to apply to certain commodities and software exported to Cuba for use in software development, and to temporary exports and reexports to Cuba of certain trade tools used to install, service or repair items; and certain commodities and software for exhibition or demonstration.

OFAC has licensed the export of services related to commodities and software exported under the license exception SCP.
Physical Presence in Cuba

The September amendments will now allow certain U.S. businesses to have a physical presence, such as an office, retail outlet or warehouse, in Cuba to facilitate authorized transactions. This authorization applies to: news bureaus, exports of certain authorized goods (e.g., agricultural products and materials for construction or renovation of privately-owned buildings), providers of authorized mail, parcel and cargo services, providers of telecommunications or internet-based services, entities organizing or conducting certain educational activities, religious organizations and providers of travel and carrier services. These persons may also open and maintain bank accounts at Cuban financial institutions.

Financial Transactions

OFAC eased its rules on remittances in January 2015 by increasing limits on remittances to certain Cuban nationals, and authorizing banks to process the authorized remittances. In this round of amendments, OFAC is removing the limit on donative remittances to Cuban nationals who are not prohibited Cuban government officials or members of the Cuban Communist Party. In addition, OFAC is removing the cap on remittances that authorized travelers may carry to Cuba, and the cap on remittances that Cuban nationals permanently residing in Cuba may carry with them on their return to Cuba from the United States. OFAC is also unblocking certain remittances and funds transfers that were blocked for exceeding the now defunct thresholds. The new CACR will also authorize remittances from Cuba or certain Cuban nationals abroad to the United States, and will authorize certain estate-related transactions, e.g., the transfer of shares of a Cuban estate to a U.S. beneficiary.

U.S. depository institutions may open accounts for non-immigrant Cuban nationals present in the United States, and may keep those accounts open even after the Cuban national returns to Cuba. Previously, such accounts would become blocked once the Cuban national departed the United States. Under the new rules, the account remains in use, but the account holder may only access the account while lawfully in the United States. In addition, OFAC is removing the cap on payments from blocked accounts held by non-immigrant Cuban nationals in the United States to enable these funds to be used for living expenses.

Cuban Nationals in Third Countries

Under the January amendments, U.S.-owned or controlled entities in third countries, including banks, could provide goods and services to Cuban nationals in third countries. The new amendments expand that authorization to allow all persons subject to U.S. jurisdiction to provide goods or services to Cuban nationals in third countries. In addition, the new CACR allow banking institutions to open, maintain and close bank accounts for such Cuban nationals.

Other Amendments

OFAC has liberalized a number of other rules as well. For example, the receipt of payment for legal services provided to Cuba or a Cuban national is now generally authorized. Gifts valued at under US$100 that are from Cuba or are Cuban-origin may generally be imported to the United States. BIS will apply a case-by-case review policy to license applications for exports and reexports to Cuba of items to help ensure the safety of civil aviation and the safe operation of commercial passenger aircraft. OFAC expanded the scope of the general license for travel related to educational activities. OFAC also provided an interpretation under the CACR (which exists
under other sanctions regimes) clarifying that, with certain exceptions, transactions ordinarily incident to a licensed transaction and necessary to give effect thereto are authorized. OFAC also amended the CACR to note its favorable licensing policy for air ambulances and emergency medical services, to include disaster relief and historical preservation explicitly as authorized humanitarian projects, and to authorize funds transfers to official missions of the Cuban government in the United States.

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