

# Commerce and Treasury further Ease Restrictions on Cuba

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On March 16, 2016, the Obama Administration took another step towards normalizing trade relations with Cuba (a policy first announced by the Administration in December 2014), through new regulations published by the Departments of Commerce (see 81 Fed. Reg. 13972) and Treasury (81 Fed. Reg. 13989). These new regulations are the latest in a series of authorizations related to consumer communications, the operation of U.S. companies in Cuba, and travel, among others.

These new regulations focus on four main areas. First, they ease travel restrictions on Americans seeking to engage with the Cuban people through people-to-people educational travel. Second, they increase the access of Cuban nationals to the U.S. financial system by allowing certain transactions processed through U.S. institutions and the maintenance of bank accounts in the U.S. Third, the regulations expand current authorizations related to trade and commerce (such as easing of shipping restrictions, and expanding authorizations for U.S. persons engaged in certain activities to establish a presence in Cuba). Finally, U.S. companies may now sponsor non-immigrant Cuban nationals for visas to work in the U.S. and to pay their salaries.

Below is a brief summary of some of the new authorizations:

## Travel restrictions:

- **People-to-people educational travel.** Until now, the authorization for educational travel required that trips be organized by an entity subject to U.S. jurisdiction and that all travelers be accompanied by a sponsor from that organization during the travel. These new regulations authorize travel to Cuba for educational "individual people-to-people" travel, subject to certain conditions. For example, the individual traveler must have a full schedule of educational activities that results in meaningful interaction between the U.S. traveler and Cuban individuals, and: 1) enhance contact with the Cuban public; 2) support Cuban civil society; or 3) promote the Cuban people's independence from Cuban authorities. U.S. travelers must continue to keep records of their activities while on the travel, or if traveling with an organization, they may allow that organization to keep records on their behalf. 31 C.F.R. § 515.565(b).

These regulatory changes do not affect the statutory ban on tourism.

## Access to U.S. Financial System:

- **U-turn transactions.** OFAC is amending its regulations to authorize "U-turn" transactions through the U.S. financial system in which Cuba or a Cuban national has an interest. A U-turn transaction is one in which funds originating outside of the U.S. are routed through at least one U.S. financial institution before being rerouted to a non-U.S. institution, and in which neither the originator nor the beneficiary is subject to U.S. jurisdiction. 31 C.F.R. § 515.584(d).

Transactions that do not meet these criteria remain prohibited. Significantly, this includes any transaction in which either the originator or the beneficiary is subject to U.S. jurisdiction, unless the transaction is otherwise authorized in the regulations.

- **Processing of U.S. dollar instruments.** OFAC is authorizing U.S. financial institutions to process U.S. dollar instruments presented indirectly by Cuban financial institutions, and correspondent accounts used in these transactions may be denominated in U.S. dollars. However, U.S. institutions may not open a correspondent account for a banking institution subject to Cuban jurisdiction. 31 C.F.R. § 515.584(g).

### Trade and Commerce:

- **Business presence.** Previously, OFAC authorized U.S. persons to maintain a "business presence" in Cuba (e.g., via subsidiaries, branches, joint ventures, agency relationships, or other business relationships with a Cuban person or entity) to facilitate the provision of authorized telecommunication and internet-based services. OFAC is now expanding the authorization to include other persons subject to U.S. jurisdiction, including exporters of goods authorized for export or reexport to Cuba, entities providing cargo transportation services in connection with authorized trade involving Cuba, and providers of travel services. Each of these types of entities had previously been authorized to have a "physical presence" in Cuba (e.g., an office or retail outlet). 31 C.F.R. § 515.573.
- **Physical presence.** As noted above, OFAC had already authorized certain types of entities to maintain a physical presence in Cuba. OFAC is expanding this authorization to include entities engaging in non-commercial activities meeting the regulatory definition of providing support for the Cuban people, entities engaging in certain humanitarian projects, and private research or educational institutions engaging in authorized transactions. Companies that are eligible to take advantage of this are also now authorized to engage in assembly operations in Cuba, provided they do not incorporate Cuban-origin components or materials. 31 C.F.R. § 515.573.

BIS has revised its applicable license exception to authorize the export or reexport of EAR99 items or of items controlled only for anti-terrorism purposes for use by persons authorized to establish and maintain a physical business presence in Cuba. 15 C.F.R. § 740.21(e).

- **Shipping.** BIS is expanding the scope of the Aircraft, Vessels, and Spacecraft license

exception to generally authorize the transportation of cargo from the U.S. to Cuba, and then on to other countries, provided the cargo does not enter Cuban commerce and departs from Cuba on the same vessel, without a license. Previously, a vessel on such a "temporary sojourn" required a license for that cargo. 15 C.F.R. § 740.15(d)

- **Case-by-case review of certain license applications.** BIS is amending its licensing policy regarding requests to export or reexport items that will enable or facilitate exports from Cuba of items produced by Cuba's private sector. To facilitate export of such goods from Cuba, BIS is adopting a case-by-case review policy. 15 C.F.R. § 746.2(b).

### **Allowing Cuban Citizens to Earn Salaries in the U.S.:**

- **Payment of salaries and sponsorship.** U.S. entities are now authorized to pay salaries (i.e., make compensation above basic living expenses) to Cuban nationals in the U.S., consistent with the terms of the specific visa. U.S. entities are also authorized to engage in the sponsorship and hiring of Cuban nationals to work in the U.S., provided that no payments are made to the Cuban government as part of the process. 31 C.F.R. § 515.571.

These changes broadly represent expansions or extensions of actions previously taken by regulators to normalize trade relations with Cuba. However, it is important to remember that the trade embargo and travel ban, which is statutory, remains in place. Also, unless the transaction is covered by a general license, a license exception, or a specific license, the trade embargo is still in full force, and the use of U.S. dollars still carries certain restrictions. U.S. persons that wish to take advantage of these liberalizations must undertake a careful review of applicable regulations to ensure compliance with these highly technical requirements.

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