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New OFAC and BIS Cuba Regulations Affect Financial Transactions, Export Licenses, and Travel

The United States Government has issued new regulations regarding its sanctions program against Cuba. These regulations, issued by the Department of the Treasury's Office of Foreign Assets Control ("OFAC") and the Department of Commerce's Bureau of Industry and Security ("BIS") in coordination with the Department of State, implement the National Security Presidential Memorandum ("NSPM"), signed by President Trump on June 16, 2017.

The regulations, which became effective November 9, 2017, prohibit financial transactions with specified Cuban entities; expand a policy of not issuing licenses to export goods to Cuban state-owned entities, while allowing for more exports to the Cuban private sector; and impose additional constraints on individuals traveling to Cuba.

Financial Transactions

The Treasury Department has prohibited all "direct financial transactions" with entities on the State Department's List of Restricted Entities and Subentities Associated with Cuba (the "Cuba Restricted List").¹ This list, published by the State Department,² includes entities under the control of, or that act for or on behalf of, Cuban military, intelligence, or security services. A person engages in a "direct financial transaction" either (i) by originating a transfer of funds whose ultimate beneficiary is on the Cuba Restricted List, or (ii) by being the ultimate beneficiary on a transfer of funds originating from an entity on the Cuba Restricted List.³ The prohibition does not apply to contracts in effect before the relevant entity was placed on the Cuba Restricted List.⁴

Export Licenses

Historically, BIS has denied license applications seeking to export or re-export goods to Cuban state-owned entities. The new regulations apply that policy to the entities on the Cuba Restricted List.⁵

¹ 31 C.F.R. § 515.209(a).

² See <https://www.state.gov/e/eb/tfs/spi/cuba/cubarestrictedlist/index.htm>.

³ See 31 C.F.R. § 515.209(a).

⁴ See 31 C.F.R. § 515.209(b).

⁵ 15 C.F.R. § 746.2. The regulations do not indicate that these changes will have any impact on already-issued licenses.

This is not an outright denial, but rather a statement of general policy to deny such license applications. BIS can still grant such license applications if it determines the transaction fits within a list of approved purposes, such as furthering the national security interests of the United States or supporting the expansion of direct telecommunications and internet access for the Cuban people.⁶

While thus further restricting commercial activity with Cuban governmental entities, BIS has acted to foster commercial activity with the Cuban private sector. In furtherance of this objective, the new regulations expand the scope of authorized exports and re-exports of goods to the Cuban private sector. While previous regulations listed the specific types of items that could be exported or re-exported, the new regulations eliminate that list and authorize the export or re-export of all goods “for use by the Cuban private sector for private sector economic activities.”⁷ There are exceptions: such goods cannot be used to “[p]rimarily generate revenue for the state,” or to “[c]ontribute to the operation of the state, including through the construction or renovation of state-owned buildings.”⁸

Traveling to Cuba

The regulations also impact persons subject to U.S. jurisdiction (such as U.S. citizens and nationals) traveling to Cuba. The new regulations, which apply to travel arrangements made on or after November 9, 2017, impact three categories of travel: People-to-People Travel, Educational Travel, and travel in connection with Support for the Cuban People. OFAC has issued a general license to allow for these categories of travel, as a result of which an individual seeking to travel to Cuba may do so without a specific license provided he or she strictly complies with the requirements of the general license.⁹

Individuals traveling to Cuba under the People-to-People travel category may now do so only through an organization that is “subject to U.S. jurisdiction” and that sponsors non-academic educational exchanges to promote people-to-people contact.¹⁰ Such travelers must be accompanied by a representative of that organization who is also subject to U.S. jurisdiction, and who is responsible to ensure that the traveler engages in a full-time schedule of activities that “enhance contact with the Cuban people, support civil society in Cuba, or promote the Cuban people’s independence from Cuban authorities,” and “a full-time schedule of educational exchange activities that result in

⁶ 82 FR 24448 (citing NSPM 3(a)(iii)(A)-(I)).

⁷ 15 C.F.R. § 740.21(b)(1).

⁸ 15 C.F.R. § 740.21(b)(1)(i).

⁹ See 31 C.F.R. § 515.574.

¹⁰ 31 C.F.R. § 515.565(b)(1).

meaningful interaction between the traveler and individuals in Cuba.”¹¹ Each traveler is required to maintain records sufficient to document that the required full-time schedule was followed. The traveler may rely upon the organization for that purpose, and the records may be demanded by OFAC.¹²

Individuals may also travel to Cuba as part of an academic program through an accredited U.S. undergraduate or graduate degree-granting institution.¹³ Under this program, individuals may engage in a number of academic endeavors in Cuba, including: taking a course offered by the U.S. institution, noncommercial academic research “for the purpose of obtaining a graduate degree,” and studying or teaching “at a Cuba academic institution[.]”¹⁴ Individuals seeking to engage in such study must “obtain a letter from the U.S. institution stating” (among other things) that the individual is a full-time student or teacher and that the “Cuba-related travel is part of a structured educational program.”¹⁵ In most cases, the course of study must be “no shorter than 10 weeks in duration[.]”¹⁶

There are additional restrictions if an individual visiting Cuba under one of these academic programs wants to travel within Cuba separate and apart from the academic program.¹⁷ Such travel within Cuba must be done with an organization subject to U.S. jurisdiction, and the traveler must be accompanied by a representative of that organization. If a representative of the organization wishes to travel alone, that representative must have a letter from the organization stating that he or she is acting on behalf of the organization.¹⁸

Additionally, the regulations continue to allow for certain trips classified as “Support for the Cuban People Travel.”¹⁹ Such travel may be done individually (i.e., not as part of an organizational trip), but must be in conjunction with an organization that focuses on human rights, a peaceful transition to democracy, or the promotion of a strengthened civil society in Cuba.²⁰ Additionally, traveling to Cuba under this section requires a full-time schedule of activities that “[r]esult in meaningful interaction with individuals in Cuba” and “[e]nhance contact with the Cuban people, support civil society in Cuba, or promote the Cuban people’s independence from Cuban authorities[.]”²¹ Those traveling

¹¹ See 31 C.F.R. § 515.565(b)(2)-(4).

¹² See 31 C.F.R. § 515.565(b)(6).

¹³ See 31 C.F.R. § 515.565(a)(1).

¹⁴ See 31 C.F.R. § 515.565(a)(1)(i)-(iv).

¹⁵ See 31 C.F.R. § 515.565(a)(1)(i).

¹⁶ See 31 C.F.R. § 515.565(a)(1)(i)-(iv).

¹⁷ See 31 C.F.R. § 515.565(a)(2).

¹⁸ See 31 C.F.R. § 515.565(a)(2).

¹⁹ 31 C.F.R. § 515.574.

²⁰ 31 C.F.R. § 515.574(1).

²¹ See 31 C.F.R. § 515.574(a)(2).

under the Support for the Cuban People general license “must retain specific records” of any transactions entered into as part their travel.²²

The new regulations provide examples of trips that would or would not be authorized by the general license. In one example, a group of friends travels to Cuba to help build a school with a recognized non-governmental organization, renting bikes to visit art museums in their spare time. In the second example, an individual travels to Cuba and rents a bike to see the beaches and visit local shops to speak with local business owners. According to OFAC, the first is allowed under the general license, while the second is not, as it does not “promote independent activity intended to strengthen civil society in Cuba.”²³

Individuals who seek to rely on this general license to travel to Cuba alone or with friends or family should proceed with caution, as the terms “meaningful interaction,” “enhance contact,” “support civil society,” and “promote the Cuban people’s independence” lack precision and could be subject to differing interpretations. Traveling with a reputable organization would be more prudent.

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Please feel free to contact any of the persons listed below if you have any questions on this important development:

²² See 31 C.F.R. § 515.574 (Note 1 to paragraph (a)); 31 C.F.R. § 501.601; 31 C.F.R. § 501.602.

²³ See Examples 2, 3 to 31 C.F.R. § 515.574.

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