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## The US Revises Commercial and Travel Sanctions Against Cuba

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On November 9, 2017, the US Departments of the Treasury and Commerce implemented President Trump's June 2017 National Security Presidential Memorandum (NSPM) that was [designed to tighten restrictions on individual travel to Cuba and on dealings with Cuban military-related entities](#). The changes by the US Departments of the Treasury and Commerce formalize a shift from the Obama Administration's policy of easing sanctions as part of an effort to normalize US relations with Cuba, yet many of the prior authorizations generally remain intact.

### Significant Limits on Financial Transactions

As part of the regulatory changes, the US Department of the Treasury Office of Foreign Assets Control (OFA) added a new section to the Cuban Assets Control Regulations (CACR) prohibiting "direct financial transactions" with entities that the Secretary of State determines to be "under the control of, or act for or on behalf of, the Cuban military, intelligence, or security service or personnel" and that would disproportionately benefit from such direct financial transactions at the expense of the Cuban people or private enterprise in Cuba.<sup>1</sup>

Concurrently, the State Department published its List of Restricted Entities and Subentities Associated with Cuba (Cuba Restricted List) that initially identifies 180 restricted entities.<sup>2,3</sup> The list includes 84 hotels, two tourist agencies, five holding companies, five marinas, and 10 stores, among other entities. However, businesses may continue existing commercial transactions with a listed entity if their transactions were agreed to before any such entity was added to the Cuba Restricted List (i.e., prior to November 9, 2017).<sup>4</sup> Because entities on the Cuba Restricted List can play important roles in many sectors of the Cuban economy, these new prohibitions on direct financial transactions with such entities can lead to complicated compliance issues for US companies that do business in Cuba. US companies should also exercise due diligence in conducting business with non-listed counterparties, particularly those that may have some connection to the Cuban military, intelligence, or security service, because the Secretary of State has the authority to expand the Cuba Restricted List without advance notice.

## **Tougher Licensing Policy**

In addition, the Department of Commerce's Bureau of Industry and Security (BIS) has established a general policy of denial for export applications to export or re-export goods to the entities on the Cuba Restricted List unless the transactions are determined to be consistent with the NSPM.<sup>5</sup> The NSPM sets forth six policy objectives<sup>6</sup> and states that the new sanctions do not prohibit transactions that the Secretary of the Treasury or the Secretary of Commerce, in coordination with the Secretary of State, determines are consistent with these policy objectives. Thus far, the extent to which the Secretaries will exempt otherwise prohibited transactions based on policy objectives is unclear.

In a change that may provide US companies greater commercial opportunities to engage with Cuba's private sector, BIS has also expanded the preexisting License Exception Support for the Cuban People (SCP).<sup>7</sup> Prior to the latest amendments, the SCP identified certain types of items that were eligible for export or re-export to private-sector actors in Cuba. In contrast, the amended regulations create a single provision authorizing the export and re-export to Cuba of items, without specifying types, for use by the Cuban private sector for private-sector economic activities,<sup>8</sup> so long as the items are not used to primarily generate revenue for the state or to contribute to the operation of the state, including through the construction or renovation of state-owned buildings. Navigating this exception may be challenging due to difficulties in determining who the ultimate source of US exports will be.

## **New Travel Restrictions**

The CACR has also been amended to limit the Obama-era authorizations concerning individual “people-to-people” travel. Individuals traveling to Cuba pursuant to the people-to-people general license for educational exchange activities must now do so under the auspices of an organization that is subject to US jurisdiction and be accompanied by an employee, paid consultant or agent of that organization.<sup>9</sup> Further, travelers relying on the general license for support of the Cuban people must engage in a full-time schedule of activities related to enhancing Cuban civil society and independence from the Cuban authorities.

These travel restrictions limit, rather than eliminate altogether, two of the 12 general licenses for travel put in place under the Obama Administration: those for “educational travel” and “travel for support for the Cuban people.”<sup>10</sup> The two affected general licenses for travel continue to exist in a narrower form. The other 10 preexisting general licenses for travel, which remain intact, relate to (1) family visits; (2) official business of the US government, foreign governments, and certain intergovernmental organizations; (3) journalistic activity; (4) professional research and professional meetings; (5) religious activities; (6) public performances, clinics, workshops, athletic and other competitions, and exhibitions; (7) humanitarian projects; (8) activities of private foundations or research or educational institutes; (9) exportation, importation, or transmission of information or information materials; and (10) certain authorized export transactions.

## **Miscellaneous Changes**

On October 17, 2016, the Obama Administration amended the CACR to exclude certain categories of individuals from the definition of “prohibited officials of the Government of Cuba” under the

CACR.<sup>11</sup> The new regulations again define “prohibited officials” to include all individuals who were subject to the definition prior to October 17, 2016.<sup>12</sup> BIS has made corresponding revisions to exclude these individuals from several license exceptions.<sup>13</sup> The “prohibited officials” represent a broad range of individuals, including ministers, members of the national and provincial assemblies, employees of the Ministry of Interior and Ministry of Defense, editors of state-run media organizations, and members of the Supreme Court. US companies are prohibited from conducting business with “prohibited officials” and these individuals are outside the scope of existing general licenses, such as the above-mentioned SCP general license. Notably, neither the new regulations nor the corresponding FAQs specify whether US companies already engaged in transactions with now “prohibited officials” will be allowed any “grace period” to wind down their transactions.

### **Consequences and Compliance Challenges for US Companies**

The shifting Cuba sanctions regime, as the administration implements the NSPM, creates significant compliance challenges for US companies that participate in Cuba-related transactions. We stand ready to provide advice on these and other sanction-related issues.

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<sup>1</sup> “Direct Financial Transactions” are defined as transactions in which a person acts as the originator on a transfer of funds—including through wire transfer, credit card, check, or payment of cash—whose ultimate beneficiary is on the Cuba Restricted List, or acts as the ultimate beneficiary on a transfer of funds whose originator is on the Cuba Restricted List. 82 Fed. Reg. at 51,999 (§ 515.209(a)).

<sup>2</sup> [Department of State, Cuba Restricted List](#).

<sup>3</sup> [Fact Sheet: Treasury, Commerce, and State Implement Changes to the Cuba Sanctions Rules](#).

<sup>4</sup> Section 515.209(c) of the CACR provides that the prohibition on financial transactions “does not apply to any transactions related to commercial engagements that involve direct financial transactions with an entity or subentity on the Cuba Restricted List, provided those commercial engagements were in place prior to the date that entity or subentity was added to the Cuba Restricted List as published in the Federal Register.”

<sup>5</sup> Before November 9, 2017, BIS evaluated export license applications based on a presumption of approval with respect to certain products, including certain medicine and agricultural commodities. The new regulations amend Section 746.2(b)(3)(i) of the Export Administration Regulations (EAR) by adding Note 2, which provides that “BIS generally will deny applications to export or reexport items for use by entities or subentities identified by the Department of . . . unless such transactions are determined to be consistent with sections 2 and 3(a)(iii) of the NSPM.”

<sup>6</sup> NSPM, Sections 2 and 3(a)(iii) (June 16, 2017). The policy objectives are: “(a) End economic practices that disproportionately benefit the Cuban government or its military, intelligence, or security agencies or personnel at the expense of the Cuban people. (b) Ensure adherence to the statutory ban on tourism to Cuba. (c) Support the economic embargo of Cuba described in section 4(7) of the

Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (the embargo), including by opposing measures that call for an end to the embargo at the United Nations and other international forums and through regular reporting on whether the conditions of a transition government exist in Cuba. (d) Amplify efforts to support the Cuban people through the expansion of internet services, free press, free enterprise, free association, and lawful travel. (e) Not reinstate the “Wet Foot, Dry Foot” policy, which encouraged untold thousands of Cuban nationals to risk their lives to travel unlawfully to the United States. (f) Ensure that engagement between the United States and Cuba advances the interests of the United States and the Cuban people. These interests include: advancing Cuban human rights; encouraging the growth of a Cuban private sector independent of government control; enforcing final orders of removal against Cuban nationals in the United States; protecting the national security and public health and safety of the United States, including through proper engagement on criminal cases and working to ensure the return of fugitives from American justice living in Cuba or being harbored by the Cuban government; supporting United States agriculture and protecting plant and animal health; advancing the understanding of the United States regarding scientific and environmental challenges; and facilitating safe civil aviation.”

<sup>7</sup> See Section 740.21 of the EAR.

<sup>8</sup> However, eligible items are limited to those that are designated as EAR99 or controlled only for anti-terrorism reasons on the Commerce Control List.

<sup>9</sup> The prior authorization for individual “people-to-people” travel involving educational exchange activities will only continue in instances where the traveler has already completed at least one travel-related transaction before the President's June 9, 2017, announcement.

<sup>10</sup> See §§515.565, 515.574

<sup>11</sup> 81 Fed. Reg. 71372.

<sup>12</sup> “Prohibited Officials” means ministers and vice-ministers; members of the Council of State and the Council of Ministers; members and employees of the National Assembly of People's Power; members of any provincial assembly; local sector chiefs of the Committees for the Defense of the Revolution; director generals and sub-director generals and higher of all Cuban ministries and state agencies; employees of the Ministry of the Interior (MININT); employees of the Ministry of Defense (MINFAR); secretaries and first secretaries of the Confederation of Labor of Cuba (CTC) and its component unions; chief editors, editors, and deputy editors of Cuban state-run media organizations and programs, including newspapers, television, and radio; and members and employees of the Supreme Court (Tribunal Supremo Nacional). 82 Fed. Reg. at 51,999-52,000 (§ 515.337).

<sup>13</sup> See §§ 740.12(a)(2)(v)(A), 740.19(c)(2)(i), and 740.21(d)(4)(ii) of the EAR.

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