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CUBA

This BNA Insights article by Louis K. Rothberg is a companion article to Carl A. Valenstein's BNA Insight into doing business in Cuba following the normalization of U.S.-Cuba relations, published in International Trade Daily Feb. 23 (35 ITD, 2/23/16). Mr. Rothberg provides detailed summaries of new U.S. policies for doing business in Cuba.

CUBA: A U.S. Company's Guide to Statutory and Regulatory Restrictions on Doing Business in Cuba One Year after the Announcement of a New U.S.-Cuba Policy

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Statutory Restrictions Limit the Extent to Which President Obama Can Further Normalize Cuba Trade

Several U.S. statutes currently in effect constrain the ability of President Barack Obama—acting alone without Congress—to further substantially ease or lift the current U.S. embargo against Cuba.

Congress specifically enacted sanctions on Cuba through provisions in such legislation as the Cuban Democracy Act of 1992 (CDA, P.L. 102-484, Title XVII), the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (P.L. 104-114), and the Trade Sanctions Reform and Export Enhancement Act of 2000 (TSRA, P.L. 106-387, Title IX).

Among its sanctions, the CDA prohibits U.S. companies' foreign subsidiaries from engaging in trade with Cuba, and prohibits entry into the U.S. for any seagoing

vessel to load or unload general freight if it has been involved in trade with Cuba within the previous 180 days.

The LIBERTAD Act codified the economic embargo, including all restrictions under the Treasury Department's Office of Foreign Asset and Control's (OFAC) Cuba Asset and Control Regulations (CACR, 31 CFR Part 515), although the president arguably retains broad authority to amend these regulations. Nevertheless, as set forth in the LIBERTAD Act, the president cannot eliminate the embargo regulations without making a determination that a transition government is in power in Cuba. Raul Castro, is the current leader in Cuba, which is not considered a transition government because Raul was appointed by his brother Fidel Castro, and not democratically elected.

The LIBERTAD Act states that it is the sense of the Congress that the satisfactory resolution of property claims by a Cuban government recognized by the U.S. remains an essential condition for the full resumption of trade and diplomatic relations between the U.S. and Cuba. U.S.-Cuba talks on the issue of claims amounting to billions of U.S. dollars held by U.S. nationals for property expropriated or nationalized by the Castro regime over the past 55 years began in December 2015. The satisfactory resolution of these long outstanding property claims held by U.S. nationals likely will take several years to work out and then implement fully.

While TSRA authorizes certain U.S. commercial exports to Cuba, it also includes prohibitions on U.S. credit extensions to Cuba, such as financing for purchases, and requires "payment of cash in advance" or third-country financing for the exports. The interpretation of "cash in advance" has shifted from a requirement of "cash before shipment" to "cash before transfer of title and control." The TSRA also prohibits tourist travel to Cuba.

We do not foresee the present Republican-controlled Congress as realistically amending or repealing in the 2016 election year any of the above statutes so as to allow lifting of the embargo conditions that these statutes impose on U.S.-Cuba relations.

Most Investments by U.S. Persons in Cuba Remain Prohibited Despite 2015 Relaxation

Other than the narrow 2015 steps taken toward relaxing the embargo with Cuba as discussed below, under current U.S. law a U.S. person or entity (and a non-U.S. entity but which is owned or controlled by a U.S. person) is prohibited from directly engaging in general commercial activity in or with Cuba or from taking any ownership interest in any property in which Cuba has an interest.

However, even before the 2015 liberalization steps, under the so called "49/49 Rule," a U.S. person could have made an investment in a non-Cuban foreign entity that passively engages in commercial dealings in or with Cuba if:

1. the non-Cuban foreign entity is not controlled by U.S. persons; and
2. a majority of the revenues of the foreign company are not derived from Cuba.

The "legal basis" for the 49/49 Rule is informal and not stated in OFAC regulation and is said to have originated with a 1994 letter from OFAC, signed by Richard Newcomb, former director of OFAC. In the letter, Newcomb reportedly stated:

"A U.S. company or individual may make a secondary market investment in a third country company doing business in Cuba provided that the investment does not result in control in fact of the company by the U.S. investor. A secondary market investment that falls short of a controlling interest is not prohibited."

The 1994 opinion letter also reportedly states that acquiring control of a company that has ongoing business dealings with Cuba would require a license from OFAC, and "injecting capital into a company in a manner supporting its Cuban transactions is prohibited to persons subject to the jurisdiction of the United States unless those transactions are authorized by OFAC or are exempt from regulation." Therefore, a U.S. person may not make even a minority non-controlling investment in a company if the investment will be used to support the company's Cuban business.

OFAC is reported to have recently said the 1994 opinion continues to reflect OFAC's current enforcement policy thinking.

There is presently no definition in OFAC's Cuban regulations for the meaning of "own or control" a company that engages in commercial activities with Cuba under the 49/49 Rule. For purposes of the Iran regulations (i.e., 31 CFR § 560.215), OFAC has said an entity is "owned or controlled" by a U.S. person if the U.S. person: (i) holds a 50 percent or greater equity interest by vote or value in the entity; (ii) holds a majority of seats on the board of directors of the entity; or (iii) "otherwise" controls the actions, policies, or personnel decisions of the entity.

The second test of the 49/49 Rule is "majority of revenues." Neither U.S. regulations nor OFAC opinions have defined or clarified what constitutes a "majority of revenues" for these purposes.

Thus, a U.S. investor's transactional opportunities to participate broadly in Cuba economic activity in 2016 will still require an OFAC specific license, unless such investments are within the somewhat ambiguous and informal "safe harbor" parameters of the 49/49 Rule.

Hence generally, if the conditions of the 49/49 Rule are satisfied, and a U.S. person is willing to accept some risk of possible exposure to an OFAC-unlicensed transaction violation, such U.S. person may invest in non-Cuban foreign entities that engage in passive commercial activities in or with Cuba of which a majority of the revenues of the foreign company are not derived from Cuba, without express approval from the U.S. government. OFAC has not specifically announced publicly a new licensing policy for investments by a U.S. person in a foreign entity that engages in direct and substantial commercial activity in or with Cuba.

Cuba Transactions by Foreign Subsidiaries Owned or Controlled by U.S. Persons

Even under the revised OFAC Cuba sanctions regulations announced in 2015, U.S. persons' foreign subsidiaries continue to remain subject to OFAC jurisdiction for purposes of the OFAC Cuba sanctions regulations.

The terms "person subject to the jurisdiction of the United States" and "U.S. person" for purposes of the OFAC Cuba sanctions include: (a) any individual, wherever located, who is a citizen or resident of the U.S.; (b) any person within the U.S.; (c) any corporation, partnership, association, or other organization organized under the laws of the United States or of any State, ter-

ritory, possession, or district of the U.S.; and (d) any corporation, partnership, association, or other organization, wherever organized or doing business, that is owned or controlled by persons specified in paragraphs (a) or (c). Thus, a U.S. person's foreign subsidiary organized and operating outside of the U.S., nonetheless is subject to U.S. Cuba jurisdiction (see 31 CFR § 515.329(d)).

This in turn means that such foreign entity is a U.S. person for OFAC purposes concerning Cuba, and must deal with the OFAC licensing policy still valid today under the requirements of the OFAC Cuba sanctions regulations regarding such foreign subsidiaries, as contained in 31 CFR § 515.559, which provides in pertinent part as follows:

No specific licenses will be issued for transactions between U.S.-owned or controlled firms in third countries and Cuba for the exportation to Cuba of commodities unless, in addition to meeting all other requirements noted below, one or more of the following conditions are satisfied: (1) The contract underlying the proposed transaction was entered into prior to October 23, 1992; (2) The transaction is for the exportation generally of medicine or medical supplies from a third country to Cuba; (3) The transaction is for the exportation of telecommunications equipment from a third country, when the equipment is determined to be necessary for efficient and adequate telecommunications service between the U.S. and Cuba.

This regulation continues to narrowly restrict what a foreign subsidiary of a U.S. person can do with respect to Cuba trade. Specific licenses may be issued in appropriate cases for certain categories of transactions between U.S.-owned or controlled firms in third countries and Cuba, where local law requires, or policy in the third country favors, trade with Cuba.

The categories for which OFAC may in its discretion grant a specific license to a foreign subsidiary of a U.S. person include exportation to Cuba of commodities produced in the authorized trade territory where the foreign subsidiary operates, provided: (i) the commodities to be exported are non-strategic; (ii) U.S.-origin technical data (other than maintenance, repair and operations data) will not be transferred; (iii) if any U.S.-origin parts and components are included therein, such inclusion has been authorized by the Department of Commerce; (iv) if any U.S.-origin spares are to be reexported to Cuba in connection with a licensed transaction, such re-export has been authorized by the Department of Commerce; (v) no U.S. dollar accounts are involved; and (vi) any financing or other extension of credit by a U.S.-owned or controlled firm is granted on normal short-term conditions which are appropriate for the commodity to be exported.

In brief, U.S.-owned or controlled firms in third countries remain significantly constrained in the activities they may conduct with Cuba due to the OFAC licensing restrictions imposed by 31 CFR § 515.559.

January 2015 OFAC Relaxation of Cuba Sanctions

Effective Jan. 16, 2015, the Office of Foreign Assets Control revised the Cuba Assets Control Regulations (CACR, 31 CFR Part 515) to relax some restrictions. Here is a summary of some of the January 2015 key changes in the OFAC regulations.

Travel to Cuba for 12 Authorized Purposes—Not Tourism. OFAC amended CACR sections 515.533, 515.545, 515.560-515.567, and 515.574-515.576 to authorize by general license certain travel-related transactions and other transactions incident to activities within the 12 existing travel categories in OFAC's regulations—such as for educational activities (including people-to-people travel), journalistic and religious activities, professional meetings, and humanitarian projects. An OFAC general license is a self-executing regulatory authorization not requiring an application filed with OFAC for case-by-case specific licensing. No further permission from OFAC is now required to engage in transactions by a person who meets all criteria in a travel general license.

Individuals wishing to engage in activities that may fall within the scope of a general license should review the relevant general licenses contained in the CACR to determine whether their travel-related transactions are covered by such general licenses. The general license authorizations contain certain restrictions appropriate to each category of activities and must be complied with. Each traveler who relies on a general license for travel must retain specific records for five years indicating that the travel was covered by the terms of a general license. Mere failure to keep such records is an OFAC violation, even when the underlying travel itself was in fact authorized by the terms of the new general license used as a basis to travel.

Persons subject to U.S. jurisdiction who wish to engage in any travel within the 12 categories of activities specified in the CACR who do not meet the requirements of a general license will need to apply for a specific license from OFAC.

Travel by persons subject to U.S. jurisdiction for general tourist activities is not authorized by any of these changes, because general tourism is prohibited by statute. Consumers who are U.S. persons subject to U.S. jurisdiction who see advertisements for tourist-like travel to Cuba should ascertain under which of the new general licenses, if any, the tour operator asserts such travel as described in the advertisement is now authorized.

Cuban Travel Services. OFAC amended CACR section 515.572 to permit persons subject to U.S. jurisdiction, including travel agents and airlines, to provide authorized travel and carrier services, for authorized travelers and certain entities to forward authorized remittances, without the need for specific licenses from OFAC. Prior to these changes, such services required an OFAC-specific license.

Financial Transactions, Banking Credit and Debit Cards. OFAC amended CACR section 515.560 and added a new section 515.584 to authorize the use of U.S. credit and debit cards in Cuba for travel-related and other transactions and to allow U.S. financial institutions to enroll Cuban merchants processing of such transactions.

U.S. travelers will still not find convenient banking or credit card services presently available in Cuba compared with those they are used to in other countries. At this writing, no major U.S. bank or financial institutions have moved into the Cuba market. Thus, authorized travelers to Cuba presently need to carry actual paper currency, such as dollars or Euros.

Eliminate Per-Diem Cap. OFAC also amended section 515.560 to eliminate the former dollar per-diem limitation on authorized travelers' spending in Cuba.

Imports of Cuban Cigars and Alcohol. Authorized travelers who return from Cuba are now authorized to import into the U.S. no more than \$400 worth of goods from Cuba—including up to \$100 in alcohol or tobacco products. This, however, does not mean that a U.S. tourist returning directly from another country to the U.S. may bring in Cuban-origin cigars purchased in that country—such an import of Cuban items remains prohibited.

Telecommunications. OFAC amended section 515.542 to generally authorize transactions that establish mechanisms to provide commercial telecommunications services linking third countries and Cuba and within Cuba.

OFAC amended section 515.578 to authorize persons subject to U.S. jurisdiction to provide additional services incident to Internet-based communications and related communications to certain exportations and re-exportations of communications items.

Vessels Calling on Cuba then Entering the U.S. OFAC amended section 515.550 to authorize vessels to enter the U.S. after engaging in certain narrow types of trade, but not all trade, with Cuba. Prior regulations in general prohibited entry of vessels that had called on Cuba within 180 days of entry into the U.S.

January 2015 BIS Relaxation of Cuba Sanctions

The Bureau of Industry and Security revised the Export Administration Regulations to relax some, but not all, EAR export license restrictions. Here is a summary of some of the key changes in the new EAR regulations.

New EAR License Exception Support for the Cuban People (SCP). BIS created a new License Exception Support for the Cuban People (SCP) in a new regulation, 15 CFR § 740.21 of the EAR. Prior to creation of this new license exception, the export or reexport to Cuba of items now eligible under this new license exception generally required a specific individual license from BIS.

License Exception SCP authorizes the export and re-export of commercially sold or donated:

- Building materials, equipment, and tools for use by the private sector to construct or renovate privately owned buildings, including privately owned residences, businesses, places of worship, and buildings for private-sector social or recreational use;
- Tools and equipment for private-sector agricultural activity; and
- Tools, equipment, supplies, and instruments for use by private-sector entrepreneurs.

This provision will, for example, allow the export of such items to *private-sector* entrepreneurs, such as auto mechanics, barbers and hairstylists, and restaurateurs operating out of their homes or yards. But OFAC rules will prevent the sale of these items on any terms other than for cash paid in full at or before the time title transfers in the SCP goods sold.

Items eligible for export and reexport to Cuba pursuant to this portion of License Exception SCP are limited

to those designated as EAR99 or controlled on the Commerce Control List (CCL) only for anti-terrorism (AT) reasons.

Expansion of License Exception Consumer Communications Devices (CCD). BIS revised the License Exception Consumer Communications Devices (CCD) in 15 CFR § 740.19 of the EAR to remove the donation requirement and to update the list of eligible items. Prior to publication of this new rule, License Exception CCD authorized the export or reexport only of donated items, which limited the incentive to send these items to Cuba. This rule removes the donation requirement in License Exception CCD, thereby allowing export or reexport of eligible items for commercial sale or donation to eligible recipients in Cuba.

Expansion of License Exception Gift Parcels and Humanitarian Donations (GFT). License Exception Gift Parcels and Humanitarian Donations (GFT) in 15 CFR § 740.12 of the EAR has removed the note that excludes from eligibility consolidated shipments of multiple parcels for delivery to individuals residing in a foreign country. Removing the note allows export and reexport of multiple gift parcels in a single shipment pursuant to License Exception GFT. All the other terms and conditions of the license exception remain unchanged.

New Licensing Policy for Environmental Protection. BIS amended the licensing policy for Cuba in 15 CFR § 746.2 of the EAR to add a general policy of approval for licenses for exports and reexports of items necessary for the environmental protection of U.S. and international air quality, waters, and coastlines (including items related to renewable energy or energy efficiency).

September 2015 Relaxation of Sanctions

Effective Sept. 21, 2015, the Office of Foreign Assets Control and Bureau of Industry and Security amended their respective Cuban Sanctions Regulations to further relax Cuban sanctions first announced by the president on Dec. 17, 2014, and in the January 2015 regulatory amendments summarized above.

OFAC and BIS coordinated their actions to further facilitate travel to Cuba for authorized purposes (including authorizing by general license the provision of carrier services by seagoing vessel), expand the telecommunications and internet-based services general licenses, authorize certain persons subject to U.S. jurisdiction to establish a physical presence in Cuba to facilitate authorized transactions i.e. with an office or warehouse, allow certain additional persons subject to U.S. jurisdiction to open and maintain bank accounts in Cuba to use for authorized purposes, allow certain additional financial transactions, authorize all persons subject to U.S. jurisdiction to provide goods and services to Cuban national individuals located outside of Cuba, and allow a number of other activities related to, among other areas, legal services, imports of gifts sent to the U.S., and educational activities.

Provided below is a snapshot of some of these key September 2015 revisions.

OFAC Amendments

Transportation, Travel and Related Services. OFAC amended 31 CFR § 515.572 to authorize persons subject to U.S. jurisdiction to provide carrier services by seago-

ing vessel, without the need for specific licenses from OFAC, and to add an authorization to provide certain lodging services aboard such vessels in connection with such transportation. This amendment added seagoing vessel service to aircraft carrier service which was authorized earlier. OFAC also added language to § 515.572 to clarify which categories of persons may be transported between Cuba and the U.S. Such voyages also calling at third country ports en route to or from Cuba or the U.S. are not authorized.

OFAC amended 31 CFR § 515.560 to allow all authorized travelers to open and maintain bank accounts in Cuba in order to access funds while located in Cuba for authorized transactions, and to close such accounts.

Telecommunications and Internet-based Services. OFAC amended 31 CFR § 515.542 and § 515.578 to authorize persons subject to U.S. jurisdiction to establish and maintain a business presence in Cuba, including through subsidiaries, branches, offices, joint ventures, franchises, and agency or other business relationships with any Cuban individual or entity, to provide authorized telecommunications and internet-based services. OFAC also authorized persons subject to U.S. jurisdiction to enter into certain licensing agreements and to market such services.

Physical Office or Other Presence in Cuba. OFAC amended 31 CFR § 515.573 to authorize certain persons subject to U.S. jurisdiction to establish a physical presence, such as an office or other facility, in Cuba, to facilitate certain authorized transactions. This authorization covers the following: news bureaus; exporters of goods authorized for export pursuant to sections 515.533 or 515.559; providers of authorized mail and parcel transmission services and cargo transportation services; providers of telecommunications or internet-based services; entities organizing or conducting certain educational activities; religious organizations; and providers of travel and carrier services. In addition, OFAC is authorizing these individuals and entities to open and maintain bank accounts at financial institutions in Cuba for use for authorized transactions, and to close such accounts.

Educational Activities. OFAC expanded the general license in 31 CFR 515.565 to allow additional educational activities that are authorized in other sanctions programs administered by OFAC, including the provision of standardized testing services and internet-based courses to Cuban nationals, as well as to authorize U.S. and Cuban universities to engage in academic exchanges and joint non-commercial academic research.

Ordinarily Incident Transactions to Those Authorized by a General or Specific License. OFAC issued interpretive guidance in new 31 CFR 515.421 to clarify that, with certain exceptions, transactions ordinarily incident to a licensed transaction and necessary to give effect thereto are also authorized. A specific example in this section clarifies that ordinarily incident transactions include payments made using online payment platforms for authorized transactions.

BIS Amendments

Expansion of EAR License Exception Aircraft, Vessels and Spacecraft (AVS). BIS expanded the availability of EAR License Exception Aircraft, Vessels and Spacecraft (AVS, 15 CFR § 746.2(a)(1)(x)) to make License Excep-

tion AVS fully available for Cuba. Thus, new paragraph (d) was added to License Exception AVS to allow certain categories of seagoing vessels, when engaged in specified activities eligible for the license exception when destined for Cuba.

The types of vessels and activities eligible for temporary sojourn to Cuba are as follows:

- (1) Cargo vessels for hire for use in the transportation of items.
- (2) Passenger vessels for hire for use in the transportation of passengers and/or items. Vessels used to transport both passengers and items to Cuba may transport automobiles only if the export or reexport of the automobiles has been authorized by a separate license issued by BIS (i.e., not authorized by license exception). The export or reexport to Cuba of personally owned vehicles is not normally necessary to support authorized travel. However, if the need arises, the exporter or reexporter may submit a license application to BIS for review pursuant to the licensing policy in § 746.2 of the EAR.
- (3) Recreational vessels destined for Cuba that are used in connection with travel authorized by OFAC.

A vessel exported under license exception AVS can remain in Cuba for no more than 14 consecutive days before it departs for a country to which it may be exported without a license or the United States. BIS says it selected the time periods of seven days for aircraft and 14 days for vessels based on its experience in licensing aircraft and vessels for temporary sojourn to Cuba. The vast majority of such licenses were for stays of seven days or less for aircraft and 14 days or less for vessels.

Expansion of EAR License Exception Support for the Cuban People (SCP). This rule revises § 740.21(b) and (d)(1) of the EAR to remove a requirement that items must be sold or donated when exported or reexported to authorized end-users in Cuba under License Exception Support for the Cuban People (SCP). Now, leased or loaned items are also authorized.

New paragraph (e) to License Exception SCP authorizes the export and reexport to Cuba of certain items for use by U.S. persons to establish, maintain, or operate a physical presence in Cuba.

New paragraph (f) to License Exception SCP authorizes certain temporary (not to exceed one year) exports and reexports to Cuba of EAR99 items and items controlled on the CCL only for anti-terrorism reasons. Paragraph (f) authorizes exports and reexports of the following:

- Commodities and software as tools of trade for use by the exporters or employees of the exporters to install, service or repair items that are subject to the EAR and that have been exported or reexported to Cuba under a license or license exception, or foreign-origin items that are not subject to the EAR but are owned and used exclusively by individuals or private sector entities but not the Cuban Government, the Cuban Communist Party or certain officials thereof in Cuba;
- Technology as tools of trade for use by certain persons for the installation, servicing or repair of items that are subject to the EAR and that have been exported or reexported to Cuba under a license or license exception, or foreign-origin items that are not subject to the EAR but are owned and

used exclusively by individuals or private sector entities but not the Cuban Government, the Cuban Communist Party or certain officials thereof in Cuba;

- Kits of replacement parts or components for items that have been exported or reexported to Cuba under a license or license exception, or foreign-origin items that are not subject to the EAR but are owned and used exclusively by individuals or private sector entities but not the Cuban Government, the Cuban Communist Party or certain officials thereof in Cuba;
- Commodities and software for exhibition or demonstration at trade shows or to parties eligible to receive items under License Exception SCP; and
- Containers that are necessary for shipment of commodities being exported or reexported to Cuba under a license or license exception.

EAR De Minimis Level for Cuba Raised from 10 Percent to 25 Percent for U.S.-Origin Controlled Content

On April 14, 2015, the president submitted to Congress the statutorily required report indicating the Administration's intent to rescind Cuba's State Sponsor of Terrorism designation, including the certification that Cuba has not provided any support for international terrorism during the previous six months; and that Cuba has provided assurances that it will not support acts of international terrorism in the future. The U.S. Secretary of State then made the final decision to rescind Cuba's designation as a State Sponsor of Terrorism, which became effective on May 29, 2015.

As a result, on July 22, 2015, the Commerce Department amended the Export Administration Regulations to remove references to Cuba as a State Sponsor of Terrorism and to remove anti-terrorism (AT) controls on Cuba.

The EAR applies to all dual use exports from the U.S. and to *foreign* manufactured items located outside of the U.S. that contain more than a de minimis amount of controlled U.S.-origin content. These items are said to be "subject to the EAR"—meaning the items are subject to U.S. Commerce Department licensing jurisdiction (see EAR § 734.3). Thus non-U.S. Persons located outside of the U.S. having custody or control items "subject to the EAR" must comply with the license requirements of the EAR.

For most items, the de minimis level is 10 percent if the destination of the foreign-made item is in EAR Country Group E:1 (which now consists of Iran, North Korea, Sudan and Syria) and 25 percent if the destination is elsewhere.

On July 22, 2015, the key EAR amendment removed Cuba from Country Group E:1 and thus raised the de minimis level to 25 percent for most foreign manufactured items destined for Cuba. This means that an item manufactured in France that contains 15 percent by value of U.S.-origin controlled content is no longer "subject to the EAR" or in other words now is beyond the jurisdiction of the Commerce Department, and thus such item may be exported from France by a non-U.S. Person to Cuba without an EAR reexport license—whereas before July 22, 2015, such item was "subject to the EAR" and thus that same transaction would have required an EAR reexport license.

Nevertheless, Cuba continues to remain subject to a comprehensive U.S. embargo and, as specified in EAR § 746.2(a), a Commerce Department license is still required to export or reexport to Cuba any item "subject to the EAR" unless authorized by an EAR license exception. Only those EAR license exceptions listed in EAR § 746.2(a) may be used to export or reexport to Cuba. These requirements of § 746.2(a) apply to all items "subject to the EAR," including EAR99 items and items that are controlled on the Commerce Control List (CCL) only for AT reasons. In addition, OFAC also continues to maintain broad sanctions against Cuba.

Cuba continues to remain a prohibited destination under the International Traffic in Arms Regulations (ITAR, 22 CFR Parts 120-130). Consequently, foreign-made items destined for Cuba that incorporate any amount whatever of U.S.-origin ITAR-controlled defense articles or technical data cannot be exported or reexported to Cuba (see 22 CFR § 126.1(a)).

Foreign-made items destined for Cuba that incorporate U.S.-origin ECCN "500 or 600 series" content that were transferred from ITAR jurisdiction to Commerce Department jurisdiction due to Export Control Reform, continue to be "subject to the EAR" regardless of the level of U.S.-origin content, i.e., there is no de minimis for these items when destined for Cuba. To maintain this exclusion with respect to Cuba, the amended EAR adds Country Group E:2 to the list of destinations (Country Group E:1 and the People's Republic of China) subject to that exclusion.

January 2016 OFAC Relaxation of Cuba Sanctions

Effective Jan. 27, 2016, the Office of Foreign Assets Control revised the Cuba Assets Control Regulations (CACR, 31 CFR Part 515) to relax some restrictions. Here is a summary of some of the January 2016 key changes in the OFAC regulations.

Non-Agricultural Export Trade Financing Authorized. OFAC amended 31 CFR § 515.533(a) to remove the former limitations on payment and financing terms for all exports from the U.S. or reexports of 100 percent U.S.-origin items from a third country that are licensed or otherwise authorized by the Department of Commerce, other than exports of agricultural items or commodities. As required by the Trade Sanctions Reform and Export Enhancement Act of 2000, 22 U.S.C. 7207(b)(1), such agricultural exports continue to be authorized only if one of the payment and financing terms specified in the statute are used.

OFAC also amended 31 CFR § 515.584 to add an authorization for depository institutions to provide financing for such authorized non-agricultural exports and making a conforming change to 31 CFR § 515.421.

Airline Services. OFAC amended 31 CFR § 515.572 to authorize the entry into Cuban blocked space, code-sharing, and leasing arrangements to facilitate the provision of carrier services to Cuba by air authorized pursuant to section 31 CFR § 515.572(a)(2), including the entry into such arrangements with a national of Cuba.

Air and Seagoing Vessel Carrier Services. OFAC expanded 31 CFR § 572(a)(2) by adding the phrase "directly or indirectly."

The new 31 CFR § 572(a)(2) would allow air carriers and vessels to call at third country ports (hence "indi-

rectly”) when bringing licensed or authorized persons or cargo to Cuba or from Cuba via third countries in returning to the U.S. It would seemingly remove the former requirements of the U.S. to Cuba to U.S. direct route only.

Travel. OFAC revised 31 CFR § 515.533 to authorize travel-related and other transactions directly incident to the facilitation of the temporary sojourn of aircraft and seagoing vessels as authorized by the Department of Commerce for travel between the U.S. and Cuba, including by certain personnel required for normal operation and service on board a vessel or aircraft or to provide services to a vessel in port or aircraft on the ground.

Transactions Related to Information and Informational Materials. OFAC expanded 31 CFR § 515.545 to expand the general license authorizing travel-related and other transactions that are directly incident to the export, import, or transmission of informational materials to include professional media or artistic productions in Cuba. Such productions include media programs (such as movies and television programs), music recordings, and the creation of artworks.

Professional Meetings. OFAC revised 31 CFR § 515.564 to authorize travel-related and other transactions to organize professional meetings or conferences in Cuba and section 515.567 to authorize travel-related and other transactions to organize amateur and semi-professional international sports federation competitions and public performances, clinics, workshops, other athletic or non-athletic competitions, and exhibitions in Cuba.

January 2016 BIS Relaxation of Cuba Sanctions

Under a revised licensing policy, BIS will generally approve license applications for exports and reexports of:

- Commodities and software to human rights organizations or to individuals and non-governmental or-

ganizations that promote independent activity intended to strengthen civil society in Cuba;

- Commodities and software to U.S. news bureaus in Cuba whose primary purpose is the gathering and dissemination of news to the general public;
- Telecommunications items that would improve communications to, from, and among the Cuban people;
- Certain agricultural items (such as agricultural commodities not eligible for a license exception; insecticides; pesticides; and herbicides); and
- Certain items necessary to ensure the safety of civil aviation and the safe operation of commercial aircraft engaged in international air transportation, including the export or reexport of such aircraft leased to state-owned enterprises.

BIS is creating a case-by-case licensing policy that will apply to exports and reexports of items to meet the needs of the Cuban people, including exports and reexports for such purposes made to state-owned enterprises and agencies and organizations of the Cuban government that provide goods and services to the Cuban people. Examples are items for: agricultural production; artistic endeavors (including the creation of public content, historic and cultural works and preservation); education; food processing; disaster preparedness, relief and response; public health and sanitation; residential construction and renovation; public transportation; and the construction of infrastructure that directly benefits the Cuban people (e.g., facilities for treating public water supplies and supplying energy to the general public).

BIS stated that a general policy of denial will still apply to exports and reexports of items for use by state-owned enterprises, agencies, or other organizations of the Cuban government that primarily generate revenue for the state, including those in the tourism industry and those engaged in the extraction or production of minerals or other raw materials. Additionally, applications to export or reexport items destined to the Cuban military, police, intelligence and security services remain subject to a general policy of denial.