

Morgan Lewis

U.S. Cuban Sanctions: Recent Changes



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Outline

- I. President Obama's Announcement of 12/17/14**
- II. New OFAC Cuba Regulations**
- III. New BIS Cuba Regulations**
- IV. Current U.S. Sanctions that Continue to Apply**

President Obama's Announcement of December 17, 2014

President Obama's Announcement of Dec. 17, 2014

- In remarks made from the White House on December 17, 2014, President Obama announced new changes in the longstanding U.S. policy toward Cuba
 - The United States imposed an embargo on Cuba in 1960 and severed all diplomatic relations with Cuba in 1961
- President Obama instructed the Secretary of State to immediately initiate discussions with Cuba on the re-establishment of diplomatic relations

President Obama's Announcement of Dec. 17, 2014

- **Other announced changes:**
 - **Going forward, the United States will re-establish an embassy in Havana**
 - **High-ranking U.S. officials will visit Cuba**
 - **The United States will review Cuba's designation as State Sponsor of Terrorism**
 - **The United States will take steps to increase travel, commerce, and flow of information to/from Cuba**

Summary of Changes Following President Obama's Announcement

Reality Check

- **The changes are modest in scope, because long-standing statutory provisions restrict the extent to which the President can act on his own with respect to Cuba.**
- **Changes do not:**
 - **Remove the general embargo against trade with Cuba**
 - **Open the door further to travel to Cuba for U.S. businesses or tourists**
- **Significant limitations in dealing with Cuba continue to apply. Companies need to consider remaining limitations when developing Cuban strategies.**

New OFAC Cuba Regulations

OFAC Jurisdiction for Cuba

- **Activities by “U.S. Persons”**
 - **U.S. Citizens**
 - **U.S. Green Card Holders**
 - **Persons in the United States**
 - **Foreign Branches and Subsidiaries of U.S. Companies**
- **Activities conducted within or from United States**

New OFAC Cuba Regulations

- Effective January 16, 2015, the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) revised the Cuba Assets Control Regulations (CACR), 31 CFR Part 515 to relax some, but not all, restrictions
- **Many transactions with Cuba are still not authorized**



New OFAC Cuba Regulations

- New investments in all sectors in Cuba generally by persons subject to U.S. jurisdiction have **not** been authorized.
- Exports of all items, technologies, and services to Cuba, absent a specific license, have **not** been authorized.
 - Such transactions continue to require a specific license granted by OFAC, and a decision to grant or deny such license will be based on the facts and circumstances contained in a particular OFAC license application.

New OFAC Cuba Regulations

- **Where the new regulations or general licenses promulgated by OFAC do not authorize an intended transaction or activity in, or with, Cuba or Cuban nationals – remember:**
 - **Persons subject to U.S. jurisdiction (including U.S. overseas subsidiaries) may not sign a contract/ memorandum of understanding with a foreign firm if the contract terms include Cuba-related provisions, even if those provisions are contingent upon the further lifting of the embargo at a later date.**
 - **Signing such a contract is a OFAC Cuba sanctions violation!**

New OFAC Cuba Regulations

Travel to Cuba for Authorized Purposes

- **OFAC amended sections 515.533, 515.545, 515.560–515.567, and 515.574–515.576 of the CACR 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**
- **now without the need for case-by-case specific licensing.**

New OFAC Cuba Regulations

Travel to Cuba for Authorized Purposes (cont'd)

- **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 who wish 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.**

New OFAC Cuba Regulations

Travel to Cuba for Authorized Purposes (cont'd)

- The travel 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 that indicate that the travel was covered by the terms of a general license.

New OFAC Cuba Regulations

Travel to Cuba for Authorized Purposes (cont'd)

- 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 for tourist activities is not authorized by these changes, and is prohibited by statute.**

Travel to Cuba



New OFAC Cuba Regulations

Cuban Travel Services

- **OFAC amended 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.**
 - **The new authorizations permit U.S. air carriers to carry authorized passengers to and from Cuba**
- **Prior to these changes, such services required an OFAC-specific license.**

New OFAC Cuba Regulations

Remittances

- OFAC amended section 515.570 to raise the limits on remittances **from \$500 to \$2,000 per quarter** that may be sent to Cuban nationals and to generally authorize, as is done now when appropriate, on a case-by-case basis, without limitation, for remittances for humanitarian projects, support for the Cuban people, and the development of private business in Cuba.
- Section 515.560(c) was amended to raise the total remittances that a traveler may carry to Cuba **from \$3,000 to \$10,000.**

New OFAC Cuba Regulations

Credit and Debit Cards, Per Diem Expenditures in Cuba

- **OFAC amended 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 in the processing of such transactions.**



New OFAC Cuba Regulations

Importation of Certain Goods & Services

- OFAC amended section 515.560 to eliminate the former dollar-per-diem limitation on authorized travelers' spending in Cuba.
- Authorized travelers who return from Cuba are now allowed to import into the United States up to \$400 worth of goods from Cuba—including up to \$100 in alcohol or tobacco products.



New OFAC Cuba Regulations

Telecommunications

- **OFAC amended section 515.542 to generally authorize transactions that establish mechanisms to provide commercial telecommunications services that link 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.**

New OFAC Cuba Regulations

Vessels Calling in Cuba

- **OFAC amended section 515.550 to authorize foreign vessels to enter the United States after engaging in certain prior 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 United States.**



New OFAC Cuba Regulations

Certain transactions by U.S.- owned or -controlled firms in third countries with certain Cuban nationals

- OFAC added new section 515.585 –
 - “Any U.S.-owned or -controlled partnership, association, corporation, or other organization in a third country is authorized to provide goods and services to a Cuban national who is an individual located outside of Cuba, provided that the transaction does not involve a commercial exportation, directly or indirectly, of goods or services to or from Cuba.”

New OFAC Cuba Regulations

Certain transactions by U.S.- owned or -controlled firms in third countries with certain Cuban nationals (cont'd)

- Section 515.585 does **not** authorize U.S.-owned or -controlled firms in third countries to export to Cuba commodities produced in the authorized trade territory. See Section 515.559
- Section 515.585 does **not** authorize U.S.-owned or -controlled firms in third countries to re-export to Cuba U.S.- origin items. See Section 515.533
- Section 515.585 does **not** authorize any transaction prohibited by Section 515.204, including the purchase or sale of Cuban-origin goods.”

New BIS Cuba Regulations

BIS/EAR Jurisdiction for Cuba

- **Activities outside the United States by “Non- U.S. Persons” involving items subject to EAR**
 - **All U.S. origin items wherever located;**
 - **Foreign-made commodities that incorporate in amounts exceeding prescribed de minimis levels:**
 - *controlled U.S.-origin commodities,*
 - *foreign-made commodities that are ‘bundled’ with controlled U.S.-origin software,*
 - *foreign-made software that is commingled with controlled U.S.-origin software, and*
 - *foreign-made technology that is commingled with controlled U.S.-origin technology*

BIS/EAR Jurisdiction for Cuba (cont'd)

- **Activities outside the United States by “Non- U.S. Persons” involving items subject to EAR**
 - **Certain foreign-made direct products of U.S. origin technology or software.**
 - *The term “direct product” means the immediate product (including processes and services) produced directly by the use of technology or software; and*
 - **Certain commodities produced by any plant or major component of a plant located outside the United States that is a direct product of U.S.-origin technology or software.**

New BIS Cuba Regulations

Revised Export Administration Regulations [EAR]

- Also effective on January 16, 2015, the U.S. Department of Commerce's Bureau of Industry and Security (BIS) revised the Export Administration Regulations (EAR), 15 CFR Parts 732-799 to relax some, but not all, EAR export license restrictions



New BIS Cuba Regulations

New EAR License Exception - “Support for the Cuban People”

- **BIS created new License Exception “Support for the Cuban People” (SCP) – 15 CFR § 740.21 of the EAR**
- **Prior to publication of this new license exception, the export or re-export to Cuba of items now eligible under this new license exception generally required a license from BIS.**

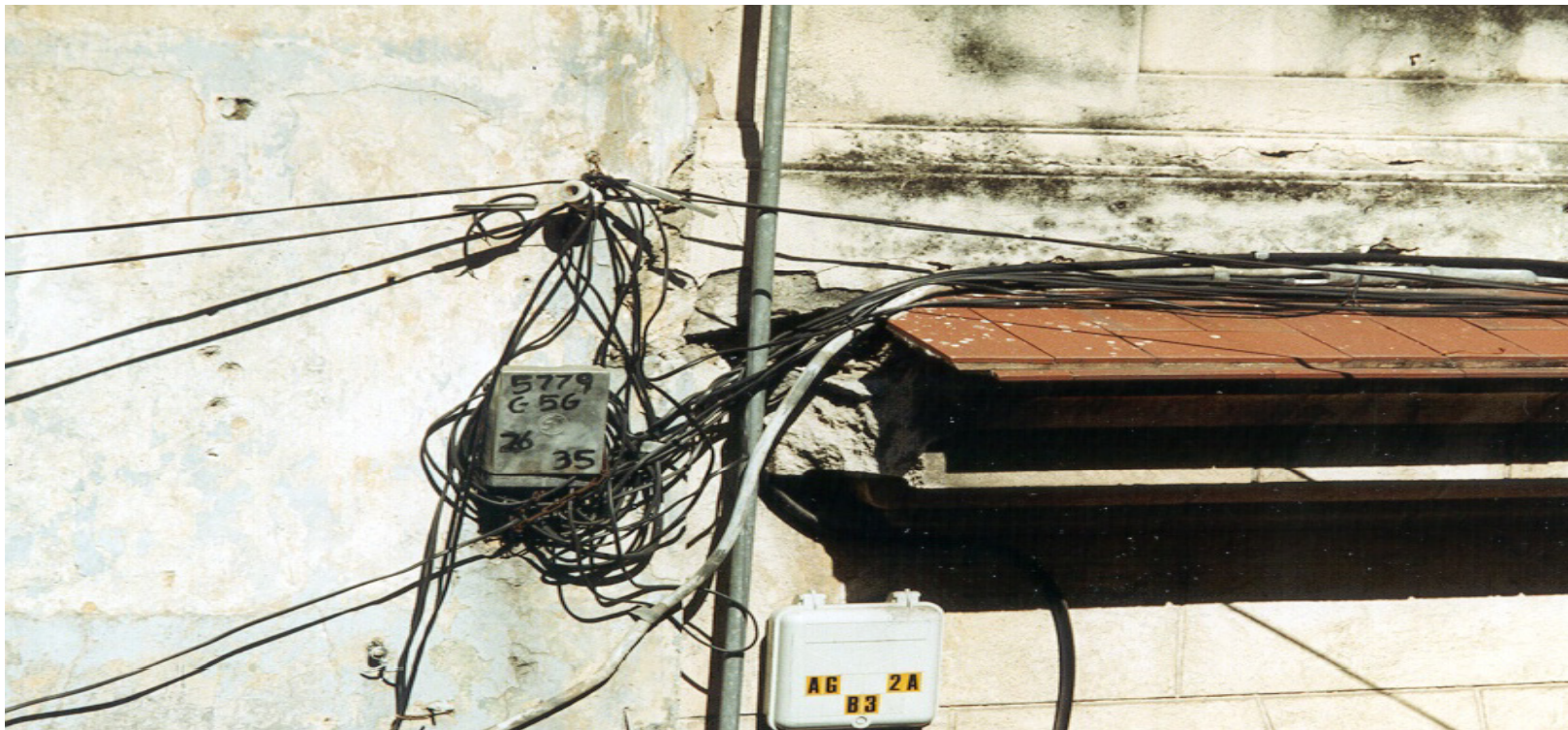
New BIS Cuba Regulations

New EAR 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
 - *“Building materials” is not more specifically defined*

New BIS Cuba Regulations

New EAR License Exception SCP



New BIS Cuba Regulations

New EAR License Exception SCP (cont'd)

- tools and equipment for private-sector agricultural activity
- tools, equipment, supplies, and instruments for use by private-sector entrepreneurs. Note that this provision will, for example, allow the export of such items to private-sector entrepreneurs, such as **barbers and hairstylists, restaurateurs, and auto mechanics**
- **SCP is limited to those items designated as EAR99 or controlled on Commerce Control List (CCL) only for antiterrorism (AT) reasons.**

New BIS Cuba Regulations

New EAR License Exception SCP (cont'd)



New BIS Cuba Regulations

Expanded 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 this new rule’s publication, License Exception CCD authorized the export or re-export of only donated items, which limited the incentive to send these items to Cuba.**

New BIS Cuba Regulations

Expanded License Exception “Consumer Communications Devices” (cont’d)

- This rule removes the donation requirement in License Exception CCD, thereby allowing export or re-export of eligible items for commercial sale or donation to eligible recipients in Cuba.

New BIS Cuba Regulations

Expansion of License Exception “Gift Parcels and Humanitarian Donations”

- 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 who reside in a foreign country.
- Removing the note allows export and re-export 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 BIS Cuba Regulations

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 re-exports 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).



Current U.S. Sanctions that Continue to Apply

Current U.S. Sanctions that Continue to Apply

- **OFAC Regulations prohibit any person subject to U.S. jurisdiction from dealing in any property in which Cuba or a Cuban national has, or has had, any interest**
- **The term person subject to the jurisdiction of the United States includes:**
 - a) Any individual, wherever located, who is a citizen or resident of the United States;**
 - b) Any person within the United States;**
 - c) Any corporation, partnership, association, or other organization organized under the laws of the United States or of any state, territory, possession, or district of the United States; and**

Current U.S. Sanctions that Continue to Apply

- The term person subject to the jurisdiction of the United States includes: (*cont'd*)
 - d) Any corporation, partnership, association, or other organization that is owned or controlled by persons specified in (a) or (c) (= **foreign subsidiaries**)
- “Dealing” and “Property” are very broadly defined and include such things as contracts and services
 - For example, persons subject to U.S. jurisdiction may not purchase Cuban cigars in ANY third country

Current U.S. Sanctions that Continue to Apply

- Unless directly related to an activity or transaction authorized by earlier provisions or as explained in the new OFAC regulations issued Jan. 16, persons subject to U.S. jurisdiction are not generally authorized to provide any:
 - **accounting, consulting, transportation, legal, marketing, sales, or insurance services to a Cuban company or to a foreign company with respect to the foreign company's Cuba-related business**

Current U.S. Sanctions that Continue to Apply

- **Unless directly related to an activity or transaction authorized by earlier provisions or as explained in the new OFAC regulations issued Jan. 16, with certain exceptions, no products, technology, or services may be exported by a person subject to U.S. jurisdiction, wherever located, or, from the United States, to Cuba or a Cuban national, either directly or through third countries, such as Canada or Mexico, without first obtaining a license from OFAC**

Current U.S. Sanctions that Continue to Apply

- **The prohibition includes dealing in or assisting with the sale of goods, services, or commodities to Cuba, even if done entirely offshore**
- **Such brokering is considered to be “dealing in property” in which Cuba or a Cuban national has an interest and is prohibited**

Current U.S. Sanctions that Continue to Apply

- The statutory basis for the OFAC Cuban sanctions is the Trading with the Enemy Act of 1917 (TWEA)
- Pursuant to 31 CFR § 501.701, attention is directed to section 16 of the TWEA, as adjusted pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101-410, as amended, 28 U.S.C. 2461 note), which provides that:
 1. Persons who willfully violate any provision of TWEA or any license, rule, or regulation issued thereunder, and persons who willfully violate, neglect, or refuse to comply with any order of the President issued in compliance with the provisions of TWEA shall, upon conviction, be fined not more than **\$1,000,000** or, if an individual, be fined not more than **\$100,000** or **imprisoned for not more than 10 years**, or both; and an officer, director, or agent of any corporation who knowingly participates in such violation shall, upon conviction, be fined not more than **\$100,000** or **imprisoned for not more than 10 years**, or both.

Current U.S. Sanctions that Continue to Apply

(cont'd)

2. Any property, funds, securities, papers, or other articles or documents, or any vessel, together with its tackle, apparel, furniture, and equipment, concerned in a violation of TWEA may upon conviction be **forfeited** to the United States Government.
3. The Secretary of the Treasury may impose a civil penalty of not more than **\$65,000 per violation** on any person who violates any license, order, or regulation issued under TWEA. The current \$65,000 civil penalty cap may be adjusted for inflation pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990.
4. Any property, funds, securities, papers, or other articles or documents, or any vessel, together with its tackle, apparel, furniture, and equipment, that is the subject of a violation subject to a civil penalty issued pursuant to TWEA shall, at the discretion of the Secretary of the Treasury, be **forfeited** to the United States Government.

Current U.S. Sanctions that Continue to Apply

- The criminal penalties provided in TWEA are subject to increase pursuant to 18 U.S.C. § 3571 which, when read in conjunction with section 16 of TWEA, provides that persons convicted of violating TWEA may be fined up to the greater of either **\$250,000** for individuals and **\$1,000,000** for organizations or twice the pecuniary gain or loss from the violation



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