



International Trade & Regulatory ADVISORY ■

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Cuba Update: Latest Changes Signal Expansion of Business Opportunities

On January 26, 2016, as part of the Obama Administration's ongoing efforts to normalize relations with Cuba, the Department of Commerce, Bureau of Industry and Security (BIS) and the Department of Treasury, Office of Foreign Assets Control (OFAC) announced further amendments to the Export Administration Regulations (EAR) and the Cuban Assets Control Regulations (CACR), respectively. These amendments, which took effect on January 27, 2016, expand potential opportunities for engagement with Cuba by U.S. businesses operating in certain sectors, such as construction and building materials, arts and entertainment, media, retail, food processing, agrochemicals, aviation, telecommunications, renewable energy and infrastructure (including energy production and transmission, water treatment and sanitation, and public transportation).

EAR Changes

The export and reexport of all items subject to the EAR has long been prohibited without a license. A key element of the Administration's efforts toward normalization of relations with Cuba has been the adjustment of licensing policy by the BIS. Prior to the January 27 changes, the BIS's licensing policy regarding Cuba, with certain exceptions (e.g., medicines, medical devices and certain items related to environmental protection), was split between a general policy of denial and a "case-by-case" review policy for certain, limited items. As set forth in the amendments to the EAR, BIS has now adopted a *general policy of approval* of exports and reexports of certain items subject to the EAR. The amendments also expand the case-by-case review policy to cover items not eligible for the previously announced License Exception Support for the Cuban People (SCP), including exports or reexports to state-owned enterprises, agencies and Cuban government organizations.

General policy of approval

License applications to export or reexport the following items to Cuba are now subject to a general policy of approval:

- Telecommunications items not covered by License Exception SCP that would improve communications to, from, and among the Cuban people.
- Commodities and software to human rights organizations, individuals and nongovernmental organizations 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.

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- Agricultural items that are outside the scope of “agricultural commodities” as defined in the EAR, such as insecticides, pesticides and herbicides, as well as agricultural commodities that are not eligible for License Exception Agricultural Commodities (AGR) (e.g., non-EAR99 items).
- 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.
- Items necessary for the environmental protection of U.S. and international air quality, waters or coastlines (including items related to renewable energy or energy efficiency).

Case-by-case review policy

License applications for exports or reexports of items for use in the following activities intended to meet the needs of the Cuban people, including to state-owned and Cuban government entities that provide goods and services for the use or benefit the Cuban people, will be reviewed by BIS on a case-by-case basis:

- Agricultural production
- Artistic endeavors
- Education
- Food processing
- Disaster preparedness, relief and response
- Public health and sanitation
- Residential construction and renovation
- Public transportation
- Wholesale and retail distribution for domestic consumption by the Cuban people
- Construction of facilities for treating public water supplies
- Construction of facilities for supplying electricity or other energy to the Cuban people
- Construction of sports and recreation facilities
- Construction of infrastructure to benefit the Cuban people

BIS will continue to apply a general policy of denial for applications to export or reexport items for use by state-owned enterprises, agencies or other organizations of the Cuban government that primarily generate revenue for the state, including those engaged in tourism 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.

CACR Changes

Building on prior CACR authorizations and the expansion of exports and reexports subject to a favorable BIS licensing policy, OFAC’s January 27 amendments to the CACR further relax U.S. sanctions against Cuba on non-agricultural trade financing, as well as travel and related services, and transactions incident to certain authorized activities in Cuba. Specifically, the most recent CACR amendments accomplish the following:

- Remove certain payment and financing restrictions, including those imposed on depository institutions, for BIS authorized exports and reexports to Cuba with the exception of agricultural commodities, which remain

subject to statutory restrictions. Prior to this amendment, only payment of cash in advance or third-country bank financing was available for BIS authorized exports and reexports.

- Authorize entry into blocked space, code-sharing and leasing arrangements to facilitate air carrier services to Cuba, including agreements with Cuban nationals.
- Authorize additional travel-related and other transactions directly incident to the temporary sojourn of aircraft and vessels, including the provision of services to vessels in port or aircraft on the ground.
- Authorize travel-related and other transactions to organize (rather than simply attend) professional meetings, amateur and semiprofessional international sports federation competitions and public performances, clinics, workshops, other athletic or nonathletic competitions and exhibitions in Cuba. A parallel amendment also allows U.S. organizers of such events to keep U.S. profits after costs rather than donate the profits to an independent nongovernmental organization in Cuba.
- Authorize disaster preparedness and response projects in Cuba.
- Authorize travel-related and other transactions directly incident to the export, reexport or transmission of information and informational materials in Cuba, including the production of media programs (i.e., movies or TV shows), music recordings or artwork in Cuba. OFAC has also authorized the employment of Cuban nationals in these endeavors.

Conclusion

The expansion of potentially authorized exports and reexports by BIS also serves to expand the scope of activities authorized by OFAC. Pursuant to amended CACR Section 515.533(d), travel-related and other transactions that are “directly incident to the conduct of market research, commercial marketing, sales or contract negotiation, accompanied delivery, installation, leasing or servicing in Cuba of items consistent with the export or reexport licensing policy of [BIS] are authorized...” Accordingly, participants in the industries associated with the items subject to BIS’s favorable licensing policies may also engage in a range of activities and services incident to licensed exports or reexports in both the development of such business and in providing certain services to support licensed export or reexport business.

Despite these expanded policies and authorizations, the EAR and CACR continue to impose strict limitations on business activities in Cuba. Additionally, the U.S. trade embargo against Cuba remains in effect under statutory authority that can only be lifted by Congress. As such, U.S. companies that wish to engage in Cuban activities should understand and comply with all authorizations and associated restrictions, as well as internal policies and procedures, prior to exploring Cuban business opportunities or undertaking proposed transactions involving Cuba.

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