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# United States implements significant relaxation of Cuba Sanctions



The Obama Administration on October 14, 2016 announced sweeping revisions to the current U.S. economic embargo against Cuba. The final rules issued by the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) and the U.S. Department of Commerce's Bureau of Industry and Security (BIS) went into effect on October 17, 2016. This most recent easing is consistent with actions taken by the Obama Administration since it assumed office in 2009 and with recent changes implemented since December 2014 when President Barack Obama announced a path towards the normalization of U.S.-Cuba relations, which were restored in July 2015.

## The Existing Sanctions Framework

OFAC and the BIS are the two federal agencies primarily tasked with the promulgation of new regulations and administration of the U.S. sanctions regime against Cuba. The amendments to the Cuban Assets Control Regulations, 31 CFR Part 515 (the "CACR") are administered by OFAC and the Export Administration Regulations, 15 CFR Parts 730-774 (the "EAR") are administered by the BIS. Despite recent moves towards easing the sanctions, doing business with, investing in and tourist travel to Cuba continues to be largely prohibited absent specific authorization from OFAC and/or the BIS.

## Scope of Revisions

The relaxation of sanctions covers a wide array of areas that impact businesses and non-profit organizations. More specifically, the regulatory changes include amendments that expand opportunities for persons subject to U.S. jurisdiction to service infrastructure projects, obtain FDA approval for Cuban origin pharmaceuticals, export-eligible consumer goods, and facilitate cargo transport by vessels and aircraft. Certain key developments are highlighted and explained in greater detail below.

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Cuba Sanctions**1. Humanitarian Related Amendments**

These changes open a host of humanitarian activity, some of which is substantially commercial in nature. Persons subject to U.S. Jurisdiction (“US persons”)<sup>1</sup> are now authorized to provide services to Cuba or Cuban nationals related to developing, repairing, maintaining, and enhancing Cuban infrastructure to directly benefit the Cuban people under the BIS’ Support for the Cuban People (the “SCP”) license exception. The regulations define infrastructure to include goods and services, public transportation, water management, waste management, non-nuclear electricity generation, and electricity distribution sectors, as well as hospitals, public housing, and primary and secondary schools. This follows on the coattails of previous modifications, which loosened restrictions on the export or reexport of goods for this same purpose. Given the crumbling nature of Cuba’s infrastructure, this opening presents new potential commercial opportunities for U.S. companies and individuals with technical expertise. OFAC is also expanding the authorization for grants, scholarships, and awards to Cuba or Cuban nationals to include those related to scientific research and religious activities.

**2. Health & Medical Related Amendments**

Cuba’s pharmaceutical industry is now open for at least partial involvement by U.S. entities. Cuba has one of the largest pharmaceutical industries in Latin America and has developed a number of important medical advances, such as cancer treatments and vaccines. The new amendments will make it much easier for U.S. companies to access this market. Specifically, OFAC has issued a new general license authorizing a wide range of activities related to obtaining approval from the U.S. Food & Drug Administration (“FDA”) for Cuban-origin pharmaceuticals. This includes discovery and development, clinical research, obtaining regulatory approval to import Cuban-origin drugs into the United States. Additionally, the general license will also cover the sale and distribution of FDA-approved Cuba-origin pharmaceuticals in the United States. Companies will also, under certain conditions, be allowed to establish and maintain bank accounts for these health and medical transactions at Cuban financial institutions.

This new general license greatly expands the previously limited authorization of Cuban-origin commodities for bona-fide research purposes in only sample quantities. Apart from pharmaceuticals, OFAC has also issued a new general license authorizing joint medical research projects with Cuban nationals that covers both non-commercial and commercial medical research. This will be of substantial interest to academic, public, and private research institutions throughout the United States given the island state’s prowess in biotechnology and pharmaceuticals.

<sup>1</sup> This definition includes U.S. citizens and permanent resident aliens, any individual located in the United States, U.S.-registered vessels, U.S. companies, and foreign subsidiaries of U.S. companies.

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Online retailers and others engaging in direct sales to consumers are now able to sell non-sensitive consumer goods, such as apparel or furniture, directly to individuals in Cuba. The amendments create a new BIS license exception for EAR99 designated items and items that are listed on the BIS's Commerce Control List (CCL) only for anti-terrorism reasons. The products must be for personal use and cannot be sold to certain Cuban officials. This is a significant development as the BIS's EAR99 classification covers a wide range of goods. Consequently, this is a sweeping change given the breadth of products now eligible to be exported or reexported to Cuba

**4. Trade-Related Transactions Incidental to Exports & Reexports to Cuba**

Previously, reexported goods to Cuba that were not entirely of US origin required authorization from both the BIS and OFAC. That requirement has been eliminated and now exporters generally need only seek BIS authorization to reexport these items. OFAC has also issued a new general license to allow for the repair and servicing of items that were previously exported or reexported to Cuba with proper authorization. US persons are allowed to service these items or return them to a third country for service and repair. Separate authorization by OFAC and/or the BIS is still needed to return the repaired items back to Cuba.

**5. Transportation Related Amendments**

Friday's announcement heralds notable changes in transportation and logistics. First, the BIS now generally authorizes air cargo transiting Cuba on a temporary sojourn. This amendment has the same effect as an earlier amendment that loosened restrictions on cargo vessels.

Second, with respect to shipping, the amendments greatly limit the so called "180-day rule." Previously, foreign vessels were prohibited from entering a US port to unload or load freight for 180 days after calling on a Cuban port. OFAC has issued a general license waiving this restriction so long as the cargo subject to the EAR would be designated as EAR99 or controlled on the Commerce Control List for anti-terrorism reasons only.

This change will be important for the shipping industry as the Mariel terminal in Cuba, which is equipped to accommodate neo-Panamax container ships, is now able to receive transshipments from Asia passing through the Panama Canal bound the U.S. East Coast or U.S. ports in the Gulf of Mexico.

**\* "\*\*\*\* Professional Meetings Involving the Promotion of Tourism**

A general license already existed, which allowed US persons to attend or organize professional meetings or conferences in Cuba. However, meetings and conferences involving the promotion of tourism in Cuba were specifically excluded. That restriction has now been lifted. Nevertheless, the amendment does not authorize participation or investment in the tourism industry, although certain U.S. companies have reportedly received licenses to establish a presence in Cuba's hospitality sector.



## 7. Travel Related Transactions

The dollar value restriction for the importation of Cuban-origin goods into the United States for personal use has been removed. Previously, such goods were subject to value limits of \$400 or less and no more than \$100 of alcohol or tobacco products. The normal limits imposed by U.S. Customs & Border Protection (CBP) on duty and tax exemptions for merchandise imported as accompanied baggage and for personal use will still apply. Further, the restriction limiting US persons traveling overseas to only purchase embargoed Cuban items, such as Cuban cigars, for personal consumption while in a third country has been lifted. Foreign (non-US) travelers are also now allowed to import Cuban-origin alcohol and tobacco products into the United States as accompanied baggage.

Despite news reports that Americans would be able to purchase unlimited quantities of Cuban rum and cigars so long as such purchases were for personal consumption, certain restrictions continue to apply. All travelers are limited to bringing no more than 100 cigars and 200 cigarettes for personal use. There are no federal restrictions on the amount of alcohol travelers can import for personal use, but importation for commercial purposes requires an import license. Travelers carrying more than one case of alcohol may encounter problems with U.S. customs officials.

Finally, other notable regulatory changes include amendments related to remittances for third-country national travel, donations to the Cuban people, modifications to the definition of prohibited Cuban officials, and a new authorization related to civil aviation safety-related services.

### Ensuring Compliance

While the amendments bring about significant changes to the Cuban embargo, opening new opportunities for US companies and persons, entities subject to the jurisdiction of the U.S. trade embargo should take great care in the wake of the easing of sanctions. The following are key points to consider when operating in this space:

- **Conduct Thorough Due Diligence.** OFAC and the BIS's steps make it clear that despite the continued opening and trade liberalization between the United States and Cuba, certain individuals and entities associated with Cuban government remain off-limits for dealings. Screening of potential counterparties therefore remains a paramount concern and vetting should be performed diligently.
- **Be Mindful of Anti-Corruption Issues.** Recent changes to the U.S. sanctions regime over the past two years clearly establish that compliance is a dynamically defined goal. Compliance programs should be periodically updated to account for not only new regulations, but also the changed realities that come into play given these regulations. In other words, with these amendments come new opportunities, regulatory challenges, red flags, and an evolving target of what constitutes best practice. This can mean navigating new regulatory challenges, such as exposure to the U.S. Foreign Corrupt Practices Act ("FCPA"), and developing or enhancing internal controls and policies and procedures to mitigate new and dynamic exposure to the risk of sanctions violations and other legal liabilities.

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- **Revise Compliance.** Recent changes to the U.S. sanctions regime over the past two years clearly establish that compliance is a dynamically defined goal. Compliance programs should be periodically updated to account for not only new regulations, but also the changed realities that come into play given these regulations. In other words, with these amendments come new opportunities, regulatory challenges, red flags, and an evolving target of what constitutes best practice. This can mean navigating new regulatory challenges, such as exposure to the U.S. Foreign Corrupt Practices Act (the “FCPA”), and developing/enhancing internal controls and policies and procedures to mitigate new and dynamic exposure to sanctions violations risks and other liabilities.
- **Know the Limits of the Law.** Although the new amendments create significant openings for increased dealings and interactions with Cuba, such changes in U.S. policy can often be misunderstood, whether because of inaccurate reporting, hearsay, or misinterpretation. This can lead many to adopt a very loose, if not inaccurate and incorrect interpretation of what is permissible and compliant, potentially resulting in sanctions violations. Such violations can be financially costly, time consuming, or create reputational harm. As such, it is imperative to have an exact understanding of the scope of permissible transactions.

These sweeping changes present new opportunities for those interested in doing business in Cuba. However, the complexities of Cuban sanctions and the ever changing regulatory landscape can create compliance risks if not managed appropriately. The overall trend of loosening should not be perceived as a loosening of the United States government’s resolve to enforce those sanctions that do remain in place, and as such, exercising discretion and seeking counsel when exploring these opportunities is highly advised.

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