

U.S.-Cuba Related Sanctions Update and Overview: Obama Administration Further Eases Cuba Sanctions Against the Backdrop of Strict Statutory Restrictions

October 19, 2016

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On October 14, 2016, the Departments of Treasury and Commerce announced amendments to the Cuban Assets Control Regulations (“CACR”) and the Export Administration Regulations (“EAR”) in furtherance of the Obama Administration’s policy goals with respect to Cuba, both amendments to become effective upon publication October 17, 2016.¹ These changes cover transactions related to Cuban-origin pharmaceuticals and joint medical research, trade and commerce, civil aviation safety-related services, travel, grants and humanitarian-related services to benefit the Cuban people, and eligibility for license exceptions for Cuban government officials.²

The Obama Administration has amended its Cuba sanctions regulations and issued new guidelines on numerous occasions since President Obama announced a policy to “normalize relations” between the U.S. and Cuba and to “further engage with and empower the Cuban people.”³ While these amendments have eased the sanctions and export control restrictions, as described below, the statutory underpinnings of the U.S.-Cuba sanctions (and the CACR) contain significant restrictions and the embargo that was first imposed in 1961 is codified in legislation. The various restrictions in the authorizing statutes and the relaxations provided in the series of regulatory amendments have resulted in a complex web of restrictions. As a consequence, careful interpretation is required to apply the regulations to specific transactions, and anyone engaging in transactions with Cuba must analyze all applicable restrictions.

This article provides a brief summary of some of the notable provisions pertaining to Cuba in the relevant statutes and the regulations pertaining to: travel and related transactions, trade in agricultural products, trade in medical devices and medical research, and telecommunications.

I. Statutory Underpinnings of the U.S.-Cuba Sanctions

The U.S.-Cuba sanctions are authorized under the following statutes: the Trading with the Enemy Act of 1917 (“TWEA”),⁴ Cuban Democracy Act of 1992,⁵ Helms-Burton Act of 1996,⁶ and Trade Sanctions

¹ *Cuban Assets Control Regulations*, 81 Fed. Reg. 71,372 (Dep’t of Treasury October 17, 2016); *Cuba: Revisions to License Exceptions*, 81 Fed. Reg. 71,365 (Dep’t of Commerce October 17, 2016).

² *Id.* See Attachment 1 to this article for a summary of these changes.

³ White House, *Statement by the President on Cuba Policy Changes*, December 17, 2014, available at <https://www.whitehouse.gov/the-press-office/2014/12/17/statement-president-cuba-policy-changes>; Department of Treasury, FACT SHEET: Treasury and Commerce Announce Regulatory Amendments to the Cuba Sanctions, January 15, 2015, available at <https://www.treasury.gov/press-center/press-releases/Pages/jl9740.aspx>

⁴ *Trading With the Enemy Act of 1917*, 50 U.S.C. App §§ 5, 16.

⁵ *Cuban Democracy Act of 1992*, 22 U.S.C. §§ 6001-6010.

⁶ *The Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (Helms–Burton Act)*, 22 U.S.C. §§ 6021–6091.

and Export Enhancement Act of 2000.⁷ Some of the notable provisions pertaining to Cuba in each statute are discussed in turn.

- TWEA

TWEA authorizes the President with the power to “investigate, regulate, or prohibit” transactions between the U.S. and its enemies during times of war.⁸ At the time the embargo was first imposed, TWEA was the main statutory authority underpinning U.S. economic sanctions. However, as of this writing, the authorities of TWEA apply with respect to sanctions against Cuba only.⁹ Violations of TWEA can trigger criminal penalties, including up to 10 years of imprisonment and/or up to \$1,000,000 in fines on any person who willfully “any of the provisions” of TWEA or “any license, rule, or regulation” issued under the Act, and civil penalties of up to \$50,000 on any person who “violates any {such} license, order, rule, or regulation.”¹⁰

- Cuban Democracy Act of 1992

This Act authorizes exports of medicines and medical supplies, provided that it can be determined, through onsite verification, that particular circumstances do not apply;¹¹ permits telecommunication services between the U.S. and Cuba; and prohibits investment by any U.S. person in the “domestic telecommunications network within Cuba.”¹²

- Helms-Burton Act of 1996

This Act prohibits the importation of and dealings outside the United States in Cuban products;¹³ authorizes the President to establish and implement an exchange of news bureaus between the United States and Cuba under certain conditions;¹⁴ and codifies the CACR as in effect on March 1, 1996.¹⁵ The

⁷ 22 U.S.C. §§ 7201-7211.

⁸ *Trading With the Enemy Act of 1917*, 50 U.S.C. App § 5(b).

⁹ North Korea was the most recent country to have restrictions lifted under the TWEA. (See Proclamation 8271 - Termination of the Exercise of Authorities Under the Trading With the Enemy Act With Respect to North Korea, June 26, 2008). All other sanctions regimes are operated and enforced, at least in part, under the International Emergency Economic Powers Act (“IEEPA”). The TWEA is more expansive than the IEEPA in that the former provides the President with certain wartime economic powers that are not available under the latter. These include the power to “vest” (i.e. expropriate) property in which foreign states or their nationals have an interest; the power to regulate purely domestic transactions; the power to regulate gold or silver coin or bullion; the power to seize records. (See *Trading With the Enemy Act of 1917*, 50 U.S.C. App § 5(b)).

¹⁰ *Trading With the Enemy Act of 1917*, 50 U.S.C. App § 16.

¹¹ *Cuban Democracy Act of 1992*, 22 U.S.C. §§ 6004(c), (d).

¹² *Id.* at 6004(e).

¹³ *The Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (Helms–Burton Act)*, 22 U.S.C. §§ 6021–6091. In particular, 22 U.S. Code § 6040(a) prohibits the entry of, and dealings outside the United States, in merchandise that—(1) is of Cuban origin; (2) is or has been located in or transported through Cuba; or (3) is made or derived in whole or in part of any article which is the growth, produce or manufacture of Cuba.”

¹⁴ *Id.* at § 6044(a). These include the following conditions:

(1) The exchange is fully reciprocal.

Act also provides that the Cuban embargo will remain in effect until particular political requirements are met.¹⁶

- Trade Sanctions and Export Enhancement Act of 2000

This Act provides that the export of “agricultural commodities, medicine, or medical devices to Cuba” is licensable;¹⁷ and restricts travel to Cuba for tourist activities.¹⁸

II. Certain Regulatory Amendments Under the Obama Administration

The U.S.-Cuba sanctions are currently administered by the Treasury Department’s Office of Foreign Assets Control (“OFAC”) and the Commerce Department’s Bureau of Industry and Security (“BIS”). The OFAC sanctions regulate the conduct of persons, and the BIS restrictions apply to the export, reexport or foreign transfer of U.S.-origin items (including items in the possession of foreign persons outside of the United States). The following provides a summary of the regulations pertaining to: travel and related transactions, trade in agriculture, trade in medical devices and medical research, and telecommunications.

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- (2) The Cuban Government agrees not to interfere with the establishment of news bureaus or with the movement in Cuba of journalists of any United States-based news organizations, including Radio Marti and Television Marti.
 - (3) The Cuban Government agrees not to interfere with decisions of United States-based news organizations with respect to individuals assigned to work as journalists in their news bureaus in Cuba.
 - (4) The Department of the Treasury is able to ensure that only accredited journalists regularly employed with a news gathering organization travel to Cuba under this subsection.
 - (5) The Cuban Government agrees not to interfere with the transmission of telecommunications signals of news bureaus or with the distribution within Cuba of publications of any United States-based news organization that has a news bureau in Cuba.

¹⁵ *Id.* at § 6032(h).

¹⁶ *Id.* at § 6065. The statute requires a transition government in Cuba to meet the following requirements: (1) legalize all political activity; (2) release all political prisoners and allow for investigations of Cuban prisons by appropriate international human rights organizations; (3) dissolve the then-present Department of State Security in the Cuban Ministry of the Interior, including the Committees for the Defense of the Revolution and the Rapid Response Brigades; and (4) make public commitments to organizing free and fair elections for a new government; (5) cease any interference with Radio Marti or Television Marti broadcasts; (6) make public commitments to and be in the process of making demonstrable progress in—(A) establishing an independent judiciary; (B) respecting internationally recognized human rights and basic freedoms as set forth in the Universal Declaration of Human Rights, to which Cuba is a signatory nation; (C) allowing the establishment of independent trade unions as set forth in conventions 87 and 98 of the International Labor Organization, and allowing the establishment of independent social, economic, and political associations; (7) not include Fidel Castro or Raul Castro; and (8) give adequate assurances that it will allow the speedy and efficient distribution of assistance to the Cuban people.

¹⁷ 22 U.S.C. § 7205.

¹⁸ *Id.* at § 7209(b).

- Travel and Related Transactions

As stated above, travel for tourism purposes is statutorily prohibited. Under the OFAC regulations, travel-related transactions (including, for example, opening and maintaining bank accounts and using credit and debit cards) for travel under 12 categories are authorized by either a general or a specific license, depending on the type of transaction. The 12 categories include:

- (1) family visits;
- (2) official business of the U.S. government, foreign governments, and certain intergovernmental organizations;
- (3) journalistic activity;
- (4) professional research and professional meetings;
- (5) educational activity;
- (6) religious activities;
- (7) public performances, clinics, workshops, athletics, other competitions, and exhibitions;
- (8) support for the Cuban people;
- (9) humanitarian projects;
- (10) activities of private foundations or research or educational institutes;
- (11) exportation, importation, or transmission of information or information materials; and
- (12) certain authorized export transactions that “may be considered for authorization” under BIS policies.¹⁹

In the case of transactions or travel meeting the criteria and conditions of a general license, no application for a specific license authorizing the transaction or the travel is required. In the case of other transactions (ones that are subject to a specific license requirement), travelers must submit an application and a determination is made on a case-by-case basis.²⁰ In either case, travelers are required to certify that the travel falls within one of the twelve categories, and travelers, as well as airlines, vessel operators, and travel service providers, are required to maintain documentation related to the travel for five years.²¹ Notably, the October 17, 2016 amendments ease the recordkeeping requirements by clarifying that travel or carrier service providers may collect and retain a copy of the traveler’s specific license or simply collect the number of the traveler’s specific license.²² Authorized U.S. travelers are allowed to import merchandise acquired in Cuba, as accompanied baggage, for personal use only.²³ Importantly, the October 17, 2016 amendments lifted the \$100 maximum amount that had been in place as a ceiling on the value of such Cuban merchandise imported as accompanied baggage and the OFAC fact sheet accompanying the release of these amendments specifically noted that the lifting of the \$100 maximum value applies to Cuban cigars and liquor.²⁴

- Trade in Agriculture

¹⁹ 31 C.F.R. § 515.560(a). The referenced regulations provide the criteria and requirements for general and specific licenses for each of the 12 categories.

²⁰ *Id.*

²¹ *Id.* at § 515.572(b).

²² *Cuban Assets Control Regulations*, 81 Fed. Reg. 71,372, 71,373 (Dep’t of Treasury October 17, 2016).

²³ 31 C.F.R. § 515.560(b)(3); *Cuban Assets Control Regulations*, 81 Fed. Reg. 71,372, 71,373 (Dep’t of Treasury October 17, 2016).

²⁴ *Cuban Assets Control Regulations*, 81 Fed. Reg. 71,372, 71,373 (Dep’t of Treasury October 17, 2016).

The Trade Sanctions and Export Enhancement Act of 2000 authorized the export of “agricultural commodities” under a specific license and in the case of certain listed agricultural goods, under a general license. Under the implementing Department of Commerce’s BIS regulations, regulations,²⁵ a license is required to export or reexport to Cuba all items subject to the EAR, with certain narrow exceptions.²⁶

The export and reexport of U.S. origin agricultural commodities is permitted under the License Exception Agricultural Commodities (“AGR”). This exception applies if the transaction in question is not restricted²⁷ and meets all of the following criteria: the commodity meets the definition of “agricultural commodities”, as defined in 772 of the EAR; the commodity falls under EAR99 (the lowest level of control under the EAR); the export or reexport is made pursuant to a written contract, unless the exception to the contract requirement is applicable; and the export or reexport is made within 12 months of signing the contract (if applicable).²⁸ It should be noted that the definition of the agricultural products eligible for export under general license is controlled under the EAR,²⁹ which is administered by the Department of Commerce’s BIS, but the general license authority for such exports is set forth in CACR, which is administered by the Department of Treasury’s OFAC. For such exports and reexports of agricultural commodities, only the following payment and financing terms may be used: payment of cash in advance, or financing by a banking institution located in a third country, subject to certain restrictions.³⁰ In the past, OFAC required that U.S. exporters must have a valid classification decision by BIS, rather than self-classify agricultural commodities being exported under the Trade Sanctions Reform Act.

License applications for the export or reexport of agricultural commodities or items that are not eligible for the AGR exception or are outside the scope of “agricultural commodities”, are subject to a general policy of approval.³¹ In addition, exports or reexports of items for the following broad purposes may be authorized on a case-by-case basis: agricultural production, food processing, and wholesale and retail distribution for domestic consumption by the Cuban people.³²

- Trade in Medical Devices and Medical Research

The Trade Sanctions and Export Enhancement Act of 2000 also authorizes the export of certain “medicine{ }or medical devices to Cuba” under either general license or a specific license, and the Cuban Democracy Act of 1992 authorizes exports of medicines and medical supplies, provided that it can be determined, through onsite verification, that particular circumstances do not apply. Under the implementing provisions of the EAR, license applications to export medicines and medical devices, as

²⁵ *Cuba Licensing Policy Revisions*, 81 Fed. Reg. 4,580, 4,582, (Dep’t of Commerce January 27, 2016) (citing statutory authority for 15 C.F.R. § 746.

²⁶ 15 C.F.R. § 746.2(a).

²⁷ *Id.* at § 740.18(b).

²⁸ *Id.* at § 740.18(a).

²⁹ *Id.*

³⁰ Per OFAC Frequently Asked Questions #74, these limitations on financing are required by the Trade Sanctions Reform and Export Enhancement Act of 2000, 22 U.S.C. § 7207(b)(1), available at https://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_faqs_new.pdf. See 31 CFR § 515.533(a)(4). Effective October 17, 2016, OFAC amended this provision so that it only applies to exports and reexports of “agricultural commodities,” as defined in 15 CFR part 772, and not to exports or reexports of “agricultural items” authorized pursuant to 15 C.F.R. § 746.2(b)(2)(iv).

³¹ *Id.* at § 746.2(b)(2).

³² *Id.* at § 746.2(b)(3).

defined in part 772 of the EAR, are subject to a general policy of approval, except in the case of certain end-uses.³³ Additional new medical research activities have been authorized under the October 17, 2016 amendments to the CACR. Persons subject to U.S. jurisdiction are now authorized, under a general license, to engage in commercial and non-commercial joint medical research projects with Cuban nationals.³⁴ In addition, certain transactions incident to obtaining approval from the U.S. Food and Drug Administration of Cuban-origin pharmaceuticals are permitted under a general license.³⁵ Persons subject to U.S. jurisdiction that are engaging in the authorized activities also are permitted to open, maintain, and close bank accounts at Cuban financial institutions, provided that the accounts are solely used for the authorized activities.³⁶ In the context of such medical research, it should be noted that unless items being imported are authorized under the general license, a specific license is required for the importation of Cuban-origin commodities for bona-fide research purposes in sample quantities.³⁷

- Telecommunications

As stated above, the Helms-Burton Act of 1996 authorizes the President to establish and implement an exchange of news bureaus between the United States and Cuba under certain specified conditions.³⁸ Under the current implementing OFAC and BIS regulations, the Obama Administration has issued a series of amendments in furtherance of the goal of facilitating the free flow of information.³⁹

Under the BIS EAR, the Support for the Cuban People exception authorizes the export or reexport to Cuba of certain items intended to improve the free flow of information to, from, and among the Cuban people.⁴⁰ Exports or reexports under this exception must fall within a range of specified activities, and be designated as EAR99 or controlled only for anti-terrorism reasons on the Commerce Control List.⁴¹ In addition, applications for licenses to export or reexport the following items are subject to a general policy of approval:

- telecommunications items that would improve communications to, from, and among the Cuban people;
- commodities and software to human rights organizations or to individuals and non-governmental organizations that promote independent activity intended to strengthen civil society in Cuba;

³³ *Id.* at § 746.2(b)(1).

³⁴ 31 C.F.R. § 515.547; *Cuban Assets Control Regulations*, 81 Fed. Reg. 71,372 (Dep't of Treasury October 17, 2016).

³⁵ *Cuban Assets Control Regulations*, 81 Fed. Reg. 71,372 (Dep't of Treasury October 17, 2016). These include "discovery and development, pre-clinical research, clinical research, regulatory review, regulatory approval and licensing, regulatory post-market activities, and the importation into the U.S. of Cuban-origin pharmaceuticals."

³⁶ *Id.*; 31 C.F.R. § 515.547

³⁷ 31 C.F.R. § 515.547.

³⁸ *See supra* note 14.

³⁹ White House, *Statement by the President on Cuba Policy Changes*, December 17, 2014, available at <https://www.whitehouse.gov/the-press-office/2014/12/17/statement-president-cuba-policy-changes>.

⁴⁰ 15 C.F.R. § 740.21(a).

⁴¹ *Id.* at § 740.21(d).

- commodities and software to U.S. news bureaus in Cuba whose primary purpose is the gathering and dissemination of news to the general public are subject to a general policy of approval.⁴²

The version of the OFAC CACR prior to the October 17, 2016 amendments already provided a general license for U.S. persons to engage in all transactions incident to the provision of telecommunication services⁴³ related to the transmission or the receipt of telecommunications involving Cuba; enter into contracts or licensing agreements with telecommunications service providers in Cuba for authorized telecommunication services;⁴⁴ and transactions incident to the establishment of facilities, including subsidiaries, joint ventures, and other business relationships, to provide telecommunications services linking the United States or third countries and Cuba.⁴⁵ Prior to the most recent amendments, the CACR also included a general license with respect to certain internet-based services authorizing the exportation or reexportation from the United States or by a U.S. person of services incident to the exchange of communications over the internet is authorized, subject to exceptions.⁴⁶

Should you have questions about the applicability of regulations, please contact [Alan M. Dunn](#) or [Sahar J. Hafeez](#).

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⁴² *Id.* at § 746.2(a)(2).

⁴³ Under 31 C.F.R. § 515.542(h), “telecommunications services” includes data, telephone, telegraph, internet connectivity, radio, television, news wire feeds, and similar services, regardless of the medium of transmission, including transmissions by satellite.

⁴⁴ 31 C.F.R. § 515.542. This authorization is subject to restrictions, including that the individuals in Cuba are not prohibited officials of the Government of Cuba, as defined in §515.337 of this part, or prohibited members of the Cuban Communist Party, as defined in §515.338 of this part.

⁴⁵ 31 C.F.R. § 515.542; Cuban Assets Control Regulations, 80 Fed. Reg. 56,915, 56,916, (Dep’t of Treasury September 21, 2015).

⁴⁶ 31 C.F.R. § 515.578(a)(1).