

## **Updated Article for ACCC 2017 Summit Newsletter**

### **Recent Changes to U.S.-Cuba Sanctions Regulations**

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On Jan. 16, 2015, the United States Treasury Department's Office of Foreign Assets Control (OFAC) and the U.S. Department of Commerce's Bureau of Industry and Security (BIS) published revised Cuba sanctions regulations<sup>i</sup> that opened trade with Cuba for the first time in decades. After the January 2015 amendment, OFAC and BIS have further revised the regulations on four occasions, the most recent being on Nov. 9, 2017. In addition, OFAC and BIS have issued several updated sets of frequently asked questions (FAQs) clarifying the scope of the amendments. The sectors most impacted by the amendments to the regulations prior to November 2017 have been travel, telecommunications, financial services and exports to Cuban private entrepreneurs (*cuentapropistas*).

The most recent changes to the regulations, which had been announced by President Donald Trump on June 16, 2017 and became effective as of Nov. 9, 2017, restrict and impose new conditions and requirements on some of the transactions that had been authorized after January 2015. The embargo remains in place, and tourism is still not permitted for *persons subject to U.S. jurisdiction*.<sup>ii</sup>

OFAC and BIS implemented the changes via amendments to the Cuban Assets Control Regulations (CACR) and the Export Administration Regulations (EAR), respectively. In addition, on Nov. 8, 2017, the U.S. Department of State published a list of Cuban entities with which direct financial transactions generally will not be permitted. The revised regulations are prospective; thus, they will not affect existing contracts and specific licenses.

This article explores some of the recent changes concerning business transactions with certain Cuban entities under the country's military structure as well as travel-related transactions.

### **Business Transactions Involving Entities Under the Cuban Military Structure**

As a general rule, any Cuba-related commercial engagement that includes *direct financial transactions*<sup>iii</sup> with *restricted entities* (i.e., those entities or sub-entities that are under the control of, or act on behalf of, the Cuban military, intelligence or security services or personnel)<sup>iv</sup> will be prohibited. However, this general rule banning direct transactions with restricted entities has exceptions.

OFAC has clarified that those *Cuba-related commercial engagements* (authorized by either a general or a specific license) that were *in place* prior to the issuance of the amendments will remain authorized, even if such commercial engagements involved direct financial transactions with restricted entities. This means that any agreements or transactions executed — for example, with Gaviota, S.A. or any other entity of Grupo de Administración Empresarial, S.A. (GAESA), both of which reside under the structure of the Cuban Ministry of the Armed Forces (MINFAR) — before Nov. 9, 2017, will remain permitted. Further, any established Cuba business, such as the cruise lines or airlines already providing services between the U.S. and Cuba, will be able to continue their operations and honor their contracts in Cuba despite the possibility that one or more of their Cuban counterparts is listed as a restricted entity.<sup>v</sup>

Further, not only Cuba businesses *established* prior to Nov. 9, 2017, but also those “transactions outlined in contingent or other types of contractual arrangements agreed to prior to the issuance of the new regulations” will be permitted to continue, provided they are authorized under a general or a specific license from OFAC.<sup>vi</sup> Consequently, both definitive contracts and contingent contracts or other types of contractual arrangement (likely including Letters of Intent, Memorandum of Understanding and other non-definitive agreements) are grandfathered under the prior version of the regulations and therefore protected from prohibition, even if such contracts or the business transactions therein outlined involve direct transactions with a restricted entity.

Most authorized exports and re-exports as well the general licenses authorizing the establishment of physical presence and business presence in Cuba are also impacted by the prohibition regarding direct financial transactions with restricted entities.

### Changes to Authorized Travel Categories

*Individual people-to-people travel* [e.g., educational travel that: (1) does not involve academic study pursuant to a degree program and (2) does not take place under the auspices of an organization subject to U.S. jurisdiction that promotes people-to-people contact] is now prohibited.

*Group people-to-people travel* [e.g., educational travel not involving academic study pursuant to a degree program that takes place under the auspices of an organization subject to U.S. jurisdiction that promotes people-to-people contact] will remain authorized, provided that travelers comply with all other existing requirements of the people-to-people general license. An addition to this authorized travel category includes the requirement that now a person subject to U.S. jurisdiction who is a representative of the sponsoring organization must accompany each group in Cuba to ensure compliance with the regulations.<sup>vii</sup>

OFAC is also adding requirements for certain categories of authorized educational travel<sup>viii</sup> as well as travel under the support of the Cuban people.<sup>ix</sup> In addition, all 12 general licenses for authorized travel to Cuba now include a condition that prevents direct financial transactions with restricted entities. This means that authorized travelers will not be able to pay for lodging and/or restaurant charges if such transactions are for the benefit of restricted entities. This limitation is expected to benefit the Cuban private sector since the travelers are encouraged to stay at privately-owned hotels or bed-and-breakfasts (*casas particulares*) and eat at privately-owned restaurants (*paladares*).

As the revised regulations are implemented and enforced, it is likely that further clarifications — and possibly adjustments — will be necessary.

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<sup>i</sup> The U.S. sanctions against Cuba have been implemented through the Cuban Asset Control Regulations (CACR), found at 31 C.F.R. Part 515, while the U.S. export controls against Cuba have been implemented through the Export Administration Regulations (EAR), found at 15 C.F.R. Parts 730 *et seq.* The CACR are regulated by the Department of the Treasury’s Office of Foreign Asset Controls (OFAC), while the EAR are regulated by the U.S. Department of Commerce’s Bureau of Industry and Security (BIS).

<sup>ii</sup> For OFAC purposes, *persons subject to U.S. jurisdiction* are: (i) U.S. citizens, permanent resident aliens and entities organized under the laws of the United States, wherever located; (ii) any person or entity physically in the United States; and (iii) non-U.S. entities outside the United States that are owned or controlled by U.S. persons specified in item (i) of this paragraph (31 C.F.R. 515.329 and 515.330).

<sup>iii</sup> For purposes of this prohibition, a person engages in a *direct financial transaction* by acting as the originator on a transfer of funds whose ultimate beneficiary is an entity or subentity on the State Department’s List of Restricted Entities and Subentities Associated with Cuba (“Cuba Restricted List”) or as the ultimate beneficiary on a transfer of funds whose originator is an entity or subentity on the Cuba restricted List, including a transaction by wire transfer, credit card, check, or payment of cash.” 31 C.F.R. 515.209 (emphasis added).

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<sup>iv</sup> On Nov. 8, 2017, the U.S. Department of State issued the list of around 180 *prohibited entities* (“Cuba Restricted List,” available at <https://www.state.gov/e/eb/tfs/spi/cuba/cubarestrictedlist/275331.htm>).

<sup>v</sup> At least initially, the major Cuban counterparts of the U.S. cruise lines and airlines operating in Cuba were not included on the List of Restricted Entities.

<sup>vi</sup> See FAQ No. 67 (Nov. 8, 2017)

<sup>vii</sup> 31 C.F.R. 515.565(b)(4)

<sup>viii</sup> 31 C.F.R. 515.565(a)

<sup>ix</sup> 31 C.F.R. 515.574