

## OFAC and BIS Continue to Ease Cuba Shipping, Travel and Banking Sanctions

The Department of Treasury's Office of Foreign Assets Control (OFAC) and the Commerce Department's Bureau of Industry and Security (BIS) have respectively published another round of amendments to the Cuban Assets Control Regulations and Export Administration Regulations relating to trade between the United States and Cuba. The latest amendments, which became effective March 16, 2016, further ease sanctions in the areas of travel, banking and shipping, among others. These regulatory changes represent the most recent revisions to a rapidly evolving U.S.-Cuba policy that began in December 2014, when President Obama announced diplomatic and economic initiatives to pave the way towards normalization of relations between the two countries.

### Shipping

The export or re-export of goods from the United States to Cuba has long been generally prohibited unless the goods were moving pursuant to a license or license exception. Under BIS rules, sailing a vessel to Cuba, even temporarily and even if carrying authorized goods, constitutes an export or re-export of the vessel that requires a license. In addition, it is generally prohibited for goods in which a U.S. person has an interest to transit Cuba.

Since September 2015, vessels carrying authorized cargo from the United States to Cuba have been able to do so using a license exception to cover the vessel (License Exception for Vessels, Aircraft and Spacecraft (AVS)), however, they were still limited to carrying only goods authorized for off-loading in Cuba. Effective March 16, 2016, vessels transporting authorized cargo from the United States to Cuba may now carry other U.S.-origin cargo and then sail to other countries with the cargo that was loaded at a U.S. port. As a result, ships that transit Cuban territory will be able to more efficiently transport cargo from the United States to other countries, as well as utilize more efficient shipping routes.

Under the new regulations, cargo loaded in the United States may transit Cuba enroute to other destinations as long as the cargo departs with the vessel at the end of the sojourn in Cuba, does not enter the Cuban economy, is not transferred to another vessel while in Cuba, and is properly authorized for export to the country of ultimate destination. However, if the vessel is to remain in Cuba for longer than 14 days, a license would be required.

It is still prohibited for vessels to carry unlicensed goods from the United States to Cuba or to have on board the vessel during a U.S. port call any cargo in which Cuba or a Cuban national has an interest. Thus, a vessel arriving in Cuba from the United States would only be able to off load authorized U.S. exports. Accordingly, while the new rule may improve the efficient use of vessels carrying authorized goods from the United States to Cuba, it will not permit cargo destined for Cuba from outside the United States to transit U.S. ports. In addition, ships that have stopped in Cuba for purposes other than the loading or unloading authorized cargo continue to be prevented from entering a U.S. port for 180 days from the date the vessel departed Cuba.

### Travel

The statutory prohibition on travel for tourist activities remains in place and U.S. persons wishing to travel to Cuba must be authorized to do so by either a general or specific license from OFAC. To date, OFAC has issued a general license for only 12 categories of travel, including for educational activities intended to promote people-to-people contact.<sup>1</sup>

Whereas, previously, people-to-people educational travel could only be performed as part of an organized group, persons subject to U.S. jurisdiction are now authorized to individually engage in



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people-to-people educational travel. To be covered by this expanded general license, the people-to-people travel-related transactions must be for the purpose of engaging in a full-time schedule of educational exchange activities intended to enhance contact with the Cuban people, support civil society in Cuba, or promote the Cuban people's independence from Cuban authorities. The activities must also result in meaningful interaction between the traveler and individuals in Cuba.

As previously advised (see Cozen O'Connor Alert, *U.S. Commercial Flights to Cuba to Resume in 2016*, December 21, 2015, and *Cozen O'Connor Aviation Regulatory Update*, January 2016), the Departments of State and Transportation have authorized the resumption of scheduled commercial airline service between Cuba and the United States. Once scheduled service resumes, the change to the general license for people-to-people travel will allow individuals to buy an airline ticket without having to go through an approved tour operator.

Persons relying on this general license must keep records related to the authorized travel transactions, including records demonstrating a full-time schedule of authorized activities. Such records should be retained for five years.

### **Physical and Business Presence in Cuba**

Previously, persons subject to U.S. jurisdiction were authorized to establish a physical presence in Cuba, such as an office, retail outlet or warehouse, as long as those persons were engaged in certain categories of authorized activities. Those activities now include entities that engage in authorized humanitarian projects or authorized noncommercial activities intended to provide support for the Cuban people, and private foundations or research or educational institutes engaging in certain authorized activities.

Additionally, OFAC has expanded the existing authorization to maintain a business presence in Cuba via a subsidiary, branch, office, joint venture, franchise or other relationship with any Cuban individuals or entities (such as a joint venture) to include exporters of goods that are authorized for export or re-export to Cuba; entities providing mail or parcel transmission services or cargo transportation services; and providers of carrier and travel services to facilitate authorized transactions. The revised regulations also clarify that the physical and business presence authorizations permit exporters and re-exporters of authorized or exempt goods to assemble such goods in Cuba.

The common theme running throughout the amended rule on business presence, and the key criterion for U.S. persons wishing to establish a business presence in Cuba, is that the underlying activity for which the business presence is being established must itself be an authorized activity. Thus, it is permissible for a U.S. person to establish a business presence in Cuba to support the transportation of authorized cargo. It would not be permissible for a U.S. person to establish a business presence to support general carrier operations.

### **Banking and Other Developments**

In other developments, U.S. banking institutions are now authorized to engage in "U-turn transactions" relating to Cuba, whereby transfers from a bank outside the United States may pass through one or more U.S. financial institutions before being transferred to a bank outside the United States, as long as neither the originator nor the beneficiary is a person subject to U.S. jurisdiction. Additionally, U.S. banking institutions will be authorized to process U.S. dollar monetary instruments, including cash and travelers' checks, presented indirectly by Cuban financial institutions. Transactions where the originator or beneficiary is a person subject to U.S. jurisdiction remain prohibited unless otherwise authorized by OFAC.

In addition, Cuban nationals in the United States pursuant to non-immigrant travel status may now earn a salary and U.S. companies may sponsor, hire and pay such nationals, as long as the individual is not subject to special Cuban tax assessments and the Cuban government receives no additional payments in connection with that hiring or sponsorship. This change means that Cuban athletes (read baseball players), artists, performers and others may come to the United States and earn salaries and stipends above basic living expenses.

Although the Cuban sanction program appears to be rapidly evolving, it is important to understand that outside of the limited relief specified in the amended regulations, no other sanctions with Cuba

have been lifted. As such, persons subject to U.S. jurisdiction remain generally prohibited from doing business with Cuba unless licensed by OFAC. We would encourage anyone interested in transacting business with Cuba or a Cuban national to seek the advice of legal counsel.

We will continue to monitor developments regarding these policy changes and will provide further guidance as details are announced.

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**Should you have any questions regarding U.S. sanctions against Cuba or any other U.S. sanctions program, please do not hesitate to contact a member of Cozen O'Connor's Transportation & Trade Group.**

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<sup>1</sup> People-to-people travel is loosely defined by OFAC as educational exchanges not involving academic study pursuant to a degree program, by which the U.S. traveler engages in educational and cultural interaction with individuals in Cuba, the predominant portion of which is not with prohibited members of the Cuban Government or Cuban Communist Party.