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Cuba & Trump: What the Changes Mean

President Trump's stated new policy towards Cuba falls short of a dramatic course correction.

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On December 17, 2014, President Obama announced that the United States would “chart a new course” on its Cuba policy. Starting in January 2015, and for the next two years, the Treasury Department's Office of Foreign Assets Control (OFAC) and the Commerce Department's Bureau of Industry and Security (BIS) implemented a policy of further engagement with the Cuban people by easing, on five separate occasions, the regulatory framework for the longstanding US embargo of Cuba. These amendments made it easier for US-regulated travelers to go to Cuba for specific purposes, and created new commercial, humanitarian, and financial opportunities involving Cuba.

Since President Trump's inauguration in January 2017, his Administration has engaged in a “review of all U.S. policies towards Cuba.” On June 16, 2017, in a speech at the Manuel Artime Theater in Miami, President Trump signaled that the nearly six-month policy review was complete. The President declared he was “cancelling the last administration's completely one-sided deal with Cuba” and announced “a new policy.” The Trump Administration's newly stated Cuba policy involves: (a) strictly enforcing US law, especially as it relates to tourism to Cuba, (b) restricting funds from flowing to the Cuban military, security, and intelligence services, and (c) taking steps to ensure that US investment flows to the Cuban people, rather than the Cuban government. As described in a White House Memorandum issued contemporaneously with President Trump's speech, the President's stated plans, at this stage, do not appear to represent a significant reversal of the successive measures to ease sanctions that the



The US embassy in Havana, Cuba. The changes announced by Trump appear to be a more modest departure from Obama than some had anticipated, but will likely entail more enforcement of existing sanctions compliance. (Photo: US Government)

Obama Administration initiated. Indeed, both the US embassy in Cuba and the Cuban embassy in Washington, DC, will remain open, and diplomatic ties will continue. Rather, President Trump's approach currently appears to focus principally on trying to cut off benefits to the Cuban government and on curbing one subset of travel to Cuba by US-regulated travelers.

TIMING – NO IMMEDIATE CHANGES

As a threshold matter, for the bulk of the President's new policy to take effect, OFAC must amend the Cuban Assets Control Regulations, 31 C.F.R. Part 515 (CACR), and BIS will also need to amend the Export Administration Regulations, 15 C.F.R. Parts 730-774 (EAR), where needed consistent with the President's new policy. The President has directed OFAC and BIS to "initiate a process" to amend these regulations "within thirty days." According to a White House Fact Sheet, the process of finalizing these regulations "may take several months." OFAC in Frequently Asked Questions (FAQs) issued on the same day as the President's speech indicated that OFAC "expects to issue its regulatory amendments in the coming months." Similarly, BIS in its FAQs announced that "[i]f amendments to the EAR are necessary, BIS will publish them in the coming months." Insofar as a new enforcement approach, the White House Memorandum directs the Secretaries of State, Treasury, Commerce, and Transportation to "review their agency's enforcement of all categories of permissible travel within 90 days of the date the regulations . . . are finalized to ensure such enforcement accords with" the President's new policy vis-à-vis Cuba.

RESTRICTIONS ON DEALINGS WITH THE GOVERNMENT OF CUBA

The first prong of the President's policy involves restricting dealings with the Government of Cuba, and in particular, the Cuban military, intelligence, and security services.

- **Cuban government entities:** The President directed the Secretary of State to (a) identify parties controlled by, or acting for or on behalf of, "the Cuban military, intelligence, or security services or personnel (such as *Grupo de Administracion Empresarial S.A. (GAESA)*, its affiliates, subsidiaries, and successors)" and (b) publish a list of such parties "with which direct financial transactions would disproportionately benefit such services or personnel at the expense of the Cuban people or private enterprise in Cuba." US-regulated parties generally will be prohibited from engaging in financial dealings with these entities, except in certain cases — such as in connection with sending, receiving, or processing authorized remittances; acquiring visas for permitted travel; supporting programs to build democracy in Cuba; and supporting the authorized sale to Cuba of agricultural commodities, medicines, and medical devices.
- **Cuban Government officials:** President Trump also directed the Treasury Secretary to revise the definition of "prohibited officials of the Government of Cuba" (CACR Section 515.337), by adding parties that were dropped from that definition in October 2016. These include, for instance, members of provincial assemblies, employees of the Ministry of the Interior, employees of the Ministry of Defense, and chief editors,

editors, and deputy editors of Cuban state-run media organizations and programs. In various parts, the CACR prohibit persons subject to US jurisdiction from engaging in transactions involving “prohibited officials.”

- **Currently planned travel or commercial engagements:** In its FAQs, OFAC stated that the President’s new policy would not impact commercial engagements or travel plans that are partially underway and consistent with current law. OFAC confirmed that authorized travelers to Cuba may go forward with “travel-related arrangements that include direct transactions with entities related to the Cuban military, intelligence, and security services,” provided such arrangements “were initiated prior to the issuance of the forthcoming regulations.” Similarly, “any Cuba-related commercial engagement that includes direct transactions with entities related to the Cuban military, intelligence, or security services that may be implicated by the new Cuba policy will be permitted provided that those commercial engagements were in place prior to the issuance of the forthcoming regulations.”

RESTRICTIONS ON AUTHORIZED TRAVEL TO CUBA

The second prong of the President’s policy involves tightening restrictions on authorized travel to Cuba.

- **Current law:** Currently, US-regulated travelers may go to Cuba only if they qualify under one of twelve categories of activities, including, among others, family visits, professional research and meetings, humanitarian projects, and educational activities. Tourist travel to Cuba by US travelers has been prohibited for decades and is the subject of a Congressional mandate. The twelve authorized categories of travel to Cuba are set out in CACR Section 515.560. One of the Obama Administration’s most significant travel-related changes was to shift the requirement for an OFAC-issued travel license (which could take several weeks or months to secure, and could be denied) to a system of “general licenses,” meaning that the traveler is largely responsible for policing his or her own compliance with the twelve authorized travel categories. Significantly, President Trump’s new Cuba policy does not call for an end to the “general license” travel system.
- **Removing *individual* people-to-people travel:** President Trump directed the Treasury Secretary to revise one portion of the “educational activities” general license, which authorizes so-called “people-to-people” travel to Cuba. OFAC explained in its FAQs that the new policy will not result in changes to any other general travel license. Under the “people-to-people” travel authorization (CACR Section 515.565(b)), a US-regulated traveler may go to Cuba “for the purpose of engaging, while in Cuba, in a full-time schedule of activities intended to enhance contact with the Cuban people, support civil society in Cuba, or promote the Cuban people’s independence from Cuban authorities,” provided that certain terms and restrictions are met. Before March 16, 2016, one such term was that the travel must take part under the auspices of an organization subject to US jurisdiction that sponsors people-to-people tours. President Trump directed the Treasury Secretary to reinstate that condition, meaning that once the new OFAC regulations take effect

in a few weeks or months, US-regulated travelers will not be permitted to travel to Cuba for “self-directed” people-to-people tours.

- **Retaining *group* people-to-people travel:** According to OFAC, group people-to-people tours will remain authorized. In such tours, an “employee, consultant, or agent of the group must accompany each group to ensure that each traveler maintains a full-time schedule of educational exchange activities.”
- **Currently planned travel:** OFAC explained that the new policy will not impact travel plans that are already partially underway and consistent with current law. The agency’s FAQs confirm that, if a US-regulated traveler has “already completed at least one travel-related transaction (such as purchasing a flight or reserving accommodation) prior to the President’s announcement,” then all additional travel-related transactions for that trip are authorized, regardless of “whether the trip occurs before or after OFAC’s new regulations are issued.”
- **Enforcement of travel rules:** Although US-regulated travelers are not required to secure specific authorization from OFAC to travel to Cuba under one of the twelve travel categories, travelers will continue to be required to certify to their travel provider that they are traveling in one of the twelve authorized travel categories. Further, travelers must keep records of their travel for five years, which the US Government could request to review. Notably, President Trump directed the Treasury Secretary to “regularly audit travel to Cuba to ensure that travelers are complying with relevant statutes and regulations,” and to request that the Inspector General of the Treasury Department review this audit requirement. In other words, the current Administration appears likely to police more closely whether US-regulated travelers are complying with the terms of the travel general licenses.

CONCLUSION: POLICY SHIFTS NOT SEA CHANGES

While the full extent of President Trump’s policy towards Cuba will not be certain until OFAC and BIS publish amended regulations in the coming weeks or months, the changes announced last week appear on balance to be a more modest departure from the Obama Administration approach than some had anticipated. However, it appears that the Trump Administration expects to devote more enforcement resources than did the previous administration to Cuba sanctions compliance.



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