

Cuba Sanctions: 10 Important Changes



New regulations will facilitate trade and investment in Cuba, including air travel and telecommunications to and within the island. Here capital Havana. (Photo: Gildemax)

Ten key changes to US sanctions and export regulations for Cuba.

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On January 15, 2015, the Departments of the Treasury and Commerce revised the Cuban Assets Control Regulations (CACR) and the Export Administration Regulations (EAR) to implement President Obama's Cuba policy changes

announced on December 17, 2014. Here are 10 important takeaways from these changes, which took effect on January 16, 2015.

1. Impact on the Embargo

The comprehensive US embargo of Cuba remains in effect, as required by statute. Without Congressional action, the Executive Branch does not have authority to lift the embargo entirely. Although the regulatory changes the Obama Administration implemented are the most significant modifications to the Cuba embargo since its inception, extensive US sanctions against Cuba continue. As the Department of the Treasury's Office of Foreign Assets Control (OFAC) clarified, "[m]ost transactions between the United States, or persons subject to U.S. jurisdiction, and Cuba continue to be prohibited, and OFAC continues to enforce the prohibitions" of the CACR.

The same day the Executive Branch announced the regulatory changes, Representative Charles Rangel (D-NY), joined by 17 House Democrats, reintroduced the Free Trade with Cuba Act, a bill that Representative Rangel first introduced in 1993. The Free Trade with Cuba Act seeks to lift the embargo, although its prospects for passage remain slim.

2. Commercial Exports and Donations

A new Commerce Department license exception found at 15 C.F.R. § 740.21 — "License Exception Support for the Cuban People (SCP)" — authorizes exports and reexports of certain items to Cuba without an application to the Commerce Department for a specific license. To qualify for License Exception SCP, items must be classified under "EAR99" pursuant to the EAR (i.e., not identified on the Commerce Control List (CCL)) or controlled only for anti-terrorism (AT) reasons on the CCL. Exports pursuant to License Exception SCP will, with some exceptions, require the filing of Electronic Export Information (EEI) through the Automated Export System (AES), regardless of the value of the export.

License Exception SCP authorizes the export and reexport of the following commercially sold or donated items for "private sector" activities in Cuba:

- Building materials, equipment, and tools to construct or renovate privately-owned buildings, including privately-owned residences, businesses, places of worship, and buildings for private sector social or recreational use
- Tools and equipment for private agricultural activity
- Tools, equipment, supplies, and instruments for use by private sector entrepreneurs (e.g., auto mechanics, barbers and restaurateurs)

The Commerce Department explained in an FAQ that “the private sector in Cuba encompasses economic activity generated by private individuals and groups as enterprises for profit and also that which is generated by non-profit organizations and charities.” However, companies or corporations “that are government owned, operated or controlled are not considered private sector.” Notably, the Commerce Department has not yet provided guidance on the meaning of “building materials,” “supplies,” “privately-owned,” or what level of due diligence will be sufficient to determine that a building or residence is privately-owned. The Commerce Department did clarify, however, that “Cuban government import agencies and other government owned, operated or controlled companies and corporations may act as consignees to receive and effect delivery of eligible items to the private sector.”

License Exception SCP also authorizes exports, reexports and temporary exports to Cuba of the following:

- Donated items for use in educational, cultural, scientific and research activities
- The temporary export of items by travelers in connection with those same activities
- “Items to human rights organizations, individuals or non-governmental organizations that promote independent activity intended to strengthen civil society”

The Commerce Department also announced that generally it will approve specific license applications for exports or reexports “of items necessary for the environmental protection of U.S. and international air quality, waters, or coastlines,” although these items are not eligible for License Exception SCP.

The Commerce Department has clarified through its FAQs that the revised regulations do not change the continued requirement to submit (a) notifications of intent to export/reexport eligible agricultural commodities to Cuba pursuant to License Exception Agricultural Commodities (AGR) and (b) license applications to export/reexport eligible medicines and medical devices to Cuba — which are usually approved, subject to certain limited exceptions.

For eligible exports and reexports to Cuba, it is important to recognize that the OFAC-approved payment terms continue to be limited (and may limit the opportunities to take advantage of License Exception SCP). OFAC expanded the regulatory interpretation of “cash in advance” from “cash before shipment” to “cash before transfer of title or control.” The only other authorized payment term is financing by a third-country banking institution (i.e., not in Cuba) that is not as designated national (i.e., including Cuban banks), or organized under US law (including foreign branches).

A corresponding OFAC general license at Section 533 of the CACR authorizes travel to Cuba and associated activities that are “directly incident to the conduct of market research, commercial marketing, sales negotiation, accompanied delivery, or servicing in Cuba of items consistent with the export or reexport licensing policy of the Department of Commerce,” as long as the traveler has a full-time schedule of business activities. As a result, if a US business traveler seeks to travel to Cuba for reasons related to export opportunities eligible for License Exception SCP, such travel would appear to be authorized by the OFAC general license. If other opportunities do not qualify for the general license, travelers can apply for specific licenses from OFAC.

3. Telecommunications

A provision of EAR License Exception SCP “intended to improve the free flow of information” in Cuba and between Cuba and the rest of the world authorizes the export and reexport of certain sold or donated telecommunications items, including items related to Internet access, services and infrastructure. According to the Commerce Department FAQ, unlike the License Exception SCP provisions discussed above, recipients of telecommunications items may include Cuban government owned, operated, or controlled companies and corporations. This same provision also authorizes exports and reexports to Cuba of items for use by US news bureaus that gather and disseminate news to the public and by news media personnel who meet certain criteria. The Commerce Department has not issued guidance specifying the types of items that qualify as items “for telecommunications” under License Exception SCP, but has provided that qualifying items must be classified under “EAR99” pursuant to the EAR or controlled only for anti-terrorism (AT) reasons on the CCL.

The Commerce Department also amended its existing License Exception Consumer Communications Devices (CCD) at Section 740.19 of the EAR, which authorizes the export or reexport of certain communications items to eligible end users in Cuba. These amendments have eliminated the previous requirement that the items be donated rather than sold. License Exception CCD covers a broad range of hardware and software, such as computers, monitors, printers, cell phones, digital cameras, television and radio receivers, and certain consumer software.

A corresponding OFAC general license at Section 542 of the CACR authorizes transactions, including payments, “incident to the establishment of facilities, including fiber-optic and satellite facilities, to provide telecommunications services” connecting Cuba to the world. This OFAC general license also authorizes persons subject to the US embargo to establish facilities that provide telecommunications services solely within Cuba. Further, OFAC’s amended regulations permit persons subject to the jurisdiction of the United States to engage in transactions and payments “incident to the provision of telecommunications services related to the transmission or the receipt of telecommunications involving Cuba,” and to enter into and make payments under contracts for the provision of telecommunications services in Cuba, subject to OFAC notification and reporting requirements.

4. Financial Services

Pursuant to Section 560(c)(5) of the CACR, US financial institutions may, but are not required to, permit authorized travelers to Cuba to use their credit or debit cards while in Cuba. As OFAC explained in an FAQ, because these regulations do not require financial institutions or credit card companies to process credit card transactions in Cuba, travelers should determine with their financial institution whether a particular card may be used in the country. Pursuant to Section 584 of the CACR, US depository institutions, including banks and credit unions, are now permitted to open correspondent accounts at banks in Cuba and at Cuban banks in third countries to facilitate the processing of authorized transactions.

5. Travel

Although persons subject to the US embargo are still prohibited from traveling to Cuba for tourist activities, OFAC eased restrictions on travel under the categories of travel previously authorized by the CACR. General licenses now authorize all 12 categories of travel, meaning that travelers do not need to submit a specific license request for travel (which generally took several months). Significantly, OFAC does not require travelers to submit travel reports to the US government, but rather establishes an honor system of sorts, requiring travelers to certify to their travel provider the OFAC authorization permitting the travel. The traveler must retain specific records relating to the travel for five years, which OFAC may request.

Although certain categories are relatively broad, travelers must be sure to comply with the specific terms and restrictions of the general licenses, which are set out in Section 560 of the CACR.

The 12 categories of travel are:

- Family visits
- Government business
- Journalism
- Professional research and meetings
- Educational activities
- Religious activities
- Public performances, clinics, workshops, athletic and other competitions, and exhibitions
- Support for the Cuban people
- Humanitarian projects
- Activities of private foundations or research or educational institutes
- Work concerning the export, import, or transmission of information or informational materials
- Work concerning the export transactions authorized under regulations and guidelines

For all authorized travel, OFAC removed the longstanding per diem spending limits, so there is no longer a US dollar limit on what travelers may spend for living expenses and the purchase of Cuban goods for consumption in Cuba. US financial institutions are also permitted to process the payment of credit cards, debit cards, stored value cards, checks, drafts, travelers' checks, and similar instruments that authorized travelers use in Cuba. For these categories of travel, the traveler's schedule of activities must not include free time or recreation in excess of that consistent with a full-time schedule in Cuba.

6. Travel Services

To facilitate the travel outlined above, OFAC issued a new general license found at Section 572 of the CACR, authorizing persons subject to the US embargo to provide travel services in support of authorized travel. Subject to recordkeeping and reporting requirements, US travel agents and tour operators may provide travel services in connection with authorized travel to Cuba, and US air carriers may provide service to, from, or within Cuba in connection with authorized travel. Also, as OFAC explained in an FAQ, even though a specific OFAC license is no longer needed, carriers wishing to provide air service to Cuba must obtain regulatory approvals from other agencies, including the Departments of Transportation and Homeland Security. Transportation by vessel between the United States and Cuba (e.g., cruise ships) is not permitted.

7. Importation of Items from Cuba

Section 560(c)(3) of the CACR permits travelers returning from Cuba to import into the United States as accompanied baggage up to US\$400 worth of Cuban merchandise for personal use only — no more than

US\$100 of which can be alcohol and tobacco products. The revised OFAC regulations also permit travelers returning from Cuba to import into the United States certain goods and services produced by independent Cuban entrepreneurs. These goods and services will be determined by the US State Department and identified on the “Section 515.582 List,” made available at <http://www.state.gov/e/eb/tfs/spi/>.

8. Remittances

Under OFAC’s expanded general license found at Section 515.570(b), persons subject to the jurisdiction of the United States can send US\$2,000 in remittances per quarter to qualifying Cuban nationals — up from the prior limit of US\$500. Certain types of remittances are authorized with no US dollar limit, including those intended to support:

- Humanitarian projects in or related to Cuba that are designed to directly benefit the Cuban people
- Independent organizations designed to promote a rapid, peaceful transition to democracy
- Activities of individuals and non-governmental organizations that promote independent activity intended to strengthen civil society in Cuba
- The development of private businesses (including “small farms”)

However, a note provides that this section of the revised OFAC regulations does not authorize “investment with respect to Cuba.” Authorized travelers to Cuba may carry up to US\$10,000 in total family remittances per authorized trip. US banks and US-registered money transmitters are also generally authorized to provide services in connection with the collection or forwarding of authorized remittances.

9. Third-Country Dealings with Cuban Persons

The regulatory changes do not impact in any meaningful way the reach of the US sanctions against Cuba, which applies not only to US persons but also foreign entities that are owned or controlled by US persons. OFAC has added a new general license found in Section 585 of the CACR to allow foreign entities that are US owned or controlled to provide goods and services to Cuban nationals outside of Cuba, as long as the transactions do not involve the direct or indirect commercial export of goods or services to or from Cuba. In a note, OFAC states that it is not authorizing U.S. owned or controlled firms in third countries to export to Cuba commodities produced in third countries.

10. Official US Government Business

To help further restore diplomatic relations with Cuba, a new OFAC general license authorizes persons subject to US jurisdiction to provide goods and services to Cuban official missions and their employees in the United States. OFAC has also generally authorized Cuba-related transactions for official business by employees, grantees, and contractors of the US government and by US-regulated persons working for intergovernmental organizations of which the United States is a member or holds observer status.

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