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TELECOMMUNICATIONS

This BNA Insights article by Les Carnegie and Andrew Galdes of Latham & Watkins examines the Department of Treasury's Office of Foreign Assets Control and the Commerce Department's Bureau of Industry and Security publication of revised regulations for U.S.-Cuban trade, and finds that the changes create new opportunities for individuals and companies to sell a range of consumer communication devices and provide certain telecommunications services in Cuba.

Free Flow of Information: Exporting Telecommunications Items and Services to Cuba

BY LES CARNEGIE AND ANDREW GALDES

In place since 1963, the U.S. embargo of Cuba remains one of the most restrictive U.S. embargo programs today, notwithstanding a number of recent changes announced by President Barack Obama in December 2014. The U.S. embargo of Cuba is administered and enforced by the Department of Treasury's Office of Foreign Assets Control (OFAC) and the Commerce Department's Bureau of Industry and Security (BIS).

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The OFAC restrictions, principally expressed in the Cuban Assets Control Regulations, 31 C.F.R. Part 515 (CACR), generally prohibit most business, investment, and tourist activities as well as financial transactions by U.S. persons with Cuba. The term "U.S. persons" includes U.S. citizens and U.S. lawful permanent residents (i.e., so-called green card holders) worldwide, anyone—regardless of nationality—who is physically present in the U.S., and any entity that is organized under U.S. law. Significantly, the CACR also reach any non-U.S. entity that is owned or controlled by a U.S. person, such as foreign subsidiaries or certain foreign joint ventures. According to the 2001 version of the OFAC Fact Sheet about the CACR, the "basic goal" of the sanctions was "to isolate the Cuban government economically and deprive it of U.S. dollars."

While the OFAC regulations target the activities of U.S. persons and their owned or controlled foreign entities, the BIS regulations generally focus on U.S.-regulated items (goods, software, and technology) that may be exported or reexported to Cuba—regardless of the nationality of the exporter or reexporter or where in the world the export or reexport originates.

On Dec. 17, 2014, President Obama announced that the U.S. would ''cut loose the anchor of failed policies of the past'' in favor of charting ''a new course in U.S. relations with Cuba that will engage and empower the Cuban people.'' A central feature of the new plan is to ''increase Cubans' access to communications and their ability to communicate freely.'' This objective is consistent with other changes made by OFAC and in some cases BIS in the Iran, Sudan, Syria, and Crimea sanctions programs to promote freedom of expression and the exchange of personal communications over the Internet.

In the case of the Cuba sanctions program, certain of President Obama's policy announcements became law on Jan. 16, 2015, when OFAC and BIS simultaneously issued, respectively, revisions to the Cuban Assets Control Regulations (CACR) and the Export Administration Regulations (EAR). These revisions authorized the sale of a range of communications and telecommunications items to Cuba, the provision of certain services in Cuba related to these items, and travel to Cuba in connection with these transactions. However, these authorizations come with exceptions, qualifications, and limitations, outlined below.

Consumer Communications Devices. In September 2009, the Commerce Department issued License Exception Consumer Communications Devices (CCD), found at 15 C.F.R. 740.19, authorizing the export to Cuba of specified items such as televisions, radios, digital cameras, mobile phones, and certain personal computers and accessories—but only if the exporter donated the items. In January 2015, BIS removed the donation requirement, allowing the sale of such items. To qualify, items must be classified in the least restrictive export control category called ''EAR99'' (i.e., not identified on the Commerce Control List (CCL)) or controlled only for anti-terrorism (AT) reasons on the CCL. Most entities owned or controlled by the Cuban Government or the Cuban Communist Party, including schools and hospitals, are not eligible recipients.

[U]nlike License Exception CCD, recipients of items exported pursuant to this provision of License Exception SCP can include entities in Cuba that are 'Cuban government owned, operated or controlled companies and corporations for telecommunications infrastructure creation and upgrades.'

In January 2015, BIS also created a new license exception, License Exception Support for the Cuban People (SCP), found at 15 C.F.R. 740.21. A provision of this license exception, which is ''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—but not leased—telecommunications items. This provision also authorizes the export and reexport of items for use by U.S. news bureaus that gather and disseminate news to the public, as well as by certain news media personnel.

As in License Exception CCD, qualifying items must be classified under EAR99 or controlled only for AT reasons on the CCL. But unlike License Exception CCD, which identifies the types of qualifying items, License Exception SCP does not list what items may qualify as items ''for telecommunications,'' other than to explain that such items include those that provide ''access to the Internet, use of Internet services, infrastructure creation and upgrades.'' Further, unlike License Exception CCD, recipients of items exported pursuant to this provision of License Exception SCP can include entities in Cuba that are ''Cuban government owned, operated or controlled companies and corporations for telecommunications infrastructure creation and upgrades,'' as the agency confirms in a FAQ posted online. In that FAQ, BIS confirms that certain items listed in License Exception CCD are also eligible for export under License Exception SCP, and in these cases, an exporter may rely on either license exception to authorize the export.

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Neither BIS nor OFAC has addressed in any official way what level of diligence the agencies expect exporters to perform in determining whether their items and intended recipients are eligible under the above general licenses. When exporters submit a specific license request for an export, the agency reviews the application and approves it, denies it, or requests more information depending, in part, on the adequacy of the diligence the requesting party performed. Absent agency guidance on this diligence point, exporters should perform sufficient diligence to document with confidence that their contemplated export is covered by the general license they seek to use. This may include gathering written certifications from counterparties, assembling documents from public sources, and contacting BIS or OFAC for guidance or clarification. Exporters should retain their diligence files for at least five years in the event that either OFAC or BIS later requests information about the transaction.

Internet Infrastructure. License Exception SCP also authorizes the export and reexport of sold or donated telecommunications items related to Internet access, services, and infrastructure. A corresponding OFAC general license at Section 542 of the CACR authorizes transactions, including payments:

- Incident to "the provision of telecommunications services related to the transmission or the receipt of telecommunications involving Cuba," including under roaming service agreements with telecommunications providers in Cuba;
- Under contracts for the provision of telecommunications services in Cuba (provided the contract is not with certain prohibited officials of the Government of Cuba or Cuban Communist Party);
- Incident to establishing facilities, including fiber-optic and satellite facilities, that provide telecommunications services connecting Cuba to the world; and
- Incident to establishing facilities that provide telecommunications services solely within Cuba.

In an FAQ, OFAC clarified that, in most circumstances, the above authorizations cover transactions incident to "providing fee-based internet communications services such as e-mail or other messaging platforms, social networking, VOIP, web-hosting, or domain-name registration," along with services "such as cloud storage, software design, business consulting, and the provision of IT management and support related to use of hardware and software exported or reexported to Cuba pursuant to the Commerce Department's" License Exception CCD. Persons subject to U.S. jurisdiction who use this general license must notify OFAC within 30 days and must submit semiannual reports to the agency.

Official Statements and Recordkeeping. Although exporters will not need to file a specific license request to export a qualifying item to an eligible recipient pursuant to License Exception CCD or License Exception SCP, exporters will need to make an official statement to the U.S. Government in connection with any such export and will need to retain records associated with the export.

Almost all exports to Cuba, regardless of value, require the submission of Electronic Export Information through the Census Bureau's Automated Export System (AES). In this mandatory filing, exporters relying on a general license must indicate which general license authorizes the export to Cuba. Filings made through AES are official statements to the U.S. Government, and false statements are subject to stringent penalties. BIS is monitoring AES filings to determine the extent to which exporters are taking advantage of the new Cuba-related license exceptions as well as to ensure compliance with them. According to a senior BIS official, as of July 2015, there have been 46 exports to Cuba since January pursuant to License Exception SCP.

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The BIS regulations require exporters to retain a broad range of documents for five years from the date of export. The agency can ask for this documentation (ranging from Bills of Lading, to contracts, correspondence and other notes) at any time during the five-year period.

Traveling to Cuba. In part to "enhance the free flow of information to, from, and among the Cuban people," OFAC revised its regulations to make it easier for persons subject to the embargo to travel to Cuba. Tourism to the island remains prohibited and likely requires Congressional action for the tourism ban to be lifted.

But OFAC eased restrictions on travel under the twelve categories of travel previously authorized under the regulations, dropping the requirement that travelers submit a travel license request to OFAC, and wait for specific authorization from the agency, before traveling to Cuba. The twelve categories of authorized travel include, for instance (with a number of limitations and requirements), attending professional research and meetings; engaging in certain journalist activities; participating in qualifying educational programs; visiting close relatives; and participating in or attending public performances, clinics, workshops, athletic and other competitions, and exhibitions.

Section 533(d) of the CACR also authorizes travel to Cuba and travel-related transactions 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.'

Section 533(d) of the CACR also authorizes travel to Cuba and travel-related transactions 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." Like many of the OFAC travel permission for Cuba, the traveler's schedule of activities cannot include free time or recreation in excess of that consistent with a full-time schedule. Among other things, this travel category allows U.S. exporters to travel to Cuba to engage in sales negotiations and marketing of items eligible for License Exception SCP or License Exception CCD.

Travelers should keep in mind that when departing the U.S. on authorized travel to Cuba, they may, pursuant to EAR License Exception BAG, bring with them their personally-owned baggage and "tools of the trade" such of as personally-owned computers and mobile phones. If a tool of trade is owned by the traveler's employer, License Exception TMP is not available for travel to Cuba. Travelers should consider whether Section 740.21(c)(2) of License Exception SCP applies. This section authorizes the temporary export of items (including work-owned tools of the trade) by persons departing the U.S. for their use in, among other things, "professional research." The Commerce Department has confirmed that this provision should be interpreted broadly to cover professional business functions that are consistent with the OFAC-authorized travel categories.

Conclusion. President Obama's December announcement, followed by OFAC and BIS's January publication of revised regulations, creates new opportunities for persons and companies to sell a range of consumer communication devices and provide certain telecommunications services in Cuba. It remains to be seen whether Cuban government authorities welcome the receipt of these items and services, what additional sanctions may be eased in the coming days, and whether the U.S. Congress will seek to make further changes to the U.S. embargo against Cuba.

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