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Cuba Sanctions Changes - Trump Administration Restricts Travel and Transactions Involving Cuban Government, Modestly Expands Goods Exportable to Cuban Private Sector

On November 9, 2017, the U.S. Departments of Commerce, Treasury and State took steps to implement President Trump's June 2017 National Security Presidential Memorandum Strengthening the Policy of the United States Toward Cuba ("Presidential Memo") ([82 Fed. Reg. 48875](#)), which asserted goals including "[e]nd[ing] economic practices that disproportionately benefit the Cuban government or its military, intelligence, or security agencies," and "[e]nsur[ing] adherence to the statutory ban on tourism to Cuba."

The changes, implemented through revisions to the Cuban Assets Control Regulations ("CACR") and the Export Administration Regulations ("EAR"), tighten restrictions on educational and people-to-people travel to Cuba, prohibit "direct financial transactions" with several hundred Cuban entities that are broadly enmeshed in the Cuban economy, and reinstate an expansive definition of Prohibited Officials of the Government of Cuba. As a result, persons subject to U.S. jurisdiction – including foreign companies that are owned or controlled by U.S. persons – will need to scrutinize the already very limited range of Cuba transactions permitted under general licenses even more closely to ensure compliance. Foreign companies

operating outside the U.S. and not owned or controlled by U.S. persons should also be aware of the changes, which may affect transactions involving U.S.-person employees or the U.S. financial system (which are subject to the CACR and will require general or specific licenses issued by the Office of Foreign Assets Control), as well as transactions involving re-exports of U.S.-origin items under EAR license exceptions or export licenses issued by the Bureau of Industry and Security ("BIS").

In parallel with the additional restrictions described above, the Trump Administration implemented a modest expansion to the range of U.S. origin goods that may be exported to Cuba for use by the private sector under EAR License Exception Support for the Cuban People ("SCP"). Further details on each of the changes follow below.

A. THE CUBA RESTRICTED LIST

Published by the State Department on November 9, 2017, [the Cuba Restricted List](#) enumerates nearly 200 entities with ties to the Cuban military, intelligence or security services. The List accounts for a sizeable swath of the Cuban economy [\[1\]](#), and will therefore substantially increase the challenge that persons subject to U.S. jurisdic-

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tion face in complying with requirements for travel to or business with Cuba.^[2]

Inclusion on the Cuba Restricted List does not have the same effect as designation as a Specially Designated National (SDN), and does not result in freezing of assets.^[3] Rather, under [31 C.F.R. §515.209](#), persons subject to U.S. jurisdiction are prohibited from engaging in any “direct financial transaction” with Cuba Restricted List parties,^[4] where a “direct financial transaction” is any transaction in which the Cuba Restricted List party is the originator or the ultimate beneficiary of a transfer of funds (whether by wire transfer, credit card, check or payment of cash).

The “direct financial transaction” prohibition extends to many types of transaction that would otherwise be authorized under existing OFAC general licenses, and OFAC has amended numerous general licenses to make it clear that they do not authorize transactions that would be prohibited by 31 C.F.R. §515.209.^[5] However, some general licenses – including important authorizations for certain exports and reexports to Cuba and associated imports for repair, and for global insurance policies covering individuals traveling to Cuba – have not been updated to exclude direct financial transactions with entities on the Cuba Restricted List.^[6] These carve-outs to the Cuba Restricted List prohibitions were made in accordance with Section 3(a)(iii) of the Presidential Memo, which specifies that the regulatory changes should not prohibit transactions that are consistent with building democracy in Cuba, expand-

ing direct telecommunications and internet access for the Cuban people, sending, processing, and receiving authorized remittances, engaging in permissible travel, and supporting activities that otherwise further the national security and foreign policy interests of the United States.^[7]

In addition, the Cuba Restricted List will be considered by the Department of Commerce’s Bureau of Industry and Security (BIS) during review of applications for licenses to export (or reexport) to Cuba items that are subject to the EAR. Exports (or reexports) to listed entities will generally be subject to a policy of denial. Existing BIS licenses involving Cuba Restricted List parties will remain valid, but renewals will be subject to the policy of denial, even if all other terms remain the same.

B. PROHIBITED OFFICIALS OF THE GOVERNMENT OF CUBA

Under the CACR, individuals who fall within the definition of “Prohibited Officials of the Government of Cuba” are blocked persons, even if they have taken up residence outside Cuba,^[8] and persons subject to U.S. jurisdiction are prohibited from engaging in transactions involving these individuals and must block their property if it comes into their possession.^[9] A number of general licenses authorizing otherwise prohibited activities also exclude transactions involving Prohibited Officials of the Government of Cuba.^[10]

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Similarly, BIS license exceptions for Consumer Communications Devices (CCD) and Gift Parcels (GFT) do not extend to Prohibited Officials of the Government of Cuba.^[11]

In October 2016, the Obama administration narrowed the definition of Prohibited Officials of the Government of Cuba, limiting it to members of the Council of Ministers, and flag officers of the Revolutionary Armed Forces. The Trump administration has now reinstated the far broader, pre-October 2016 definition, which includes:

• Ministers and Vice-Ministers	• Director Generals and sub-Director Generals and higher of all Cuban ministries and state agencies
• Members of the Council of State	• Employees of the Ministry of the Interior (MININT)
• Members of the Council of Ministers	• Employees of the Ministry of Defense (MINFAR)
• Members and employees of the National Assembly of People’s Power	• Secretaries and first secretaries of the Confederation of Labor of Cuba (CTC) and its component unions
• Members of any provincial assembly	• Chief editors, editors, and deputy editors of Cuban state-run media organizations and programs, including newspapers, television, and radio
• Local sector chiefs of the Committees for the Defense of the Revolution	• Members and employees of the Supreme Court (Tribuna Supremo Nacional).

Unlike the Cuba Restricted List, Prohibited Officials of the Government of Cuba are not individually identified, which increases the difficulty of ensuring that proposed transactions comply with OFAC and EAR requirements.

C. ADDITIONAL CONTROLS ON AUTHORIZED TRAVEL TO CUBA

The CACR generally prohibit persons subject to U.S. jurisdiction from traveling to Cuba. However, a number of general licenses permit travel under specific circumstances, including for family

visits, humanitarian projects, journalistic activities, professional research, professional meetings, religious activities, public performances and exhibitions,^[12] and, as relevant here, for “educational activities,” “people-to-people travel ... for the purpose of engaging ... [in] activities that enhance contact with the Cuban people, support civil society in Cuba, or promote the Cuban people’s independence from Cuban authorities,” and “support for the Cuban people.”^[13]

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Recent changes narrow the scope of the general licenses for travel for “educational” and “people to people” activities and “support for the Cuban people.”

With respect to educational and people-to-people travel under 31 C.F.R. §515.565, all such travel must now be organized under the auspices of a sponsoring organization that is itself subject to U.S. jurisdiction. Authorized travel under general license 515.565, is primarily divided into two categories, §515.565(a)(1) which applies to U.S. undergraduate or graduate degree-granting academic institutions, and §515.565(a)(2) which applies more generally to persons subject to U.S. jurisdiction, including U.S. academic institutions that are not otherwise eligible for the authorizations in §515.565(a)(1).^[14]

With the exception of travel authorized under 31 C.F.R. §515.565(a)(1) for students and full-time permanent employees of accredited U.S. degree-granting academic institutions,^[15] all educational and people-to-people travelers relying on 31 C.F.R. §515.565 must be accompanied by a person subject to U.S. jurisdiction who is an employee, paid consultant, agent, or other representative of the sponsoring organization.^[16] Students and full-time permanent employees of a U.S. degree-granting academic institution are authorized to travel individually under subpart (a)(1), so long as the educational activities fit within the additional requirements of (a)(1), which include requirements that courses include a full-term of at least 10 weeks of study,^[17] noncommercial academic research is

conducted for the purpose of obtaining a graduate degree,^[18] and that a course of study will be eligible for credit at the U.S. academic institution.^[19]

With respect to travel in support of the Cuban people under 31 C.F.R. §515.574, the revised text imposes the additional requirements that “[e]ach traveler engage[] in a full-time schedule of activities” and that those activities both “[e]nhance contact with the Cuban people, support civil society in Cuba, or promote the Cuban people’s independence from Cuban authorities” and “[r]esult in meaningful interaction with individuals in Cuba.”^[20] As noted above, the revised General License also excludes from its scope direct financial transactions with entities on the Cuba Restricted List.

D. LIMITED NEW OPPORTUNITIES FOR U.S. EXPORTERS

Persons subject to U.S. jurisdiction remain broadly prohibited – under the CACR, the EAR, the Cuban Democracy Act (CDA), and the Trade Sanctions Reform and Export Enhancement Act (TSRA) – from exporting or reexporting goods and services to Cuba. However, the Obama Administration created pockets of opportunity for U.S. exporters, including through EAR License Exception Support for the Cuban People (SCP).^[21]

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Previously, paragraph (a)(1) of SCP limited commercial exports by restricting the types of item that could be sold (e.g., tools and equipment) and the end use (e.g., private sector construction of privately-owned buildings, use by private sector entrepreneurs).^[22] BIS has now simplified and expanded that portion of SCP to permit the export and reexport of "items designated as EAR99, or controlled ... only for anti-terrorism reasons" "for use by the Cuban private sector for private sector economic activities." 15 CFR 740.21(a)(1).^[23]

The changes to paragraph (a)(1) of License Exception SCP could permit a broader range of U.S. exporters to seek private sector markets in Cuba. However, the opportunity remains limited both by the overall small scale of the Cuban private sector and by the fact that, due to restrictions in the CDA and TSRA,^[24] License Exception SCP remains inapplicable to medicines, medical devices, and agricultural commodities.^[25] In addition, even where SCP appears applicable, U.S. exporters must consider whether any transaction that involves direct financial transactions with a party on the Cuba Restricted List falls outside the scope of SCP given that these parties have already been identified as having ties to the Cuban military, intelligence or security services and may not be acting in the Cuban private sector or in support of private sector economic activities.

E. COMPLIANCE ISSUES

The regulatory changes implemented in the wake of the Presidential Memo will have a significant impact on travel to Cuba, both as a result of changes to the people-to-people travel requirements and the publication of the Cuba Restricted List. Any travelers to Cuba subject to the jurisdiction of the U.S. will need to be cautious of the requirements of the general license under which they are traveling as well as the restrictions on transactions while in Cuba with parties on the Cuba Restricted List. Furthermore, universities and other academic institutions will need to carefully evaluate the requirements of general license 515.565 to ensure that the travel-related activities of their students, employees, and other representatives are covered by the license.

The impact of the recent regulatory changes is not limited to travelers, however, and exporters hoping to take advantage of changes to the SCP license exception or other available BIS license exceptions will need to evaluate carefully the parties and products involved in any potential transaction to determine whether the license exception applies and whether creation of the Cuba Restricted List (and related revisions to OFAC general licenses), and the revised definition of Prohibited Officials of the Government of Cuba place additional restrictions on the parties with whom a person subject to U.S. jurisdiction may do business in Cuba.

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Footnotes:

[1] The List includes two ministries (MINFAR — Ministerio de las Fuerzas Armadas Revolucionarias, and MININT — Ministerio del Interior), dozens of hotels, stores, and marinas, five major holding companies (CIMEX — Corporación CIMEX S.A., Compañía Turística Habaguanex S.A., GAESA — Grupo de Administración Empresarial S.A., Gaviota — Grupo de Turismo Gaviota, UIM — Unión de Industria Militar) and 34 of those holding companies' subentities, as well as an assortment of "Entities Directly Serving the Defense and Security Sectors" (including familiar names such as Empresa Importadora Exportadora de Abastecimientos Técnicos, better known as EMIAT, and Empresa Cubana Exportadora e Importadora de Servicios, Artículos y Productos Técnicos Especializados, better known as TECNOTEX).

[2] For purposes of CACR, persons subject to U.S. jurisdiction include: (a) any individual, wherever located, who is a citizen or resident of the United States; (b) any person within the United States; (c) any corporation, partnership, association, or other organization organized under the laws of the United States or of any State, territory, possession, or district of the United States; and any corporation, partnership, association, or other organization, wherever organized or doing business, that is owned or controlled by a person identified by (a) or (c). 31 C.F.R. §515.329.

[3] Only one entity on the Cuba Restricted List, Corporation CIMEX S.A., was previously designated as an SDN; however, the Cuba Restricted List also identified 16 subentities of CIMEX, which, if owned 50 percent or more by CIMEX, are also SDNs by operation of law in accordance with the 50 Percent Rule.

[4] The 50 Percent Rule, which extends prohibitions to entities owned 50 percent or more, individually or in the aggregate, by one or more SDNs, does not apply to subsidiaries of Cuba Restricted List entities. Rather, as the State Department website states, "[e]ntities or subentities owned or controlled by another entity or subentity on this list are not treated as restricted unless also specified by name on the list." Further, travel-related transactions and commercial engagements involving a direct financial transaction with Cuba Restricted List parties are permitted if they were initiated before the date the entity was added to the Cuba Restricted List.

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Footnotes (continued):

[\[5\]](#)

General Licenses that now exclude direct financial transactions with Cuba Restricted List entities	
31 C.F.R. § 515.530	Exportation of powers of attorney or instructions
31 C.F.R. § 515.534	Negotiation of, and entry into, contingent contracts
31 C.F.R. § 515.545	Transactions related to information and informational materials
31 C.F.R. § 515.560	Travel-related transactions to, from, and within Cuba
31 C.F.R. § 515.561	Family visits
31 C.F.R. § 515.564	Professional research and professional meetings in Cuba
31 C.F.R. § 515.565	Educational activities
31 C.F.R. § 515.566	Religious activities in Cuba
31 C.F.R. § 515.567	Public performances, clinics, workshops, athletic and other competitions, and exhibitions
31 C.F.R. § 515.572	Provision of travel, carrier, transportation-related, and remittance-forwarding services
31 C.F.R. § 515.573	Physical presence and business presence in Cuba; Cuban news bureaus
31 C.F.R. § 515.574	Support for the Cuban People
31 C.F.R. § 515.576	Activities of private foundations or research or educational institutes
31 C.F.R. § 515.577	Authorized transactions necessary and ordinarily incident to publishing
31 C.F.R. § 515.578	Export, reexport, and import of internet-based services and import of software
31 C.F.R. § 515.581	Transactions related to conferences in third countries
31 C.F.R. § 515.584	Certain financial transactions involving Cuba
31 C.F.R. § 515.590	Certain grants, scholarships, and awards

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[6] The following general licenses were not amended to exclude financial transactions with Cuba Restricted List parties: 31 C.F.R. 515.533 (authorizing certain exports and reexports to Cuba and the import from Cuba for service or repair of items previously exported/reexported to Cuba); 515.562 (authorizing official business of the U.S. government, foreign governments, and certain intergovernmental organizations); 515.563 (authorizing certain journalistic activities in Cuba), 515.580 (authorizing global insurance policies covering individuals traveling to Cuba); 515.575 (authorizing certain humanitarian projects); and 515.570 and 515.587 (authorizing certain remittances).

[7] See Frequently Asked Questions Related to Cuba, Office of Foreign Assets Control, updated Nov. 8, 2017, No. 47, https://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_faqs_new.pdf.

[8] General license 31 C.F.R. §515.505 unblocks certain individual nationals of Cuba who have taken up lawful permanent residence outside of Cuba, but specifically excludes Prohibited Officials of the Government of Cuba and Prohibited Members of the Cuban Communist Party.

[9] 31 CFR §515.201.

[10]

General Licenses NOT Applicable to Transactions Involving Prohibited Officials of the Government of Cuba	
31 C.F.R. § 515.512	Provision of certain legal services
31 C.F.R. § 515.542	Mail and telecommunication related transactions
31 C.F.R. § 515.565(b)	Travel for people-to-people activities
31 C.F.R. § 515.570	Remittances
31 C.F.R. § 515.587	Authorized transactions necessary and ordinarily incident to publishing
31 C.F.R. § 515.577	Export, reexport, and import of certain internet-based services; importation of software (unless services are widely available to the public at no cost to the user)
31 C.F.R. § 515.578	

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[\[11\]](#) 15 C.F.R. § 740.12(a) (GFT); 15 C.F.R. § 740.19(b) (CCD).

[\[12\]](#) See, e.g., 31 C.F.R. §§ 515.560, 515.561, 515.562, 515.564, 515.565, 515.566, 515.567.

[\[13\]](#) 31 C.F.R. §§ 515.565(a), 515.565(b), 515.574, respectively.

[\[14\]](#) Two additional general licenses were created to authorize travel that was planned in accordance with the terms of the prior version of 31 C.F.R. §515.565, but that does not meet the new requirements. Under 31 C.F.R. §515.565(d) and (e), such travel is authorized so long as: (1) it complies with the pre-revision terms of the general license; (2) any travel initiated after November 9, 2017 does not involve direct financial transactions with entities on the Cuba Restricted List; and (3) the traveler completed at least one travel related transaction (e.g. purchasing a flight or reserving a hotel) before June 16, 2017 for non-academic people-to-people travel under 515.565(b), and before November 9, 2017 for educational travel under 515.565(a).

[\[15\]](#) The activities authorized by 565(a)(1) apply only to students and full-time permanent employees of accredited U.S. degree-granting academic institutions, and do not cover part-time, adjunct or visiting faculty, whereas 31 C.F.R. §515.565(a)(2), applies more generally to faculty, staff, and students of U.S. academic institutions.

[\[16\]](#) 31 C.F.R. §515.565(a)(2). Representatives traveling individually on behalf of a sponsoring organization must obtain a certification letter from the sponsoring organization specifying the individual's responsibilities at the organization and how the travel to Cuba is related to those responsibilities. *Id.*

[\[17\]](#) 31 C.F.R. §515.565(a)(1)(i), (iii), (iv).

[\[18\]](#) 31 C.F.R. §515.565(a)(1)(ii).

[\[19\]](#) 31 C.F.R. §515.565(a)(1)(iii).

[\[20\]](#) 31 C.F.R. §515.574(a)(2).

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[\[21\]](#) 31 C.F.R. § 515.533(a) authorizes transactions ordinarily incident to the export of items from the United States or the reexport of items from a third country, to any person in Cuba if the export/reexport is licensed or otherwise authorized by the Department of Commerce under the EAR. While this provision gives effect to the EAR License Exceptions available for Cuba, it does not extend to transactions ordinarily incident to the export/reexport of non-U.S. goods that are not subject to the EAR.

[\[22\]](#) Sales directly to individuals for their personal use and that of their immediate family were also permitted and continue to be allowed under the revised version of SCP, provided that the individuals at issue are not members of the Politburo or prohibited officials of the Cuban government as defined by 31 C.F.R. §515.337.

[\[23\]](#) The items must not be used to “primarily generate revenue” for the state or “contribute to the operation of the state, such as through construction or renovation of state-owned buildings.” *Id.*

[\[24\]](#) Agricultural commodities, medicines, and medical devices are not eligible for any provision of License Exception SCP due to limitations in the Trade Sanctions Reform and Export Enhancement Act of 2000, as amended (22 U.S.C. 7201-7211) and the Cuban Democracy Act of 1992, as amended (22 U.S.C. 6001-6010).

[\[25\]](#) Certain exports of agricultural commodities may be authorized under License Exception Agricultural Commodities (AGR). 15 C.F.R. Part 740.18. Further, BIS has a general policy of approval for license applications to export medicines and medical devices. 15 C.F.R. 746.2(b)(1).

This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.