

PUBLICATION

Cuba Sanctions Guidance: November 2017 Update

November 10, 2017

On November 9, 2017, changes to the United States' Cuba Sanctions program went into effect, as the Department of Treasury's Office of Foreign Assets Control (OFAC) and the Department of Commerce's Bureau of Industry and Security (BIS) amended the Cuban Assets Control Regulations (CACR) and Export Administration Regulations (EAR), respectively. The CACR updates and EAR updates implement the changes announced by President Trump in his June 2017 speech and associated National Security Presidential Memorandum (NSPM). The State Department also published its Cuba Restricted List, which identifies additional restricted entities and subsidiaries that U.S. persons are prohibited from transacting with. The following is an overview of the key changes businesses should be aware of with respect to activities involving Cuba.

State Department and the Cuba Restricted List

The introduction of the Cuba Restricted List seeks to channel funds away from the Cuban military, intelligence, and security services. The State Department prohibits U.S. persons from engaging in direct financial transactions with the 180 entities and subsidiaries currently on this new list. For purposes of this prohibition, a person engages in a direct financial transaction by acting as the originator on a transfer of funds whose ultimate beneficiary is on the Cuba Restricted List or acting as the ultimate beneficiary on a transfer of funds whose originator is on the Cuba Restricted List.

The Cuba Restricted List consists of ministries, holding companies, hotels, tourist agencies, marinas, stores, soft-drink manufacturers, rum distributors, and entities serving the defense and security sectors.

Of particular note on the Restricted List are the large military-run corporations that dominate the Cuban economy, including GAESA, CIMEX, and Gaviota. The three major holding companies control most of Cuba's retail business and tourism sectors, along with the now-blacklisted Habaguanex S.A., which runs hotels and commercial entities in Old Havana. The Restricted List also targets a new cargo port and special trade zone outside the city of Mariel, the Mariel Special Economic Development Zone's container terminal, which has been the focus of Cuba's efforts to draw foreign investment in manufacturing and distribution. (The List includes Almacenes Universales and Terminal de Contenedores de Mariel, S.A., the two companies that run the terminal).

Other blacklisted enterprises include the state-owned rum companies Ron Caney and Ron Varadero; the soft-drink manufacturers Tropicola, Najita, and Jupina; the Gaviota-owned PhotoService, which prints photographs and sells camera batteries; the high-end jewelry store Coral Negro; and the newly opened Manzana de Gomez luxury shopping mall. Blacklisted hotels include the Manzana Kempinski, which opened this year as Cuba's first hotel to meet the international five-star standard.

Notably, the State Department clarified that if an entity is not on the Cuba Restricted List, then it is not subject to sanctions even if it is controlled by or has ties to the military or GAESA; nor is there a "50% Rule" that stretches sanctions to companies owned by entities on the Cuba Restricted List.

While no direct financial transactions with listed entities are allowed going forward, transactions involving listed entities that were initiated prior to issuance of the list on November 9 are allowed. Similarly, should the State Department add new entities to the list in the future, direct financial transactions with an entity initiated prior to the addition of that entity to the Cuba Restricted List will be allowed, while new direct transactions with the newly listed entity will be prohibited going forward.

The four-month delay in releasing the detailed restrictions allowed some U.S. companies to engage with Cuba prior to the deadline, and as a result, they will be allowed to continue to do business with now-prohibited entities. These business deals include an agreement with a Puerto Rican subsidiary of a U.S. company to set up an agricultural equipment warehouse and distribution operation at the Mariel Special Economic Development Zone, as well as a deal for another U.S. agricultural equipment manufacturer to potentially sell hundreds of tractors to Cuba for its agricultural cooperatives.

Treasury Department/OFAC

In conjunction with the announcement of the sanctions update, OFAC issued a [Fact Sheet](#) and a [Frequently Asked Questions](#) guideline to provide insight on the updated sanctions program. There are several notable changes and updates, including key definitions and amended general license regimes for a few of the 12 authorized categories of travel.

Categories of Travel

People-to-People Educational Travel Limited to Groups

Under the new regulations, individual people-to-people nonacademic travel is no longer authorized. However, those travelers planning to go to Cuba under the individual people-to-people general license that have already completed at least one travel-related transaction (such as purchasing a flight or reserving accommodation) prior to the President's June 16, 2017 announcement may still move forward with their trip.

OFAC's updated "People-to-People" general license now requires that all people-to-people nonacademic educational travel be conducted under the auspices of an organization that is subject to U.S. jurisdiction and that sponsors such exchanges to promote people-to-people contact. Such travelers must be accompanied by someone from the sponsoring organization, and the sponsoring organization must ensure that each traveler engages in a full-time schedule of educational exchange activities.

In the people-to-people context, a sponsoring organization is an entity subject to U.S. jurisdiction that sponsors educational exchanges that do not involve academic study pursuant to a degree program and that promote people-to-people contact. No specific license from OFAC is required to act as a sponsoring organization.

Support for the Cuban People

The "Support for the Cuban People" general license authorizes certain travel-related transactions and other transactions intended to provide support for the Cuban people, which include activities of recognized human rights organizations; independent organizations designed to promote a rapid, peaceful transition to democracy; and individuals and non-governmental organizations that promote independent activity intended to strengthen civil society in Cuba. OFAC is amending this general license to require that each traveler utilizing this authorization engage in a full-time schedule of activities that enhances contact with the Cuban people, supports civil society in Cuba, or promotes the Cuban people's independence from Cuban authorities, and that results in meaningful interactions with individuals in Cuba. No direct financial transactions can be made with anyone on the Cuba Restricted List.

The following two examples are representative of what qualifies for the "Support for the Cuban People" general license, as stated in the updated CACR.

EXAMPLE 1

An individual plans to travel to Cuba, stay in a room at a rented accommodation in a private Cuban residence (casa particular), eat at privately-owned Cuban restaurants (paladares), and shop at privately-owned stores run by self-employed Cubans (cuentapropista) during his or her four-day trip. While at the casa particular, the individual will have breakfast each morning with the Cuban host and engage with the Cuban host to learn about Cuban culture. In addition, the traveler will complete his or her full-time schedule by supporting Cuban entrepreneurs launching their privately-owned businesses. The traveler's activities promote independent activity intended to strengthen civil society in Cuba. Because the individual's qualifying activities are not limited to staying in a room at a rented accommodation in a private Cuban residence (casa particular), eating at privately-owned Cuban restaurants (paladares), and shopping at privately-owned stores run by self-employed Cubans (cuentapropista) – and the traveler maintains a full-time schedule that enhances contact with the Cuban people, supports civil society in Cuba, and promotes the Cuban people's independence from Cuban authorities, resulting in meaningful interaction between the traveler and Cuban individuals – the individual's travel qualifies for the general license.

EXAMPLE 2

A group of friends plans to travel and maintain a full-time schedule throughout their trip by volunteering with a recognized non-governmental organization to build a school for underserved Cuban children with the local community. In their free time, the travelers plan to rent bicycles to explore the streets of Havana and visit an art museum. The travelers' trip would qualify for the general license because the volunteer activities promote independent activity intended to strengthen civil society in Cuba and constitute a full-time schedule that enhances contact with the Cuban people and supports civil society in Cuba, and results in meaningful interaction between the travelers and individuals in Cuba.

However, the following is an example of what does *not* qualify under the "Support for the Cuban People" general license according to the CACR:

EXAMPLE 3

An individual plans to travel to Cuba, rent a bicycle to explore the neighborhoods and beaches, and engage in brief exchanges with local beach vendors. The individual intends to stay at a hotel that does not appear on the Cuba Restricted List. This traveler's trip does not qualify for this general license because none of these activities promote independent activity intended to strengthen civil society in Cuba.

Carrier Services Guidance

The existing authorizations for U.S. persons providing carrier services were unaffected by the regulatory changes. A general license still authorizes persons subject to U.S. jurisdiction to provide carrier services by vessel or aircraft to, from, or within Cuba, in connection with authorized travel, without the need for a specific license from OFAC. Persons subject to U.S. jurisdiction are authorized to provide carrier services to authorized travelers, and travelers may purchase tickets provided that their travel is authorized pursuant to the CACR. The authorization to provide carrier services is limited to transportation of authorized travelers, directly or indirectly, between the United States and Cuba. Carrier service providers and travelers are responsible for maintaining records of their Cuba-related transactions for at least five years. The CACR also permits persons subject to U.S. jurisdiction providing authorized carrier services by vessel to also provide lodging for authorized travelers onboard during the period of time the vessel is traveling to, from, or within Cuba, including when docked in a port in Cuba.

Prohibited Officials List Expanded

OFAC is also amending the definition of the term "prohibited officials of the Government of Cuba" to include certain additional individuals, going back to the definition that was in place prior to amendments made in October 2016. Existing OFAC general licenses for certain telecommunications transactions included limitations on dealing with prohibited officials. There will now be a broader list of prohibited officials excluded from these general licenses. BIS is making conforming changes to three license exceptions that include the same definition.

Commerce Department/BIS

BIS is establishing a general policy of denial for license applications to export items for use by entities and subentities on the Cuba Restricted List unless the transaction is otherwise consistent with the NSPM. BIS is also simplifying and expanding its license exceptions that authorize certain license-free exports to the Cuban private sector. These actions include a rule published by BIS that amends the licensing policy for Cuba and portions of three license exceptions available for exports and reexports to Cuba: License Exceptions Gift Parcels and Humanitarian Donations (GFT), Consumer Communications Devices (CCD), and Support for the Cuban People (SCP).

UN Update

On November 1, the UN General Assembly endorsed a resolution calling on the United States to lift its economic, commercial, and financial blockade against Cuba. While the U.S. abstained from a vote on the resolution in 2016 for the first time in 25 years, this year U.S. Ambassador to the UN Nikki Haley voted no on the 2017 resolution. 191 of the 193 member countries of the United Nations voted in favor of the initiative presented by Cuba, which was opposed only by the government of the United States, along with Israel.

Reactions in Washington

Florida lawmakers considered to be Cuba-hawks, including Sen. Marco Rubio and Reps. Mario Diaz-Balart and Ileana Ros-Lehtinen, were unsatisfied with the extent of the sanctions update. Rubio blamed "bureaucrats in the State Department who oppose the President's Cuba policy," and lamented that several Cuban entities and subentities controlled by the government were left off the Cuba Restricted list, including the tourism groups Gran Caribe and Cubanacan. Although these companies are owned by the Cuban tourism ministry, Rubio pointed to the fact that the Tourism Minister is an army colonel. Ros-Lehtinen was also very critical of the update, declaring that "the acceptance of this false narrative of a Cuban private sector [is] disappointing... there is no truly independent private sector under a communist dictatorial regime because the regime controls all aspects of society." This is likely in response to the expanded activity associated with the "Support for the Cuban People" general license, which, practically speaking, seems to have replaced the now-prohibited individual people-to-people educational travel option.

If you have any questions regarding the content of this alert, please contact any member of Baker Donelson's [Global Business Team](#).