



U.S. - CUBA REGULATIONS UPDATE

OCTOBER 14, 2016

KEY TAKEAWAYS

- Today, as part of the effort to cement the progress made in the U.S.-Cuba relationship, the Obama administration announced a new Presidential Policy Directive (PPD) and a fifth round of regulatory changes further easing U.S. sanctions on Cuba. These regulations become effective on October 17.
- The regulatory changes were substantial. They included authorization to import some Cuban pharmaceuticals, to export consumer goods from the U.S. to Cuba for personal use, and to enter into contingent contracts, among others.
- The PPD is important because it institutionalizes the administration's Cuba policy by providing formal guidance to relevant U.S. Government agencies, clarifying and aligning their strategic objectives towards Cuba.
- In the coming months, the Obama administration will look to promote new bilateral agreements and commercial deals that will help consolidate the progress made since December 2014. In addition, the administration will continue to urge Congress to look for opportunities to amend legislation that eases the embargo and to confirm the nomination of Jeffrey DeLaurentis as U.S. ambassador to Cuba.
- Should Hillary Clinton win the election, her administration is expected to continue the current policy of normalization, though her attention may be consumed by other priorities in her first months. For his part, Donald Trump has vowed to reverse the president's policy if Cuba does not agree to U.S. demands on human rights, though it remains unclear if he would maintain this position as president. Meanwhile, it is possible that opponents of the embargo will try to push Cuba-friendly legislation in early 2017, though this will largely depend on the makeup of the next Congress.

A FINAL PUSH

As the Obama administration nears the end of its term, officials have been looking for ways to make the bilateral progress with Cuba irreversible. In the last month alone, the president nominated current Charge d'affaires Jeffrey DeLaurentis to become the first U.S. ambassador to Cuba in fifty years despite uncertainty over whether he can

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get confirmed, both countries held the fourth bilateral commission to advance the normalization process, and senior U.S. officials including Dr. Jill Biden and U.S. Trade Representative Michael Froman traveled to Cuba to engage in high-level discussions.

The new PPD and fifth round of regulatory changes build on ongoing efforts by institutionalizing the U.S. policy towards Cuba and by removing additional barriers for U.S. companies and organizations interested in engaging with Cuba. The new directive outlines the U.S. vision for the future of the bilateral relationship, and provides guidance to the executive branch on how to achieve its key Cuba policy objectives. While these changes will likely be the most substantive regulatory steps in the coming months, the administration will look to approve specific licenses that fall within its policy – possibly even issuing another round of changes or initiatives. The administration will also urge Congress to confirm DeLaurentis and pass Cuba-friendly legislation.

In the annex of this paper, ASG includes the full regulatory changes to the Cuban Assets Control Regulations (CACR) and Export Administration Regulations (EAR) just announced. Below we highlight some of the most significant ones for the private sector:

- **Health related transactions and Cuban-origin pharmaceuticals.** The Treasury Department’s Office of Foreign Asset Control (OFAC) will allow the importation of Cuban-origin pharmaceuticals approved by the U.S. Food and Drug Administration (FDA) into the U.S., as well as joint medical research with Cuban entities.

Though the administration previously issued a general license for imports of certain goods produced by Cuban entrepreneurs, the import of Cuban pharmaceuticals represents a willingness to allow at least certain imports from Cuban state-owned institutions by general license.

- **Services related to infrastructure.** OFAC will allow U.S. persons to provide services to Cuba related to infrastructure development, repair and maintenance. The term “infrastructure” includes areas such as water and waste management, public transportation, non-nuclear electricity generation and distribution, hospitals, public housing, and primary and secondary schools, among others.

Cuba is in dire need of infrastructure development and upgrades, so this change represents a significant opportunity for U.S. companies and organizations. It is unclear how receptive Cuba will be to U.S. involvement in more sensitive sectors, though companies should explore opportunities.

- **Consumer goods for personal use.** The Commerce Department’s Bureau of Industry and Security (BIS) will allow the export of certain consumer goods sold online or other means to individuals in Cuba for personal use.

This change covers most items being sold to Cubans for personal consumption as long as they do not have high levels of encryption or other advanced technology, and should provide real opportunities for online retailers and others involved in direct sales. Sales cannot go to prohibited officials in Cuba, though as noted below, the definition of whom this covers has narrowed.



- **Narrowing the Definition of “Prohibited Officials.”** The U.S. Government significantly reduced the number of individuals with which U.S. companies in allowed categories cannot do business, essentially limiting this category to high-level officials in the Council of Ministers, flag officers of the Revolutionary Armed Forces, and members of the Politburo.

This should reduce the compliance burden for companies considering selling goods or engaging in other allowed activities.

- **Contingent contracts.** OFAC is adding an expanded general license that will authorize persons subject to U.S. jurisdiction to enter into certain contingent contracts for transactions currently prohibited by the embargo, provided that contract performance is made expressly contingent on prior authorization by OFAC and any other relevant federal agencies, or on authorization no longer being required.

This change is significant for two reasons: First, it allows companies that are considering entering deals in Cuba to negotiate appropriate contracts before getting a license from OFAC – a process that can be lengthy. Second, it allows for companies to do the same even in areas that are not currently part of the policy, in anticipation of all or part of the embargo being revoked. It is unclear how willing Cuba would be to engage in such contracts without some assurance that they can be implemented within a reasonable timeframe.

Despite these positive changes, the U.S. private sector continues to face challenges. Elements of the embargo continue to pose significant barriers to trade, travel, and investment, and few companies are able or willing to take advantage of easing for fear that they may get inadvertently caught up in sanctions. Without definitive movement by Congress, U.S. companies also remain uncertain over the permanence of the executive actions. Moreover, Cuba’s cumbersome bureaucracy, red tape, and slow approval processes have been major impediments to signing commercial deals. Although bilateral relations are improving, there is still suspicion on both sides, making it difficult for some U.S. companies to take full advantage of the new regulations.

LOOKING AHEAD

The results of the November 2016 U.S. elections will determine the path forward with Cuba, as the new president will have the authority to continue Obama’s policy or reverse the changes made since December 2014. Hillary Clinton has publicly supported the president’s policy and the lifting of the embargo, and is expected to continue his approach with Cuba. However, Clinton will have limited ability to undertake additional changes through executive action, as the Obama administration has taken many of the major steps it could under current law. Instead, to make significant progress in the regulatory space, Clinton would need to focus attention on pushing for legislation that removes parts of or the full embargo.

For his part, Donald Trump presents a bigger challenge for companies interested in opportunities in Cuba. While he previously supported rapprochement, the Republican candidate has repeatedly stated in recent months that he would reverse President Obama’s policy unless the Cuban Government meets U.S. demands on human rights. Some of his statements may have been political posturing to shore up Republican votes in Florida and elsewhere, and if elected he may feel less compelled to follow through.



Nevertheless, such comments were not well received by Cuban authorities. Fidel Castro hinted at Havana's preference for a Clinton presidency when he published an article on October 9 stating that Clinton beat Trump in the second debate.

Congress will continue to be a key player in the U.S.-Cuba relationship going forward. Depending on the outcome of the November elections, lawmakers may work to approve amendments to budgetary law that are Cuba-friendly. With little time left until the end of their term, and major issues like supreme court nominations and the Trans-Pacific Partnership taking priority, there is a low likelihood that major changes will get approved. However, a new Congress in 2017, depending on its ultimate make up, may undertake efforts to lift parts or the full embargo.



ANNEX: OVERVIEW OF REGULATORY CHANGES

Key changes published by the U.S. government that will come into effect on Monday, October 17 include:

- **Health-related Transactions: Expanding Opportunities for Scientific Collaboration and Access to Medical Innovations**
 - Joint medical research. OFAC is issuing a new authorization that will allow persons subject to U.S. jurisdiction to engage in joint medical research projects with Cuban nationals. This authorization will encompass both non-commercial and commercial research.
 - Cuban-origin pharmaceuticals. OFAC is issuing a new authorization that will allow transactions incident to obtaining U.S. Food and Drug Administration (FDA) approval of Cuban-origin pharmaceuticals. An additional authorization will allow the importation into the United States, and the marketing, sale, or other distribution in the United States, of FDA-approved Cuban-origin pharmaceuticals.
 - Bank accounts. Persons subject to U.S. jurisdiction engaging in the aforementioned health-related activities will also be authorized to open and maintain bank accounts in Cuba for use in conducting the authorized business.
- **Humanitarian-related Transactions: Providing Additional Grant Opportunities and Strengthening Cuban Infrastructure**
 - Grants, scholarships, and awards. OFAC is expanding the authorization for grants, scholarships, and awards to Cuba or Cuban nationals to include grants, scholarships, and awards related to scientific research and religious activities.
 - Services related to Cuban infrastructure. OFAC is adding a new authorization that will allow persons subject to U.S. jurisdiction to provide services to Cuba or Cuban nationals related to developing, repairing, maintaining, and enhancing certain Cuban infrastructure in order to directly benefit the Cuban people.
- **Travel-related Transactions: Supporting People-to-People Contact by Facilitating Authorized Travel and Commerce**
 - Importation of Cuban-origin merchandise as accompanied baggage for personal use. OFAC is removing the monetary value limitations on what authorized travelers may import from Cuba into the United States as accompanied baggage. This includes the value limitation on alcohol and tobacco products. Persons subject to U.S. jurisdiction will be further authorized to import Cuban-origin merchandise acquired in third countries into the United States as accompanied baggage, again without value limitations. OFAC is also removing the prohibition on foreign travelers importing Cuban-origin alcohol and tobacco products into the United States as accompanied baggage. In all cases, the Cuban-origin goods must be imported for personal use, and normal limits on duty and tax exemptions will apply.
 - Remittances. Persons subject to U.S. jurisdiction will be authorized to make remittances to third-country nationals for travel by third-country nationals to, from, or within Cuba, provided the travel would be authorized by general license for a person subject to U.S. jurisdiction.
- **Civil Aviation: Supporting International Aviation and Passenger Safety**



- *Safety-related services. OFAC is adding a new authorization that will allow persons subject to U.S. jurisdiction to provide civil aviation safety-related services to Cuba and Cuban nationals aimed at promoting safety in civil aviation and the safe operation of commercial aircraft.*
- **Trade and Commerce: Bolstering Trade and Commercial Opportunities and the Growth of Cuba's Private Sector**
 - *Export-related transactions. OFAC is amending its general license authorizing certain transactions incident to exports and reexports authorized by the BIS to eliminate references to "100% U.S.-origin items." This is intended to minimize and clarify the circumstances in which an export or reexport authorized by BIS requires additional licensing by OFAC.*
 - *Consumer goods for personal use. BIS will generally authorize exports of certain consumer goods that are sold online or through other means directly to eligible individuals in Cuba for their personal use.*
 - *Imports of previously exported items. OFAC is adding an authorization that will allow the importation into the United States or a third country of items that were previously exported or reexported to Cuba pursuant to a BIS or OFAC authorization. This authorization will also permit persons subject to U.S. jurisdiction to service and repair such items. Exporting or reexporting replacement items or items that have been repaired or serviced must be separately authorized by OFAC and/or BIS as appropriate.*
 - *Contingent contracts. OFAC is adding an expanded general license that will authorize persons subject to U.S. jurisdiction to enter into certain contingent contracts for transactions currently prohibited by the embargo, provided that contract performance is made expressly contingent on prior authorization by OFAC and any other relevant Federal agency, or on authorization no longer being required. Transactions ordinarily incident to negotiating and entering into such contracts will also be authorized.*
 - *Financing. OFAC is making a technical correction to clarify that agricultural items, such as pesticides and tractors, authorized by BIS for export or reexport to Cuba are not subject to restrictions on payment terms. As required by the Trade Sanctions Reform and Export Enhancement Act, authorized exports and reexports to Cuba of agricultural commodities, such as poultry and corn, remain subject to the limited payment and financing terms of cash in advance or third country financing.*
 - *Certain vessel transactions. OFAC is issuing a general license that will waive the restriction prohibiting foreign vessels from entering a U.S. port for purposes of loading or unloading freight for 180 days after calling on a Cuban port for trade purposes if the items the vessel carried to Cuba would, if subject to the EAR, be designated as EAR99 or controlled on the Commerce Control List for anti-terrorism reasons only.*
 - *Transit of cargo. BIS will generally authorize air cargo to transit Cuba, complementing an existing general authorization for cargo transiting Cuba aboard vessels.*

ASG's Latin America Practice has extensive experience helping clients navigate the Cuban market. For questions or to arrange a follow-up conversation please contact [Karen Poreh](#).

