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## *Acting on President's December Announcement, OFAC Implements Changes to Cuba Sanctions Policy*

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Last month, President Obama [announced that changes would be coming](#) to U.S. trade policy regarding Cuba. (You can see our comments on that announcement in the client alert [here](#).) Although that announcement signaled a significant policy shift, the announcement did not substantively change the Cuba sanction rules. On January 15, the first set of formal changes to implement the President's announcement arrived, through changes to the Cuban Assets Control Regulations ("CACR") issued by the Department of Treasury's Office of Foreign Assets Control ("OFAC").

The amendments, as we predicted last month, are modest in scope, because long-standing statutory provisions restrict the extent to which the President can act on his own with respect to Cuba. Most importantly, the action does not remove the general embargo against trade with Cuba. Nor does it open the door further to travel to Cuba for U.S. businesses or tourists. Significant limitations in dealing with Cuba continue to apply, and clients would be wise to take those limitations into account in plotting their strategies for Cuba in the next few years.

Changes that are most relevant for our clients include the following:

### **Travel**

OFAC issued 12 general licenses authorizing travel-related transactions to, from, or within Cuba that previously required a specific license. This, in effect, deregulates a small slice of travel by Americans to Cuba, but *only* to the extent that travel falls into one of the stated categories. Travelers in these categories—for example, educators going to observe Cuban schools, journalists covering stories in Cuba, religious groups meeting with Cuban counterparts, attendance at professional meetings, humanitarian projects—can board a plane to Havana without any authorization from or notice to the U.S. government. Others cannot.

The examples provided by OFAC in the new regulations confirm that the Administration is interpreting the 12 categories narrowly. And the new regulations underscore that travelers must retain records to demonstrate that their travel to Cuba fell within categories approved and did not include additional "tourist activities."

Journalists, ministers, teachers, and others who fall under these permitted travel categories now will be allowed to return to the U.S. with a modest allowance of Cuban goods, including \$100 worth of Cuban cigars or liquor.

*Flights.* The new authorizations permit U.S. air carriers to carry authorized passengers to and from Cuba without an OFAC specific license.

*Enforcement questions.* The largest area of uncertainty will continue to concentrate on how the White House will direct, and how the agencies that enforce the Cuba rules at the border will carry out, the implementation of these new travel policies and provisions. Thus:

- Suppose a client joins a university-sponsored educational tour to Cuba, but departs from the tour for a day to see a part of Cuba that is not on the program? That still constitutes a violation of the CACR—but will OFAC or the border agents of Homeland Security care?
- Suppose the same client extends the trip for two days to enjoy the Cuban beaches? That too is a violation—but will border agents examine returning American passport-holders to check that their departure date coincided with the end of the authorized program? What if the client claims that she wanted to see the beaches in their pristine condition, before the embargo is lifted? Or that she wanted to meet with local Cubans (outside the structure of a university tour) for the “people-to-people” purpose of understanding them better and explaining America to them?
- Suppose the same client departs from the trip for an afternoon meeting with a Cuban entrepreneur in the same line of business as his? Such a meeting to negotiate a business deal would still be prohibited—but can the “people-to-people” loophole apply to casual business-related exploration?

These are not new questions; licensed authorized organizational trips to Cuba have faced them regularly in recent years under the policy that now is being converted to a general-license authorization, and enforcers have not typically taken a hard line on violations at the edges of authorized travel. But Cuba policy and enforcement will be under a spotlight for the remainder of the Obama years, as the Republicans in control of both houses of Congress look for areas in which they can show the administration overstepping of the narrow scope it has announced in its Cuba changes. Accordingly, we expect to continue to caution clients to be careful about how they take advantage of the evident relaxation of Cuba travel restrictions.

## **Banking**

Under the new CACR, travelers in Cuba are permitted to use credit or debit cards issued by a U.S. financial institution. U.S. banks can now open correspondent accounts in Cuba. (Cuban banks cannot do the same in the U.S.)

## **Imports from Cuba**

The embargo remains in effect for commercial imports from Cuba, other than the authorization for permitted travelers to bring back limited imports. But the new regulations open a channel for imports of goods produced by “independent Cuban entrepreneurs” that appear on the “Section 515.582 List” as determined by the State Department. This is a new feature of the Cuba sanctions regime. The State Department has not yet published a 515.582 List, nor are the criteria for qualifying as an “independent” entrepreneur fleshed out at this stage.

## Telecommunications

The one sector in which the new CACR provide a more sizeable opening appears to be telecommunications. OFAC has expanded the telecommunications general license, authorizing the provision of telecommunications services related to the transmission or the receipt of telecommunications involving Cuba, including the entry into and performance under roaming service agreements with telecommunications services providers in Cuba, by persons subject to U.S. jurisdiction. Telecommunications services include data, telephone, telegraph, internet connectivity, radio, television, news wire feeds, and similar services, regardless of the medium of transmission. The reach of this provision, accordingly, is broad—as the Administration intends, because it views the opening of internet and telecomm capabilities in Cuba as one of the fastest routes to generating economic and political change in that country.

## Relaxed restrictions on foreign subsidiaries

The new CACR takes the first baby step toward changing the policy, which for most of the last few decades has been unique to the Cuba sanctions, of barring activity by foreign subsidiaries of U.S. companies with a sanctions target. Under the new rules, U.S.-owned or -controlled entities in third countries may provide goods and services, including financial services, to a Cuban national who is located outside of Cuba, provided that the transaction does not involve a commercial exportation, directly or indirectly, of goods or services to or from Cuba.

This change will have minor effects—there are few Cuban customers for goods or services who are located outside of Cuba—but it reintroduces the principle (applied in most other U.S. sanctions regimes) that foreign subsidiaries may be treated less restrictively than their U.S. parent company when operating abroad and dealing with sanctioned customers.

These changes, while a signaling of a potential future shift in Cuba trade policy, are quite modest. U.S. companies will continue to be largely excluded from the Cuba economy and must continue to screen potential transactions to ensure compliance with the Cuba sanctions program. And as we [previously wrote](#), non-U.S. companies—although now able to transact with certain Cuban nationals abroad—will continue to be limited by the Cuba sanctions. For instance, American executives or employees must remain walled off from business activity with Cuba, except in the categories of business that are subject to a general license.

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