

Client Alert

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JUST ANNOUNCED: Financing by US Depository Institutions of Export Transactions to Cuba and Further Loosening of Exportation and Travel Restrictions

In a continued effort to implement the policy change announced by President Obama on December 17, 2014 to engage and empower the Cuban people, the Office of Foreign Assets Control (“OFAC”) and the Bureau of Industry and Security (“BIS”) have announced additional amendments to the Cuban Assets Control Regulations (“CACR”) and the Export Administration Regulations (“EAR”), respectively, which will be published and effective in the upcoming days.

The regulatory changes discussed below are more in the line of significant changes made to the regulations since they were last updated on September 21, 2015. Overall, the regulatory changes provide additional methods for financing export transactions to Cuba, further loosen restrictions on travel to Cuba and provide additional categories of items that will be generally authorized for exportation to Cuba. First, the regulatory changes allow alternative methods of payment for authorized export transactions, including financing of such transactions by US depository institutions. Additionally, the regulatory changes also make it easier for commercial airlines to travel to Cuba and expand some of the existing categories for which travel to Cuba was generally authorized. For its part, BIS will subject new categories of items to a “general policy of approval” when a license is requested to export or reexport certain categories of items to Cuba.

BIS Expands General Policy of Approval and Creates Case-by-Case Licensing Policy

According to the sections of the EAR governing exports to Cuba, items requiring a license to be exported or reexported to Cuba are subject to a general policy of denial, except for certain items like items necessary for the environmental protection of US and international air quality, waters or coastlines, which are subject to a general policy of approval. The changes to the CACR now make telecommunications items, items necessary to ensure the safety of civil aviation, and agricultural items outside the scope of the definition of “agricultural commodities” (i.e. insecticides, pesticides, etc.) subject to a general policy of approval as well. These three broad categories of items were previously subject to a policy of “consideration on a case-by-case basis”, making it easier to export these items to Cuba now.

BIS is also creating a case-by-case licensing policy relating to the exportation of items to meet the needs of the Cuban people, such as items for agricultural production, artistic endeavors, education, food processing, residential construction and renovation, the construction of infrastructure, and other related purposes. However, items for use by state-owned enterprises, agencies, or other organizations of the Cuban government that primarily generate revenue for the state, including those in the tourism industry and those engaged in the extraction or production of minerals or other raw materials, will continue to be subject to a general policy of denial.

Financing for Exports and Reexports

US depository institutions are now authorized to provide financing for exports and reexports of items to Cuba such as most of the ones now subject to a general policy of approval as set forth above. The

provision of such financing by US depository institutions includes issuing, advising, negotiating, paying or confirming letters of credit (even those issued by a Cuban financial institution), accepting collateral for issuing or confirming letters of credit, and processing documentary collections.

However, the provision of such financing by US depository institutions has two limitations. First, financing may only be provided for the exportation or reexportation to Cuba of items authorized by BIS under the provisions of the Export Administration Act of 1979 and the EAR. Second, even for agricultural items or commodities that are authorized for exportation or reexportation to Cuba by BIS, US depository institutions may not participate in the financing of such transactions because the Trade Sanctions Reform and Export Enhancement Act of 2000 continues to limit the methods of payment authorized for the exportation or reexportation of such items to either cash in advance or financing by a third-country banking institution.

Further Loosening of Restrictions on Travel to Cuba

OFAC had formerly authorized travel to Cuba to attend professional meetings or to conduct professional research. Changes to the CACR's general license authorizing travel to Cuba for professional research and professional meetings now clarifies that such travel is authorized not only to attend, but also to organize, professional meetings in Cuba. For a traveler organizing a professional meeting or conference on behalf of an entity, either the traveler's profession must be related to the organization of professional meetings or conferences or the traveler must be an employee or contractor of an entity that is organizing the professional meeting or conference.

Similarly, the changes to the CACR's general license authorizing travel to Cuba for public performances, clinics, workshops and athletic and other competitions and exhibitions now authorize travel to Cuba not only to participate in, but also to organize, such events. The changes to the regulations also clarify that transactions incident to the organization of such events include marketing related to such events in Cuba.

The general license authorizing travel-related transactions to Cuba relating to the exportation, importation or transmission of information and informational materials was expanded to clarify that such authorized travel now also include transactions as are directly incident to professional media or artistic productions of information or informational materials for exportation, importation, or transmission, including the filming or production of media programs (i.e. movies or television shows), the recording of music and the creation of artworks in Cuba. A traveler taking advantage of this general license must be regularly employed in or demonstrate professional experience in a field relevant to such professional media or artistic productions and the traveler's schedule of activities must not include free time or recreation in excess of that consistent with a full-time schedule.

In relation to the deal reached between the US and Cuba to commence commercial flights to Cuba, OFAC's changes to the CACR also include general authorizations to enter into blocked space, code-sharing or leasing arrangements that facilitate the provision of carrier serviced by air, including the entry into such arrangements with a national of Cuba. As discussed above, in collaboration with OFAC's changes to the CACR, BIS will also generally approve license applications for exports and reexports of items necessary to ensure the safety of civil aviation and the safe operation of commercial aircraft engaged in international air transportation, including the export or reexport of such aircraft leased to state-owned enterprises.

The Latin America Group at Hunton & Williams LLP will continue to closely monitor related developments. Please contact us if you have any questions or would like further information regarding the recent changes to the CACR or the EAR, the normalization of US-Cuba relations or any regulation or sanction governing the Cuban embargo.

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