

Client Alert

October 2016

New Changes to US-Cuba Regulations Further Clarify and Ease 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) has announced additional amendments to the Cuban Assets Control Regulations (CACR). These amendments, which will be effective on October 17, 2016, constitute the sixth time that the various sets of regulations governing Cuba have been amended.

The regulatory changes implemented by OFAC today principally relate to:

- (1) trade and commerce;
- (2) contingent contracts;
- (3) services related to infrastructure;
- (4) health and pharmaceuticals; and
- (5) certain other activities.

Trade and Commerce

The amendments clarify that all transactions ordinarily incident to the exportation of items from the United States, or the re-exportation of items from a third country, to any person within Cuba are authorized, provided that:

- (1) such exportation or re-exportation is licensed or otherwise authorized by the Department of Commerce;
- (2) the transaction is not between a US-owned or US-controlled firm in a third country and Cuba for the exportation of commodities produced in a country other than the United States or Cuba;
- (3) the transaction is not financed from any blocked account; and
- (4) in the case of the exportation or re-exportation of agricultural commodities, only payment of cash in advance or financing by a banking institution located in a third country is used as the method of payment and financing.

This amendment removes references to “100% U.S.-origin items” and adds clarity to the transactions that are generally authorized by OFAC, including the importation into the United States of items from a third country for exportation to Cuba pursuant to a license or other authorization by the Department of Commerce.

The CACR now also expressly allows for the importation from Cuba of items previously exported to Cuba for the purpose of servicing or repairing such item. Prior to this clarifying amendment, the CACR appeared to provide that a US person was authorized to travel to Cuba to install, service or repair an item exported in compliance with the CACR, but such item could not be sent back to the United States for service or repair. However, it is important to note that such serviced, repaired or replaced item must separately be authorized for export to Cuba before it can be returned to the Cuban party requesting such service, repair or replacement.

Contingent Contracts

A new section is now included in the CACR providing that US persons are authorized to enter into, and to engage in all transactions ordinarily incident to the negotiation of and entry into, contingent contracts for transactions that are *prohibited* by the CACR, *provided that* (1) the performance of any such contingent contract is made expressly contingent on the prior authorization of OFAC or authorization no longer being required and (2) the performance of any such contingent contract that is subject to licensing requirements of another federal agency is expressly made contingent upon the prior authorization of that agency or the removal of those licensing requirements.

Through this amendment, OFAC clarifies that US persons are allowed to negotiate and enter into contingent contracts for transactions not generally licensed or otherwise expressly authorized by the CACR, provided that such contracts are not in fact executed until such transaction is permitted by license or otherwise. This means that even if a proposed transaction does not relate to one of the more generally favored transactions under the CACR (e.g., telecommunications, agricultural commodities, etc.) such transaction may still be explored by the US party, provided that the ability to ultimately undertake such transaction will depend on receiving a license or similar authorization from the applicable regulator.

Services Related to Infrastructure

With the amendments adopted by OFAC today, US persons are now expressly authorized to provide to Cuba or Cuban nationals services related to developing, repairing, maintaining and enhancing Cuban infrastructure that directly benefit the Cuban people, provided that the exportation of any materials to provide such services is authorized by the Department of Commerce. For purposes of this new authorization, infrastructure means systems and assets used to provide the Cuban people with goods and services produced or provided by the public transportation, water management, waste management, non-nuclear electricity generation and electricity distribution sectors, as well as hospitals, public housing and primary and secondary schools.

Health and Pharmaceuticals

Prior to today's changes, the CACR allowed for specific licenses to import Cuban-origin commodities for bona fide research purposes in sample quantities only. With this latest round of amendments, the CACR provides a general license authorizing US persons to engage in all transactions incident to joint medical research projects with Cuban nationals.

Further, US persons are now authorized to engage in all transactions incident to obtaining approval from the US Food and Drug Administration (FDA) of Cuban-origin pharmaceuticals, including discovery and development, pre-clinical research, clinical research, regulatory review, regulatory approval and licensing, regulatory post-market activities and the importation into the United States of Cuban-origin pharmaceuticals.

Finally, US persons are also now authorized to engage in all transactions incident to the marketing, sale or other distribution in the United States of FDA-approved Cuban-origin pharmaceuticals, including the importation into the United States of Cuban-origin pharmaceuticals.

Importation of Cuban Merchandise as Accompanied Baggage for Personal Use, Including Alcohol and Tobacco

Prior to today's changes, the CACR restricted the amount of merchandise that could be imported from Cuba as accompanied baggage for personal use to \$400, with no more than \$100 of such merchandise consisting of alcohol or tobacco products. OFAC is removing these monetary value limits, which means that the normal limits on duty and tax exemptions for merchandise imported as accompanied baggage and for personal use will apply. This does not mean that Cuban alcohol and tobacco can be freely imported from Cuba, however. Instead, it is the less restricted importation of such products into the United States as accompanied baggage (incident to travels to Cuba) that will be authorized and only for personal use.

Similarly, the CACR previously provided that US persons located in third countries were authorized to, among other things, purchase or acquire merchandise subject to the prohibitions of the CACR provided that the merchandise was for personal consumption *while* in the third country. With today's changes, OFAC removes the limitation that the merchandise be consumed while abroad, and authorizes the importation of such merchandise into the United States as accompanied baggage provided that the merchandise is for personal use only.

Professional Meetings in Cuba Promoting Tourism in Cuba

Prior to today's amendments, the general license provided in the CACR that authorized US persons to attend or organize professional meetings or conferences in Cuba prohibited such attendance or organization if the meeting or conference related to the promotion of tourism in Cuba. OFAC has removed the requirement that such meetings or conferences not relate to the promotion of tourism in Cuba. However, the amendments do not otherwise authorize a US person's investment or participation in Cuba's tourism industry.

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 Cuban Assets Control Regulations, the recent changes thereto or any regulation or sanction governing the Cuban embargo.

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