

Reproduced with permission from International Trade Reporter, Vol. 32, No. 5, 01/29/2015. Copyright © 2015 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

BILATERAL TRADE

This BNA Insights article by Simeon M. Kriesberg, Carol J. Bilzi and Paul Virtue examines the changes announced by the Commerce and Treasury departments following President Obama's decision in December 2014 to re-establish diplomatic relations with Cuba and begin to ease a five-decade-long U.S. economic embargo on Cuban goods. The new policy will have a near-term impact on some U.S. business dealings with Cuba by easing certain financial transactions in a number of sectors. But, the authors warn, there are many uncertainties and very little the president can change without the agreement of Congress. The politics of the issue, however, could be reshaped if the business community makes lifting the embargo a priority.

The New U.S. Policy Toward Cuba: The Business Implications

BY SIMEON M. KRIESBERG, CAROL J. BILZI AND
PAUL VIRTUE

The U.S. Treasury and Commerce departments on Jan. 16 issued certain amendments to U.S. sanctions and export control regulations in order to implement the new U.S. policy toward Cuba that President Obama announced on Dec. 17, 2014. The amendments, which took immediate effect, relax long-standing restrictions on certain U.S. business dealings with Cuba, though most commercial engagement with Cuba will remain off limits.

The following U.S. business sectors will be the most significantly affected by the amended regulations.

Simeon M. Kriesberg and Paul Virtue are partners in Mayer Brown's Government & Global Trade practice based in Washington. Carol J. Bilzi is counsel based in Washington. Simeon Kriesberg can be reached at skriesberg@mayerbrown.com. Paul Virtue can be reached at pvirtue@mayerbrown.com. Carol J. Bilzi can be reached at cbilzi@mayerbrown.com.

Travel-Related Businesses. As announced in December, one dozen categories of travel to Cuba by U.S. citizens, U.S. residents and individuals located in the U.S., which had been permitted by general or specific license, will now be permitted by general license, so that prospective travelers will not need to apply to the Treasury's Office of Foreign Assets Control (OFAC) for a license particular to each trip. General tourist travel, however, will remain prohibited, as will business travel not related specifically to authorized activity.

Travel agents and airlines will be able to provide authorized travel and carrier services without seeking specific licenses. As noted in FAQ 20 OFAC's frequently asked questions, although scheduled air transportation will no longer be precluded, air carriers will need to seek approval from the U.S. Transportation Department to initiate scheduled flights from the U.S. to Cuba.

Communications Businesses. OFAC is generally authorizing commercial telecommunications services linking the U.S. or third countries and Cuba, as well as such services within Cuba. Authorized services include the entry into and performance of roaming service agreements with service providers in Cuba and transactions related to establishing facilities to provide telecommunications within Cuba or between Cuba and the U.S. or

other countries, such as fiber-optic cable and satellite facilities. Certain reporting requirements may apply.

U.S. businesses will also be permitted to provide services incidental to Internet-based communications and incidental to the exportation or re-exportation of communications items. These services include instant messaging, chat and e-mail, social networking, web browsing, web hosting (provided that it is not to promote tourism) and domain name registration.

The Commerce Department's Bureau of Industry and Security (BIS) is revising a current License Exception, Consumer Communications Devices (CCD), to remove the donation requirement and update the list of eligible items. Previously, items could only be shipped under License Exception CCD if they were being donated to eligible Cuban end-users free of charge. Now, License Exception CCD will permit certain consumer communications commodities and software (such as computers, mobile phones, televisions, radios, digital cameras and certain telecommunications and information security-related software) to be exported or re-exported, without a license, for commercial sale to eligible recipients in Cuba. Only those items listed in the amended License Exception are eligible, and restrictions on authorized end-users remain.

The exportation or re-exportation of services relating to exports or re-exports authorized under License Exception CCD will also be permitted. Such services might include software design, business consulting, information technology management services (including cloud storage) and services to install, repair or replace consumer communications devices.

The exportation or re-exportation of services relating to exports or re-exports authorized under License Exception CCD will also be permitted. Such services might include software design, business consulting, information technology management services (including cloud storage) and services to install, repair or replace consumer communications devices.

BIS is creating a new License Exception, Support for the Cuban People (SCP), which will authorize the export and re-export without a license of certain telecommunications items, including items for access to the Internet, use of Internet services, infrastructure creation and upgrades. License Exception SCP will also authorize exports and re-exports of certain items that previously required a license for use by news media personnel and U.S. news bureaus. Only items classified at the least restrictive export control level (EAR 99) or controlled on the Commerce Control List (CCL) only for anti-terrorism reasons will be eligible.

Agricultural Businesses. Previously authorized agricultural transactions will continue to be constrained by the requirement that Cuban customers pay “cash in ad-

vance.” That term, however, will be redefined from “cash before shipment” to “cash before transfer of title and control.” More flexible credit arrangements will remain barred.

The new BIS License Exception SCP will eliminate the licensing requirement for exports and re-exports of commercially sold or donated tools and equipment for private sector agricultural activity in Cuba. This provision is limited to those items classified as EAR 99 or controlled on the CCL only for anti-terrorism reasons.

Medical and Construction Businesses. The amendment of the “cash in advance” requirement will benefit those businesses that supply medicines and medical devices. Certain medical transactions with Cuba have been permitted before, but subject to the more restrictive cash requirement.

A long-standing exception for “humanitarian projects” will be expanded to include construction projects intended to benefit independent civil society groups, environmental projects and agricultural and rural development projects that promote nongovernmental activity.

The new BIS License Exception SCP will authorize the export and re-export of certain U.S.-origin building materials, equipment and tools for use by the Cuban private sector to construct or renovate privately owned buildings, including privately owned residences, businesses, places of worship and buildings for private sector social or recreational use. This provision is limited to those items classified as EAR 99 or controlled on the CCL only for anti-terrorism reasons.

Financial Services Businesses. The limits on personal remittances to Cuban nationals will be increased from \$500 to \$2,000 per quarter, so financial institutions and businesses that transmit money will likely find substantially greater volumes of remittance transactions. U.S. credit cards, debit cards, travelers' checks and other specified financial instruments will be usable in Cuba by travelers, and U.S. financial institutions will be able to enroll merchants and process the authorized transactions.

The elimination of the former per diem limitation on authorized travelers' expenditures in Cuba will likely increase the value of travelers' transactions in Cuba charged on U.S. credit and debit cards and otherwise.

U.S. depository institutions will be generally licensed to open correspondent accounts at Cuban financial institutions to facilitate the processing of authorized transactions, although Cuban banks will not be permitted to open such accounts at U.S. banks.

U.S. financial institutions will be permitted to reject, rather than be required to block, certain funds transfers involving Cuba that originate and terminate outside the U.S., provided that neither the originator nor the beneficiary is a U.S. person and that certain Cuban parties do not have an interest in the transfer.

U.S. financial institutions will be permitted to process certain funds transfers involving Cuba but not involving a U.S. originator or beneficiary, provided that the transfers relate to transactions in which U.S. persons would be permitted to engage.

Insurance companies will be permitted to offer, and pay claims arising under, global insurance policies (including health, life and travel) that cover third-country nationals traveling to Cuba.

Health insurance, life insurance and travel-related insurance for authorized travelers from the U.S. will also be permitted.

The new regulatory regime also unblocks the accounts of Cuban nationals who have permanently relocated outside of Cuba. Previously, U.S. financial institutions and their foreign branches, including banks and broker-dealers, were required to block assets in Cuban nationals' accounts that predated the later of January 28, 2011, or the date of individuals' permanent relocation. Businesses controlled by such Cuban nationals are also no longer blocked.

Insurance companies will be permitted to offer, and pay claims arising under, global insurance policies (including health, life and travel) that cover third-country nationals traveling to Cuba. Health insurance, life insurance and travel-related insurance for authorized travelers from the U.S. will also be permitted.

Environmental Protection Businesses. BIS is amending the licensing policy for Cuba to include a general policy of approval for exports and re-exports of items necessary for the environmental protection of U.S. and international air quality, waters and coastlines, including items related to renewable energy or energy efficiency. Although a license will still be required to export or re-export these items to Cuba, BIS will look favorably upon applications for such a license.

There will also be new opportunities for U.S. importers, which will be authorized to import specified goods and services produced by Cuban entrepreneurs, as determined by the U.S. State Department.

Other Businesses. Various training programs in Cuba will now be authorized, including training on entrepreneurship, journalism, adult literacy and vocational skills, so U.S. businesses that conduct such training will have new opportunities in Cuba. There will also be new

opportunities for U.S. importers, which will be authorized to import specified goods and services produced by Cuban entrepreneurs, as determined by the U.S. State Department.

The new BIS License Exception SCP will authorize the export and re-export of certain U.S.-origin tools, equipment, supplies and instruments for use by Cuban private sector entrepreneurs, such as auto mechanics, restaurateurs, barbers and hairstylists. This provision is limited to those items classified as EAR 99 or controlled on the CCL only for anti-terrorism reasons.

Foreign Subsidiaries of U.S. Companies. Previously, the business activities of foreign subsidiaries of U.S. companies were as restricted with respect to Cuba as the business activities of the U.S. parents. The new regulations, however, will permit U.S.-owned or -controlled entities in third countries to provide, with some limitations, goods and services to Cuban nationals in third countries.

It is unlikely that Congress will enact legislation in the near term that would dismantle the array of U.S. sanctions and export controls against Cuba.

Therefore, expansion of business opportunities through administrative action will remain the most fruitful path.

Next Steps for U.S. Businesses. U.S. businesses engaged in the foregoing areas should carefully examine the regulations to determine the scope of the new opportunities available to them. Although much travel to Cuba will remain restricted, the new amendments will permit travel and incidental transactions related to market research, commercial marketing, sales negotiation, accompanied delivery and servicing in Cuba of items permitted under the amended export controls. (Any such travel must comply with the continued prohibition against tourist travel.)

U.S. businesses should also consider urging OFAC and BIS to issue clarifications of the amendments where ambiguities remain. Both agencies sometimes issue responses to FAQs, as OFAC and BIS have done, which can be quite helpful.

Furthermore, to the extent that additional general OFAC licenses would advance the intent of the president's new policy, businesses should seek to persuade OFAC to issue such licenses.

It is unlikely that Congress will enact legislation in the near term that would dismantle the array of U.S. sanctions and export controls against Cuba. Therefore, expansion of business opportunities through administrative action will remain the most fruitful path.