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New Regulations Create Business Opportunities in Cuba

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Last week, the U.S. Commerce Department's Bureau of Industry and Security announced amendments to the Export Administration Regulation (EAR) that further liberalize U.S. trade relations with Cuba.[1] Commerce's rule adds a number of new categories of transactions that the agency will license and was made in conjunction with changes to the U.S. Treasury Department, Office of Foreign Assets Control's (OFAC) Cuba sanctions program.[2] Building upon regulatory changes published in January and September 2015, the rule aims to engage and empower the Cuban people, while also maintaining stringent restrictions on, and limiting benefits to, the Cuban government-run economy and Cuban military, police, security, and intelligence entities. Although the regulatory changes open up several new avenues for U.S. companies to do business in Cuba, some obstacles remain.

Both Treasury and Commerce administer strict controls on Cuba-related transactions. More specifically, Commerce is charged with regulating exports and reexports of U.S. items to Cuba. A license from Commerce is required to export or reexport commodities, software, and technology subject to the EAR, including low-level EAR99 items, to Cuba unless a license exception applies.[3] Previously, what made matters more difficult for companies seeking to conduct business in Cuba was that most license applications were subject to a general policy of denial. Commerce's recent amendments relax export controls on many items by creating one basket of items that are subject to a licensing policy of approval and another basket of items for which licenses are considered on a case-by-case basis.

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Practice Areas

Export Controls and Economic Sanctions
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The following categories of goods, software, and technology are now subject to a general policy of approval:[4]

- Items that are necessary to ensure the safety of civil aviation and the safe operation of commercial aircraft engaging in international air transportation;
- Telecommunications items that would improve communications to, from, and among the Cuban people;
- Items to human rights organizations or to individuals and non-governmental organizations that promote independent activities designed to strengthen civil society in Cuba;
- Commodities and software for use by U.S. news bureaus in Cuba whose primary purpose is gathering and disseminating news to the general public; and
- Agricultural items and agricultural commodities that are not eligible for a license exception (e.g., insecticides, pesticides, herbicides, and agricultural commodities classified above the EAR99 level).

Although Commerce generally was willing to consider licenses for the items identified above on a case-by-case basis prior to the new rule, the change provides U.S. companies with added comfort and assurance that they should have little difficulty obtaining approval to export these items to Cuba going forward, provided, of course, that the Cuban end-user does not raise national security or foreign policy concerns.

Perhaps more importantly, Commerce's rule puts aside its previous general policy of denial in favor of a case-by-case review of license applications for items intended to meet the needs of the Cuban people. Notably, the case-by-case review policy applies to commodities exported or reexported to state-owned enterprises and Cuban government organizations that ultimately provide the goods for the use and benefit of the Cuban people. The new case-by-case licensing policy covers the following types of exports and reexports:

- Items for agricultural production; artistic endeavors; education; food processing; disaster preparedness, relief, and response; public health and sanitation; residential construction and renovation; and public transportation;
- Items for construction of water treatment, electricity/energy, sports and recreation, and other facilities that directly benefit the Cuban people; and
- Items to wholesalers and retailers for domestic consumption by the Cuban people.

Practically speaking, this fairly extensive list of goods that may be authorized for export to Cuba, combined with the fact that these sales may be made to government organizations and entities, create new possibilities for U.S. companies seeking to enter the Cuban market.

Note that even if Commerce issues a license to export goods to Cuba, U.S. companies must still contend with Treasury's Cuba sanctions. OFAC's recent regulatory changes also benefit U.S. exporters. For example, prior to last week, payment and financing terms for licensed exports were limited to cash in advance or third-country financing. With the exception of exports of agricultural commodities/items, these OFAC restrictions have been lifted. U.S. banks are now able to provide financing, including issuing a letter of credit for authorized exports to Cuba.[5] Thus, U.S. companies with an approved export license are no longer hamstrung by restrictive payment arrangements and now have the flexibility to work with their Cuban customers and agree to mutually beneficial terms.[6]

Nonetheless, challenges remain for U.S. companies eager to make a name in Cuba. Although the new and expanded license exceptions and licensing policies issued since January 2015 provide companies several paths to engage with Cuba, the authorizations and policies are fact-specific and require a careful analysis of the types of items to be exported to Cuba and the end-users for such items. Keep in mind that Commerce generally will not approve exports for use by Cuban state-owned enterprises or organizations that primarily generate revenue for the state, such as those engaged in tourism and in the extraction or production of minerals or other raw materials. Commerce also generally will deny license applications for items destined to the Cuban military, police, intelligence, or security services.

Furthermore, while applying for a license for Cuba is a fairly straightforward process, it does take time (preparation and submission of an application and a final license determination can take anywhere between two to six weeks or longer), requiring companies to plan ahead before making sales to Cuba. Additionally, the private sector in Cuba is fairly small, and, despite the fact that Commerce's new licensing policies permit certain exports to the Cuban government, funding may still be an issue. Tourism-related trade and investment, which offer potentially lucrative business opportunities, also remain prohibited under the Cuba embargo.

Finally, looking ahead, for those companies unable to take advantage of the current reforms, there are some legal roadblocks that may limit the extent of further relief from the Cuba trade restrictions. In this regard, Congress, pursuant to the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (commonly known as "Helms-Burton"), codified the economic embargo on Cuba.[7] Congress also has erected significant hurdles for suspending or terminating the sanctions, including requirements for major changes to Cuba's government.[8] So far, the Administration has creatively and adeptly relaxed restrictions on Cuba to help support the Cuban people and promote democratic reform, while also seeking to remain within the bounds imposed by Congress. However, effecting more far-reaching, business-friendly changes to U.S. export controls and sanctions on Cuba that go beyond helping the Cuban people and encouraging democracy may need to be driven primarily by legislative action and/or major reforms to the Cuban government.[9]

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[1] Cuba Licensing Policy Revisions, 81 Fed. Reg. 4580 (Jan. 27, 2016) (amending 15 C.F.R. pt. 746), https://www.gpo.gov/fdsys/pkg/FR-2016-01-27/pdf/2016-01557.pdf.

[2] Cuban Assets Control Regulations, 81 Fed. Reg. 4583 (Jan. 27, 2016) (amending 31 C.F.R. pt. 515), https://www.gpo.gov/fdsys/pkg/FR-2016-01-27/pdf/2016-01559.pdf.

[3] 15 C.F.R. § 746.2(a).

[4] Certain other types of licenses, such as those for medicines and medical devices and items necessary for the environmental protection of U.S. and international air quality, waters, or coastlines, were already subject to a favorable licensing policy prior to the new rule being issued. *Id.* § 746.2(b).

[5] 31 C.F.R. §§ 515.533(a)(2) and 515.584(f). The limitation on payment and financing terms for agricultural commodities and items is a result of the complex legislative and regulatory scheme used to impose and maintain sanctions on Cuba. Specifically, the Trade Sanctions Reform and Export Enhancement Act of 2000 requires that payment and financing terms for agricultural items and commodities be limited to cash in advance or financing by a third-country financial institution. 22 U.S.C. § 7207(b)(1).

[6] OFAC's Cuba sanctions program provides authorizations for a number of transactions related to exports licensed or otherwise permitted by Commerce. Among other activities, U.S. companies are permitted to engage in travel-related transactions and additional transactions as are directly incident to the conduct of market research, commercial marketing, sales or contract negotiation, accompanied delivery, installation, leasing, or servicing in Cuba of items consistent with the export or reexport licensing policy of Commerce. 31 C.F.R. § 515.533(d)(1). Additionally, companies carrying out Commerce-authorized exports are allowed to engage in certain transactions necessary to establish and maintain a physical presence in Cuba, such as leasing an office or warehouse. *Id.* § 515.573.

[7] P.L. 104-114 (1996) at Sec. 102(h).

[8] *Id.* at Secs. 204-206.

[9] *See, e.g.*, U.S. Government Accountability Office, *U.S. Embargo on Cuba: Recent Regulatory Changes and Potential Presidential or Congressional Actions*, GAO-09-951R (Sept. 17, 2009).