



## Beyond Rum and Cigars: Further Easing of Sanctions Paves Way for Increased Business Opportunities in Cuba

On October 17, 2016, the U.S. government further eased the economic sanctions and trade embargo against Cuba to implement the administration's policy of increasing engagement and commerce to benefit the Cuban people and American businesses. In coordinated revisions that reflect their overlapping jurisdiction over the U.S. embargo of Cuba, the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") and the U.S. Department of Commerce's Bureau of Industry and Security ("BIS") released revisions to the Cuban Assets Control Regulations, 31 C.F.R. Part 515 ("CACR"), and the Export Administration Regulations, 15 C.F.R. Parts 730–774 ("EAR"). The revised regulations are effective immediately.

While initial headlines have highlighted the relaxation of limitations on the importation of Cuban-origin rum and cigars, other aspects of this latest round of eased sanctions are much more significant for those planning to expand their business opportunities in Cuba.

This *Commentary* summarizes key provisions that will increase flexibility for trade with Cuba. These provisions will most directly benefit the following entities:

- Pharmaceutical manufacturers and distributors;
- Medical researchers;
- Infrastructure development firms;
- Direct-to-consumer retailers, including online retailers;
- Manufacturers of "agricultural items";
- Air and maritime cargo operators; and
- Civil aviation safety services providers.

In addition, *all* entities exploring future opportunities in Cuba can now lay contractual groundwork for future operations through contracts contingent on OFAC authorization or further relaxation of the sanctions.

Although these revisions provide U.S. companies with an increased array of opportunities in Cuba, the long-standing comprehensive U.S. trade embargo on Cuba remains in force. As a result, U.S. citizens and U.S. companies, and foreign-incorporated entities owned or controlled by such persons—collectively in CACR parlance, "persons subject to U.S. jurisdiction"—must remain vigilant in their trade compliance. This could prove more challenging as compliance programs adapt to the expanded scope of authorized activities in and exports to Cuba.

## Medical Research and Pharmaceuticals

The amended CACR—through a new general license at § 515.547—have opened significant opportunities in medical research and pharmaceuticals manufacturing in Cuba and with Cuban partners. First, persons subject to U.S. jurisdiction may now engage in joint medical research projects with Cuban nationals, including both commercial and non-commercial medical research. Second, persons subject to U.S. jurisdiction may also engage in all transactions incident to obtaining approval for Cuban-origin pharmaceuticals from the U.S. Food and Drug Administration (“FDA”). This authorization includes: discovery and development; pre-clinical research; clinical research; regulatory review, approval, licensing, and post-marketing activities; and the importation into the United States of Cuban-origin pharmaceuticals. Third, transactions incident to the marketing, sale, or other distribution of Cuban-origin pharmaceuticals in the United States are also authorized. In addition, accounts may be opened and maintained in Cuban financial institutions for use in conducting these activities.

## Infrastructure Development

Framed as an expansion of the authority to provide humanitarian services in Cuba and to Cuban nationals, the amended CACR now offer substantial opportunities for persons subject to U.S. jurisdiction to provide a broad range of services associated with Cuban infrastructure development and maintenance. Specifically, pursuant to § 515.591, persons subject to U.S. jurisdiction may now provide services related to developing, repairing, maintaining, and enhancing Cuban infrastructure that directly benefit the Cuban people, consistent with the export or reexport licensing policies of the Department of Commerce. For the purposes of this authorization, infrastructure means hospitals, public housing, primary and secondary schools, and, more generally, those 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 electrical distribution sectors. The authorization includes projects related to the environmental protection of U.S., Cuban, and international air quality, waters, and coastlines.

## Direct-to-Consumer Exports and Reexports

OFAC and BIS have amended their regulations to expand existing authorizations to export and reexport certain items to Cuba. These changes are significant because the revisions provide more opportunities Cuban citizens to access most American goods.

First, in another broad expansion, BIS has amended License Exception Support for the Cuban People (“SCP”) to authorize exports or reexports of any items subject to the EAR that are classified EAR99 or controlled only for antiterrorism purposes, provided that such items are sold directly to eligible individuals for their personal use, or the personal use of their immediate families. (Previously, the license exception applied to certain items for use by the private sector. The export of items that would meet the needs of the Cuban people, including wholesale or retail distribution for domestic consumption, was subject to a case-by-case licensing policy). While certain Cuban government and Communist Party officials remain ineligible end-users under the expanded License Exception SCP, the revisions also narrow the categories of individuals subject to this exclusion. This new authorization will be particularly important for online retailers and other entities that directly market products to consumers.

Second, the amended general license at § 515.533(a) of the CACR removed the reference to 100 percent U.S.-origin items in the general license authorizing certain reexports of U.S.-origin goods from a third country to Cuba. OFAC intended this revision to minimize and clarify the circumstances under which an export or reexport authorized by BIS would require separate licensing by OFAC. Now, all transactions related to the export or reexport of goods authorized by BIS under the EAR are also authorized under the general license except transactions between a U.S.-owned or -controlled firm in a third country and Cuba for the exportation to Cuba of commodities produced in a country other than the United States or Cuba.

## U.S. Financing of Agricultural Items

In amendments to § 515.533(a), OFAC has also taken steps to clarify the extent to which restrictions of payment terms

apply to certain agricultural exports and reexports. The CACR have long required transactions involving “agricultural commodities” (as defined in the EAR) and “agricultural items” (related goods that fall outside that definition, such as pesticides and tractors) to be paid for in advance, in cash, or to be financed by a third-country financial institution. Although limitations on financing of “agricultural commodities” remain in place as required by the Trade Sanctions Reform and Export Enhancement Act of 2000, 22 U.S.C. § 7207(a), the revised CACR now clarify that transactions involving the export and reexport of “agricultural items” may be made under payment and financing terms that apply to other authorized exports and reexports. Banking institutions that are persons subject to U.S. jurisdiction are authorized to provide financing for exports and reexports of such “agricultural items,” including issuing, advising, negotiating, paying, or confirming letters of credit, accepting collateral backing such as letters of credit, and processing documentary collections.

## **Air and Maritime Cargo Operations**

Separate from the easing of export and reexport restrictions, OFAC and BIS have taken steps to ease restrictions on international cargo shipments involving or transiting through Cuba.

First, foreign cargo vessels that call on a Cuban port for trade purposes are generally prohibited from entering U.S. ports to load or unload cargo for 180 days following the vessel's departure from Cuba, subject to certain exceptions. The revised regulations add another exception such that foreign vessels are no longer subject to this restriction if their cargo contains only items from a third country that would be classified as EAR99 or controlled only for antiterrorism reasons (if they were subject to the EAR).

Second, the amended EAR also authorize cargo loaded on an aircraft to transit Cuba under License Exception Aircraft, Vessels, and Spacecraft (“AVS”) provided that cargo is not removed from the aircraft for use in Cuba, is not transferred to another aircraft or vessel, and leaves with the same aircraft when it departs. This revision authorizes temporary sojourn of air cargo in the same fashion as that previously authorized for maritime cargo.

## **Civil Aviation Safety-Related Services**

The amended CACR, pursuant to the revised general license at § 515.572, now also offer expanded opportunities for commercial civil aviation companies and service providers. In an effort to promote safety of civil aviation and the safe operation of commercial aircraft, the revised CACR implement a new general license authorizing the provision of civil aviation safety-related services to Cuba and to Cuban nationals. Export or reexport of repair parts to Cuba, however, must be separately authorized by BIS or provisions of the EAR.

## **Contingent Contracts**

Perhaps most significantly, companies contemplating expanding business into Cuba in the future will be able to benefit from the general license authorizing the negotiation of and entry into contingent contracts related to otherwise prohibited transactions. Prior to the revisions, the authorization to enter into only executory contracts was limited to the export or reexport of certain goods, provided the contract was contingent on compliance with Department of Commerce regulations. Under the new general license at § 515.534, persons subject to U.S. jurisdiction may enter into and engage in all transactions ordinarily incident to negotiating and entering into contingent contracts for transactions that are prohibited by the CACR, provided that performance of the contract is made expressly contingent on prior authorization by OFAC and any other federal agency with licensing authority over the transaction (or when such authorization and licensing requirements have been removed).

The new ability to enter into contingent contracts will enable companies to lay the contractual foundations for future business—for example, to establish a relationship with a prospective distributor or to lease facilities to establish a physical presence in Cuba—and offers a substantial opportunity for U.S. businesses to plan proactively and prepare to enter the Cuban market.

## **Importation of Cuban-Origin Items**

Finally, although the summaries above have focused on those provisions that likely will most benefit the expansion of business

opportunities in Cuba, those travelling to Cuba to prepare for or engage in authorized activities also now have fewer restriction on importing Cuban-origin goods. OFAC has removed the limitation on the value of such items that may be imported from Cuba—previously \$400 (with no more than \$100 of tobacco or alcohol products). The limitation that the items be for personal use and imported as accompanied baggage continues to apply, subject to normal import duty and tax exemptions. Also, persons subject to U.S. jurisdiction may now import Cuban-origin items from third countries under the same conditions. Before the revisions, such goods purchased in third countries could be purchased and consumed, but not imported into the United States. Foreign persons travelling to the United States also benefit from the relaxation because they may now import any Cuban-origin items—including alcohol and tobacco products—as accompanied baggage, provided the goods are not in commercial quantities and are not imported for resale.

## Continued Caution Remains Warranted

Significantly, despite these revisions and the several prior rounds of amendments over the past two years, Cuba remains subject to a comprehensive U.S. trade embargo. Although these most recent amendments to the CACR and EAR are likely to be welcome news to those entities eager to expand into Cuba, taking advantage of these new authorizations could pose increased compliance risks or present other business complications. For example:

- The authorization to conduct joint medical research does not authorize travel to conduct such research. Although separate travel authorization is provided elsewhere in the CACR, such travel must not be paid for through a Cuban bank account established in connection with the research activities. The funds in such an account may be

used exclusively for the medical research (and related) transactions authorized in the general license.

- The general license authorizing services related to commercial aircraft safety could authorize certain repair activities for aircraft that develop a safety-of-flight malfunction while in Cuba. However, export of the repair parts to Cuba must be separately authorized by the CACR and EAR.
- Companies relying on the direct-to-consumer export authorization should have measures in place to ensure that the goods are intended for use by the purchaser or immediate family members. Criteria to evaluate quantities of purchase, frequency of purchase, and the nature of the goods being sold, among other potential factors, would be helpful, if not necessary to maintain compliance with this broadened export authorization.
- Notwithstanding the expansion of opportunities to engage with Cuba, persons subject to U.S. jurisdiction must be sure to conduct reasonable due diligence on all counterparties, a requirement that may be complicated in the near term, given the long-standing restrictions on trade with Cuba.
- Finally, while the U.S. government continues to expand its policy of increasing the engagement with and support of the Cuban people, practical realities in the Cuban market and restrictions imposed by the Cuban government may continue to limit the extent to which U.S. parties might benefit from efforts in Cuba.

As further guidance and amendments to the U.S. trade embargo of Cuba evolve, Jones Day will continue to keep significant developments under review.

## Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at [www.jonesday.com/contactus/](http://www.jonesday.com/contactus/).

**Sean T. Boyce**

Dubai

+971.4.709.8416

[sboyce@jonesday.com](mailto:sboyce@jonesday.com)

**Pedro A. Jimenez**

Miami/New York

+1.305.714.9701/+1.212.326.3776

[pjimenez@jonesday.com](mailto:pjimenez@jonesday.com)

**Chase D. Kaniecki**

Washington

+1.202.879.3734

[ckaniecki@jonesday.com](mailto:ckaniecki@jonesday.com)

**Laura Fraedrich**

Washington

+1.202.879.3646

[lfraedrich@jonesday.com](mailto:lfraedrich@jonesday.com)

**Johanna O. Rousseaux**

Miami

+1.305.714.9709

[jorousseaux@jonesday.com](mailto:jorousseaux@jonesday.com)

**Lindsey M. Nelson**

Washington

+1.202.879.3735

[lmnelson@jonesday.com](mailto:lmnelson@jonesday.com)

**Michael P. Gurdak**

Washington

+1.202.879.5470

[mpgurdak@jonesday.com](mailto:mpgurdak@jonesday.com)

**D. Grayson Yeargin**

Washington

+1.202.879.3634

[gyeargin@jonesday.com](mailto:gyeargin@jonesday.com)

**Fahad A. Habib**

San Francisco

+1.415.875.5761

[fahabib@jonesday.com](mailto:fahabib@jonesday.com)

**Chad O. Dorr**

Washington

+1.202.879.3795

[cdorr@jonesday.com](mailto:cdorr@jonesday.com)

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