

KIRKLAND ALERT

November 21, 2017

The Administration Changes Course on Cuba

On November 8, 2017, the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC), the U.S. Department of State's Bureau of Economic and Business Affairs, and the U.S. Department of Commerce's Bureau of Industry and Security jointly announced changes to U.S. trade controls on Cuba. The changes, which took effect on November 9, 2017, roll back some of the liberalization that took place under the Obama administration. At the same time, the newly articulated restrictions clarify some murkier areas of compliance, and some companies may be surprised to learn that certain activities may be permissible.

The View from Washington

Consistent with his campaign platform, President Trump has pursued a [more assertive approach](#) in relations with Cuba than his [predecessor](#), who had sought to reverse a decades-old, bipartisan U.S. policy intended to isolate the Castro regime economically and diplomatically. In June 2017, President Trump signed the *National Security Presidential Memorandum on Strengthening the Policy of the United States Toward Cuba* (NSPM), which formally announced a change in U.S. policy towards Cuba aimed at enhancing U.S. national security interests, promoting democracy on the island and encouraging the Cuban government to address systemic human rights abuses. The recently announced regulatory changes are intended to implement the policy objectives articulated by the NSPM.

While the administration's policy and regulatory changes are meaningful, thus far they do not amount to a wholesale reversal of President Obama's Cuba policy. Diplomatic relations between the United States and Cuba still exist, despite some significant challenges. However, there is a more meaningful implication of this policy shift: It would appear to largely eliminate a legal (as a result of the *Cuba Democracy Act* and the *Cuban Liberty and Democratic Solidarity Act*) and political window that would have existed in 2018 to eliminate the U.S. embargo altogether were Raul Castro to keep his promise to relinquish power next year.

Cuba Sanctions In Transition

Under the Trump administration, the following changes have now taken effect:

- The Department of State issued the *List of Restricted Entities and Subentities Associated with Cuba* (Cuba Restricted List). This list describes the individuals and entities with which persons subject to U.S. jurisdiction are prohibited from conducting "direct financial transactions" under the revised Cuba Sanctions Regulations. The Cuba Restricted List targets parties considered to be under the control of, or to act for or on behalf of, the Cuban military, intelligence, or security services or personnel.²

However, there is a more meaningful implication of this policy shift: It would appear to largely eliminate a legal (as a result of the *Cuba Democracy Act* and the *Cuban Liberty and Democratic Solidarity Act*) and political window that would have existed in 2018 to eliminate the U.S. embargo altogether were Raul Castro to keep his promise to relinquish power next year.

- However, it is important to note that only “direct” financial transactions with listed parties are prohibited, and that “direct financial transactions” are defined narrowly to be only those where the U.S. person is the “originator on a transfer of funds whose ultimate beneficiary” is on the Cuba Restricted List. Therefore, the prohibition is significantly narrower than in other regimes where both direct and indirect dealings, and receipt and provision of goods and services, are prohibited with certain parties. Also, unlike restricted party lists issued and administered by OFAC — which consider even an unnamed party to be sanctioned if it is majority-owned by one or more parties appearing on a list such as the Specially Designated Nationals List (SDN List) — these sanctions technically apply only to those parties “specified by name” on the Cuba Restricted List, and not their subsidiaries.³
- In conjunction with the State Department, the Department of Commerce has established a general policy of denial for license applications to export items to individuals and entities designated on the Cuba Restricted List and eased the regulatory burdens associated with certain exports to the Cuban private sector.⁴ For example, under License Exception Support for the Cuban People (SCP), now any item designated as EAR99 or controlled only for anti-terrorism reasons may be exported to Cuba for use by the Cuban private sector for private sector economic activities, so long as the items are not “used to primarily generate revenue for the state or used to contribute to the operation of the state.”⁵ This expands the scope of such license-free exports beyond what had previously been limited to specific types of items.
- Lastly, the Treasury Department has banned purely recreational travel to Cuba. Educational travel and so-called people-to-people nonacademic educational travel are now permitted only if done under the auspices of an organization that is subject to U.S. jurisdiction and where an employee or agent (who must also be subject to U.S. jurisdiction) of the organization accompanies travelers. Additionally, travel must include some sort of “meaningful interaction with individuals in Cuba.”⁶

Key Takeaways

- Companies must avoid providing funds directly to individuals and entities identified on the Cuba Restricted List. For transactions that may indirectly involve these parties, companies should ensure that their actions do not fall within the scope of the new prohibition.
- There are now increased export opportunities with the Cuban private sector, though it will be important to undertake appropriate diligence to safeguard against those transactions assisting or benefiting the Cuban government.
- Individual “self-certified” travel to Cuba, which had been occurring for many months now, is once again banned. Educational and “people-to-people” travel must be organized through approved entities and meet particular requirements.

The Department of Commerce has established a general policy of denial for license applications to export items to individuals and entities designated on the Cuba Restricted List and eased the regulatory burdens associated with certain exports to the Cuban private sector.

- A potential silver lining for companies interested in doing business in Cuba, such as services providers in the tourism industry, is the opportunity to engage in transactions that do not involve “direct transactions” and may not be prohibited.

* * *

Anchored in Washington, D.C., Kirkland & Ellis’s [International Trade and National Security Practice](#), in coordination with the Firm’s [global offices](#) and [related practice areas](#), serves as a trusted adviser to companies, private equity sponsors and boards to identify, assess and mitigate the complex international risks of operating or investing across national borders.

We focus on U.S. and EU anticorruption (FCPA, UK Bribery Act), economic sanctions (OFAC, EU), export controls (ITAR, EAR), anti-money laundering (AML), cross-border investment clearance (CFIUS) and related areas. We regularly work with our clients on a global basis on transactional, regulatory counseling, and investigative and enforcement matters, providing seasoned, holistic and sound advice.

If this publication was forwarded to you and you would like to receive similar future client alerts directly, please subscribe [here](#).

Companies must avoid providing funds directly to individuals and entities identified on the Cuba Restricted List. For transactions that may indirectly involve these parties, companies should ensure that their actions do not fall within the scope of the new prohibition.

-
- ¹ The White House, *National Security Presidential Memorandum on Strengthening the Policy of the United States Toward Cuba*, June 16, 2017, available at <https://www.whitehouse.gov/the-press-office/2017/06/16/national-security-presidential-memorandum-strengthening-policy-united>.
 - ² U.S. Department of State, *The State Department’s List of Entities and Subentities Associated With Cuba (Cuba Restricted List)*, Nov. 9, 2017, available at <https://www.federalregister.gov/documents/2017/11/09/2017-24449/the-state-departments-list-of-entities-and-subentities-associated-with-cuba-cuba-restricted-list>.
 - ³ U.S. Department of State, *Frequently Asked Questions on the Cuba Restricted List*, Nov. 8, 2017, available at <https://www.state.gov/e/eb/tfs/spi/cuba/cubarestrictedlist/275382.htm>.
 - ⁴ U.S. Department of Commerce, *Amendments To Implement United States Policy Toward Cuba*, Nov. 9, 2017, available at <https://www.federalregister.gov/documents/2017/11/09/2017-24448/amendments-to-implement-united-states-policy-toward-cuba>.
 - ⁵ 15 C.F.R. § 740.21 (b).
 - ⁶ U.S. Department of the Treasury, *Cuban Assets Control Regulations*, Nov. 9, 2017, available at <https://www.federalregister.gov/documents/2017/11/09/2017-24447/cuban-assets-control-regulations>.

If you have any questions about the matters addressed in this *Kirkland Alert*, please contact the following Kirkland authors or your regular Kirkland contact.

Mario Mancuso, P.C.
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
www.kirkland.com/mmancuso
+1 202 879 5070

Zachary S. Brez, P.C.
Kirkland & Ellis LLP
601 Lexington Avenue
New York, NY 10022
www.kirkland.com/zbrez
+1 212 446 4720

Michael S. Casey
Kirkland & Ellis International LLP
30 St Mary Axe
London EC3A 8AF
www.kirkland.com/mcasey
+44 20 7459 2255

Sanjay José Mullick
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
www.kirkland.com/smullick
+1 202 879 5111

Joanna M. Ritcey-Donohue
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
www.kirkland.com/jritcey-donohue
+1 202 879 5980

Carrie Schroll
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
www.kirkland.com/cschroll
+1 202 879 5107

Sam Moss
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
www.kirkland.com/smoss
+1 202 879 5254

This communication is distributed with the understanding that the author, publisher and distributor of this communication are not rendering legal, accounting, or other professional advice or opinions on specific facts or matters and, accordingly, assume no liability whatsoever in connection with its use. Pursuant to applicable rules of professional conduct, this communication may constitute Attorney Advertising.

© 2017 KIRKLAND & ELLIS LLP. All rights reserved.

www.kirkland.com