

# KIRKLAND ALERT

October 31, 2016

## U.S. Relaxes Cuba Sanctions, Ends Burma Sanctions, Although Election Uncertainties and Compliance Challenges Remain

On October 14, 2016, President Obama approved a Presidential Policy Directive easing U.S. sanctions on Cuba. A week prior, on October 7, 2016, President Obama issued an Executive Order terminating U.S. sanctions on Burma, also known as Myanmar. Collectively, these two Presidential actions may constitute some of the last measures the Obama Administration will take as part of its effort to leave a foreign policy legacy of seeking to normalize relations with countries that for decades the U.S. had largely cut off through sanctions from trade and investment.

Cuba sanctions changes authorize a number of new activities and permit executory contracts with Cuban parties contingent upon U.S. government approval related to scientific collaboration, civil aviation, commerce, travel and trade, and they are the latest step in an initiative to ease the sanctions that began two years ago. Though Executive action has relaxed restrictions, Congressional action is required to remove the long-standing embargo, and the upcoming Presidential election casts an uncertain light on U.S. future policy towards Cuba.

Burma sanctions had been in place for almost twenty years and their termination caps a recent liberalization effort following the country's formation of a democratically-elected civilian-led government. Though their end means U.S. companies now generally can freely trade with Burma and invest in the country and its companies, important compliance considerations remain with respect to screening, export controls and anti-corruption compliance.

### *Cuba Developments*

Pursuant to the Presidential Policy Directive, on October 17, 2016, the U.S. Department of the Treasury, Office of Foreign Assets Control ("OFAC") and the U.S. Department of Commerce, Bureau of Industry and Security ("BIS") published final rules amending the Cuban Assets Control Regulations ("CACR") and the Export Administration Regulations ("EAR"), respectively. Those seeking to do business in Cuba generally need to check for applicable authorizations from OFAC as well as BIS, as both may be required. Highlights of these principal developments include:

- *Imports and Exports* — A general license allows authorized exports or re-exports to Cuba to return to the U.S. or a third country for service or repair. The subsequent exportation or re-exportation of those items, or of replacement items, still requires separate authorization.

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- *Contingent Contracts* — A new general license permits contingent contracts for transactions prohibited by the CACR. Performance of the contracts is still contingent on authorization by OFAC and any other applicable agency, or on such authorization no longer being required. This authorization enables parties to confirm a business opportunity before seeking OFAC approval.
- *Infrastructure Development* — Persons subject to U.S. jurisdiction may provide Cuba or Cuban nationals with services related to developing, repairing, maintaining and enhancing Cuban infrastructure, defined to encompass:
  - 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.

Services also must be consistent with BIS policy.

- *Medical and Pharmaceuticals* — Joint medical research projects with Cuban nationals are authorized including activities related to obtaining approval from the U.S. Food and Drug Administration of Cuban-origin pharmaceuticals. Persons subject to U.S. jurisdiction who are engaging in these activities may open, maintain, and close bank accounts at financial institutions as long as such accounts are used solely for this purpose.
- *Civil Aviation Safety and Cargo Transit* — Services for Cuba and Cuban nationals to ensure civil aviation safety and the safe operation of commercial aircraft are approved. Cargo aboard aircraft may now transit Cuba on its way to other foreign destinations, so long as the cargo remains on that aircraft, under License Exception Aircraft, Vessels and Spacecraft (“AVS”).
- *Travel* — Persons subject to U.S. jurisdiction may now travel to Cuba for purposes of attending or organizing professional meetings or conferences in Cuba, even if the purpose of such meetings or conferences is the promotion of tourism in Cuba.

Personal importation into the United States as accompanied baggage of merchandise of Cuban-origin such as rum and cigars, as well as other products, is now unlimited by any dollar threshold.

- *Consumer Sales* — Items designated as “EAR99” or controlled on the Commerce Control List (CCL) only for anti-terrorism reasons can be sold to consumers in Cuba, as long as they are not identified as prohibited parties on U.S. government lists. This step is intended to facilitate sales of consumer products to consumers directly, such as by online retailers, if the items qualify as subject only to these lowest export control restrictions.
- *Cuban Government Targets Narrowed* — Fewer Cuban officials are now ineligible for more favorable treatment under certain exceptions of OFAC and BIS regula-

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tions. Only members of the Council of Ministers, flag officers of the Revolutionary Armed Forces, and members of the Politburo remain on the list of ineligible persons.

### *Burma/Myanmar Developments*

The President's Executive Order means the Burmese Sanctions Regulations ("BSR") administered by OFAC, which had generally prohibited the export and re-export of financial services to Burma; most imports into the U.S. from Burma; and new investment in Burma, are no longer in effect. We review below the key impacts.

- *Transactions with Burmese Counterparties* — All individuals and entities named on OFAC's list of Specially Designated Nationals and Blocked Persons List ("SDN" List), and therefore "blocked" pursuant to the BSR have been removed. When parties are "blocked" it means U.S. persons generally are prohibited from engaging in trade and financial transactions with them. About 200 parties were removed from the SDN List, including Burmese airlines, banks, hotels and resorts, energy and commodities companies, infrastructure firms and trading houses.

Burmese individuals or entities may still be blocked pursuant to other OFAC sanctions authorities, such as counter-narcotics sanctions. In addition, under OFAC's rules, parties that are 50% or more owned by an SDN are considered blocked even if they are not themselves listed, which is much more challenging to assess.

- *Banking and Financial Transactions* — U.S. financial institutions may maintain correspondent accounts for Burmese banks. Notwithstanding the lifting of sanctions, this would have remained prohibited given that the Financial Crimes Enforcement Network ("FinCEN") made a finding under Section 311 of the USA PATRIOT Act that Burma is a "jurisdiction of primary money laundering concern".<sup>1</sup> In addition to the lifting of BSR restrictions, on October 7, FinCEN issued an administrative exception suspending its prohibition.

In order to make use of this exception, U.S. banks are required to undertake enhanced due diligence procedures.

- *Imports of Jadeite and Rubies* — The ban on importation into the United States of Burmese-origin jadeite and rubies, and any jewelry containing them, has been revoked. The President waived the financial and blocking sanctions in the JADE Act, which prohibited such importations even indirectly from third countries.<sup>2</sup>
- *Reports on New Investments* — Compliance with the State Department's Responsible Investment Reporting Requirements that affected new investment over \$500K is no longer required.

### *Cuba and Burma - Looking Ahead*

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these markets, including for the following reasons:

*Congressional action:* Absent Congressional action, the President will remain limited in his options for ultimate reform of policy towards Cuba, and most commercial transactions continue to be prohibited for persons and entities subject to U.S. jurisdiction without U.S. government authorization.

*Upcoming election:* The upcoming election will affect future Cuba sanctions policies, as a new President may choose to continue down the path towards normalization, or to revert back to the comprehensive restrictions of the past.

*Sanctioned party screening:* Checking for Burmese counterparties that may still appear on other sanctions lists and may have beneficial ownership by an SDN is a necessity to prevent prohibited transactions.

*Export controls:* Controls on the export of goods, software and technology remain, which is determined by an item's classification and any related export license requirement.

*Anti-corruption and anti-money laundering:* FinCEN has formally identified Burma as a country of major money laundering concern and Burma's military and State-owned actors still play a role in the country's economy. Due diligence of third party agents and intermediaries, and appropriate compliance controls, continue to be important for trade and investment in Burma.

U.S. businesses interested in Cuba and Burma opportunities should continue to remain vigilant to be aware of future developments that will affect trade and investment.

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- 1 In recent years, when the BSR was in effect, OFAC had issued general licenses to authorize correspondent banking in light of FinCEN's finding.
- 2 "JADE" stands for "Junta's Anti-Democratic Efforts," a law which was enacted in 2008.

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