

# KIRKLAND ALERT

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## U.S. Sanctions on Cuba — Political and Regulatory Steps Toward Normalization Continue

On March 20, 2016, President Obama arrived in Cuba for an historic visit aimed at engaging with the Cuban people and encouraging the nascent private sector. In advance of the trip, the Obama Administration rolled out changes to the Cuba sanctions program, further easing restrictions on dealings between the two countries, in furtherance of these goals. The U.S. Department of Treasury, Office of Foreign Assets Control (“OFAC”) and the U.S. Department of Commerce, Bureau of Industry and Security (“BIS”) announced expansions of the previous relaxation of restrictions in areas related to travel, financial services, and commerce and trade. These amendments come just one month after the announcement that regularly scheduled air services between the United States and Cuba will be restarted. The changes enable U.S. and Cuban businesses to use the U.S. financial system to engage in certain bilateral trade and investment, U.S. travelers to more easily visit Cuba and baseball fans potentially to see Cuban baseball players signed onto U.S. teams.

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On March 16, 2016, OFAC and BIS published final rules amending the Cuban Asset Control Regulations (“CACR”) and the Export Administration Regulations (“EAR”), which are effective immediately. Although these changes reinforce the Obama Administration’s commitment to the liberalization of the Cuba sanctions program, most transactions between Cuba and the United States, or involving persons subject to U.S. jurisdiction, continue to be prohibited, and OFAC continues to enforce the prohibitions of the CACR.

### OFAC Rule Changes At-A-Glance

The revised OFAC [rules](#) were released in conjunction with an update to OFAC’s [Frequently Asked Questions](#) on Cuba.

#### *Travel and Related Transactions*

The final rule permits individuals to travel to Cuba without an authorized organization to sponsor and accompany the traveler. Travel for tourism purposes continues to be prohibited under the CACR and individuals are required to maintain a full-time schedule of educational exchange activities intended to enhance contact with the Cuban people, support civil society in Cuba, or promote the Cuban people’s independence from Cuban authorities.

In addition, U.S. companies are now authorized to engage in transactions related to the sponsorship or hiring of Cubans to work or perform in the United States, subject to certain limitations. The change allows for the payment of salaries and

compensation in excess of basic living expenses provided that no additional payments are made to the Cuban government in connection with such sponsorship or hiring. OFAC specifically envisioned Cuban athletes (such as Major League Baseball players), artists, and performers as potential beneficiaries.

OFAC further has authorized certain dealings in Cuban-origin merchandise for personal consumption while in a third-country. For example, Americans traveling in Europe are now allowed to consume Cuban-origin alcohol and tobacco products.

#### *Financial Transactions*

OFAC's revised rules further ease restrictions on financial transactions to facilitate commerce with Cuba and Cuban citizens. Remaining significant restrictions under U.S. and Cuban laws continue to restrain U.S.-Cuba trade, but the relaxation of financial services transactions is an important predicate for increased international trade. First, U.S. banks are now authorized to process U-turn transactions in which Cubans have an interest. Specifically, funds transferred from a foreign bank that pass through one or more U.S. banks before being transferred to another foreign bank are now permissible. U-turn transactions were previously authorized under U.S. Iran sanctions regulations before authorization was revoked by OFAC (and was not reinstated earlier this year as part of Implementation Day for the Joint Comprehensive Plan Of Action). Second, U.S. banks are now authorized to: (i) process U.S. dollars in cash and traveler's checks presented indirectly by Cuban banks; and (ii) open and maintain bank accounts in the United States for Cuban nationals in Cuba to receive payments in the United States and to remit such payments to Cuba. Third, the amendments facilitate payment transactions for U.S. businesses with an authorized presence in Cuba in certain sectors such as telecommunications and agriculture.

#### *Physical and Business Presence*

OFAC expanded the existing authorization for business presence, such as a joint venture, which was previously limited to telecommunications and internet-based providers. Exporters of goods that are authorized for export or re-export to Cuba or that are exempt, entities providing mail or parcel transmission services or cargo transportation services, and providers of carrier and travel services to facilitate authorized transactions are now permitted to establish a business presence in Cuba. OFAC also expanded its existing authorization involving physical presence in Cuba (e.g., an office, retail outlet, warehouse, etc.) to include entities that are engaged in humanitarian and other non-commercial activities intended to "provide support to the Cuban people," and private foundations or educational institutes engaged in authorized activities pursuant to the CACR.

## **BIS Rules Facilitate Trade Now Permitted Under OFAC Rules**

The accompanying BIS rule amends the EAR to broaden certain license exceptions and adopts a licensing policy of case-by-case review for certain exports and reexports in support of the private sector in Cuba. BIS has made clear that license

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applications that will be most successful are those that make the best case that the activities will support private sector growth in Cuba. Because the United States continues to impose a comprehensive trade embargo on Cuba, individuals and entities must obtain a license from BIS for the export or re-export to Cuba of all items subject to the EAR, unless a license exception applies. Under the new rule, BIS permits vessels departing the United States on temporary sojourn to Cuba with cargo bound for other destinations to travel to Cuba under License Exception Aircraft, Vessels and Spacecraft (AVS) rather than having to obtain a license. The rule also revised License Exception Support for the Cuban People (SCP) to authorize export or reexport of EAR99 items and items controlled on the Commerce Control List only for anti-terrorism reasons for use by persons authorized by OFAC to establish and maintain a physical or business presence in Cuba. In addition, BIS has expanded its case-by-case review licensing policy to include exports and re-exports of items that would enable or facilitate exports from Cuba of items produced by the Cuban private sector.

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## Concluding Thoughts

The President's visit to Cuba, and the coordinated steps by OFAC and BIS, underscores the administration's commitment to bolster U.S. relations with Cuba. While the U.S. embargo and Cuban law currently prohibit any normalized trade between the two countries, these incremental regulatory changes, backed by substantial U.S. political ballast, are laying the foundation for increased future bilateral trade and commercial engagement.

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