

LEGAL UPDATES

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# U.S. Imposes Tougher Sanctions on Cuba Travel and Trade

## KEY POINTS

Individual travelers may no longer visit Cuba without a sponsor under the popular People-to-People educational travel program.

U.S. persons traveling to or doing business in Cuba are prohibited from transacting with over 175 Cuban hotels, stores and other entities that the State Department says are controlled by the Cuban military, intelligence or security sectors.

The restrictions on travel arrangements and transactions take effect November 9, 2017.

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## Administration Reverses Previous Efforts to Normalize Relations

At the direction of President Trump, three U.S. agencies issued regulatory amendments on November 9, 2017, that increase restrictions on travel and trade with Cuba. These amendments contain “grandfather” provisions permitting the continuance of some travel and transactions arranged under the former rules, but any U.S. person contemplating travel to or transactions with Cuba should consider the new rules carefully.

## The Background

In 2015 and 2016, the Obama administration revamped U.S. export regulations to allow increased travel and trade between the United States and

Cuba. Candidate Trump criticized these changes and, after his election as president, issued a National Security Presidential Memorandum on Strengthening the Policy of the United States Toward Cuba (NSPM) on June 16, 2017. The NSPM directed the U.S. State Department, the U.S. Department of Commerce – Bureau of Industry and Security (BIS) and the U.S. Department of Treasury – Office of Foreign Assets Control (OFAC) to issue regulatory amendments to support Cuban entrepreneurs, partially repeal previously authorized travel programs and prohibit transactions with the Cuban military, intelligence and security sectors. The new State Department, BIS and OFAC amendments are effective November 9, 2017.

## **State Department Action**

The State Department has published a List of Restricted Entities and Subentities Associated With Cuba (the Cuba Restricted List) that identifies more than 175 Cuban entities determined to be either controlled by or acting on behalf of the Cuban military, intelligence or security sectors. The Cuba Restricted List includes the Cuban Ministry of the Interior, more than 80 hotels, two tourist agencies, 10 retail establishments, four real estate agencies and the Mariel Special Development Zone. The State Department has also published a related fact sheet and FAQ guidance.

## **BIS Action**

BIS has amended its Export Administration Regulations (the EAR) to expand permitted trade between the U.S. and Cuban private-sector entrepreneurs and to deny licensing privileges for Cuba Restricted List parties. BIS has also updated its Cuba FAQ guidance.

The Obama administration created a Support for the Cuban People (SCP) License Exception in the EAR that authorized unlicensed exports or re-exports of certain EAR99 items or anti-terrorism controlled items to the Cuban private sector for use in construction projects, agriculture or other private-sector activities. The NSPM EAR amendments expand the SCP License Exception to authorize unlicensed exports or re-exports of qualifying items to Cuba in *any* transaction “for use by the Cuban private sector for private-sector economic activities,” unless such items would primarily generate revenue for the Cuban government or contribute to Cuban government operations through construction or renovation of state-owned buildings.

The Obama administration also authorized BIS to issue export licenses permitting a variety of exports or re-exports for causes to support the Cuban people, such as improving telecommunications, supporting human rights, agricultural production, environmental protection and infrastructure projects. Depending on the category, the EAR requires BIS to generally approve these license applications or to consider them on a case-by-case basis. The EAR also permits BIS, in its discretion, to license transactions involving Cuban government agencies that would provide goods and services for the benefit of the Cuban people.

The NSPM EAR amendments now direct BIS to generally deny license applications for any exports or re-exports to Cuba Restricted List entities. However, applications involving Cuban government organizations not named on the Cuba Restricted List remain eligible for licenses, if approved by BIS. BIS has also clarified that any licenses it issued prior to November 9, 2017, involving Cuba Restricted List entities will remain valid despite the recent amendments.

### **OFAC Action**

OFAC has also amended its Cuban Assets Control Regulations (CACR) to prohibit financial dealings and other transactions with Cuba Restricted List entities and to restrict previously authorized Cuba travel programs. OFAC has also issued a fact sheet and updated its Cuba FAQ guidance.

OFAC's CACR amendments now expressly prohibit persons subject to U.S. jurisdiction from engaging in financial transactions where any Cuba Restricted List entity will be the ultimate beneficiary or originator of a transfer of funds. Previous CACR general licenses will continue to authorize persons subject to U.S. jurisdiction to engage in various transactions in Cuba if such transactions are ordinarily incident to a transaction licensed by BIS or otherwise covered under an EAR License Exception. The NSPM CACR amendments now limit those general licenses to prohibit entry into new ordinarily incident transactions with Cuba Restricted List entities. However, the new rules will authorize parties who entered into a commercial engagement with a Cuba Restricted List entity before November 9, 2017 for a transaction ordinarily incident to an authorized transaction to continue to do business with such Cuba Restricted List entity under their existing agreement.

The NSPM CACR amendments also eliminate the individual People-to-People travel program that previously permitted individuals to travel to Cuba without an OFAC license to engage in educational exchange activities with the Cuban people. The CACR now requires anyone traveling under the People-to-People program to travel with a qualified sponsoring organization subject to U.S. jurisdiction. Furthermore, travelers engaging in sponsored People-to-People travel are now prohibited from transacting with Cuba Restricted List entities during their travels. OFAC's CACR amendments also add similar restrictions to preexisting educational Cuba travel programs and the General License for Support for the Cuban People travel.

OFAC has confirmed that travelers who have "completed at least one travel-related transaction (such as purchasing a flight or reserving accommodation)" prior to November 9, 2017, may continue to travel to Cuba individually after November 9, 2017, under the prior People-to-People program rules without a sponsoring organization. However, if those travelers initiate any new travel-related transactions after November 9, 2017, those transactions must comply with the new rules.

### **What This Means to You**

The new rules present many practical challenges going forward, including:

The grandfather provisions protect only travel arrangements and transactions entered into before November 9, 2017. Travelers and businesses that have partially completed their arrangements should carefully consider how the amendments' new restrictions on transacting with Cuba Restricted List entities might affect their plans.

Persons seeking to utilize the EAR's SCP License Exception to transact with the Cuban private sector should carefully diligence their counterparties to confirm they are not connected to the Cuban government and truly qualify as private-sector entrepreneurs.

The Cuba Restricted List contains a large number of Cuban hospitality businesses, so anyone planning a trip to Cuba should plan their travel carefully to avoid transacting with prohibited entities.

Furthermore, the CACR continues to prohibit tourist activities in Cuba under all circumstances.

Travelers must ensure that their travel itinerary complies with the CACR because the NSPM directs OFAC to "regularly audit travel to Cuba to ensure that travelers are complying with relevant statutes and regulations."

Last (but not least) the current policy authorizing U.S. persons to bring Cuban-origin cigars and rum back with them will remain in place. However, travelers should be careful in purchasing these goods, because several retailers (as well as the Ron Caney and Ron Varadero rum production companies) are now named on the Cuba Restricted List.

### **Contact Us**

For more information about how the new rules may impact your business, contact Cortney Morgan, Linda Tiller or Grant D. Leach or another member of Husch Blackwell's Export Controls & Economic Sanctions group.