

## Client Alert



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## U.S. Government Takes Additional Steps to Relax Comprehensive Embargo of Cuba

On September 21, 2015, the U.S. Treasury Department's Office of Foreign Assets Control ("OFAC") and the U.S. Commerce Department's Bureau of Industry and Security ("BIS") introduced a second round of amendments (the "September Amendments") to the Cuban Assets Control Regulations ("CACR") and the Export Administration Regulations ("EAR") in a continuing effort to relax certain aspects of the U.S. embargo of Cuba. The September Amendments follow earlier amendments issued on January 16, 2015 (the "[January Amendments](#)") and further implement the Obama Administration's policy changes [announced](#) on December 17, 2014.

The September Amendments include several potentially useful new authorizations, including provisions allowing certain operators to establish a physical or business presence in Cuba, as well as further relaxations in the context of travel and transportation (including for vessels and civil aviation safety), telecommunications and internet-based services, software development, and financial and estate-related transactions. Despite these changes, the embargo remains in place and most Cuba-related activities—including travel to Cuba for tourism, investment in Cuba, and general trade with Cuba—continue to be prohibited for persons subject to U.S. jurisdiction. Any significant change to the embargo will require Congressional action.

The amendments to the [CACR](#) and [EAR](#) are available in the Federal Register. Additional information about these changes is also available in updated "Frequently Asked Questions" documents issued by [OFAC](#) and by [BIS](#) as well as in a [joint press release](#) issued by both agencies.

An overview of the September Amendments is provided below.

1. [Authorization for Physical Presence in Cuba](#)
2. [Authorization for Business Presence in Cuba for Telecommunications and Internet-Based Transactions](#)
3. [Expanded Authorizations for Telecommunications, Internet-Based Services, Software Development, and Technology Transfers](#)
4. [New Travel and Vessel/Air Transportation Authorizations](#)
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## 1. Authorization for Physical Presence in Cuba

One of the more notable changes is that certain persons subject to U.S. jurisdiction are now authorized to engage in all transactions necessary to establish and maintain a "physical presence" in Cuba to facilitate authorized or exempt transactions ("Physical Presence Authorization").

### a. What is a permitted "physical presence"?

A "physical presence" can be an office, warehouse, retail outlet, classroom, or other presence through an employee, contractor, or other local representative. Although the difference between a "physical presence" and a "business presence" (see Part 2 below) is not explicitly defined, it appears that companies that are only authorized to establish a "physical presence" may not enter into business relationships (e.g., joint ventures, franchise agreements, agency agreements) with Cuban nationals or establish a legal presence (e.g., branch, subsidiary).

### b. What types of transactions are authorized under the Physical Presence Authorization?

- Leasing physical premises and securing related goods and services, including for use in, and to pay fees related to, the operation of the physical premises;
- Marketing related to the physical premises;
- Employment of Cuban nationals in Cuba and of persons subject to U.S. jurisdiction (who may be domiciled in Cuba during their employment); and
- Opening, maintaining, and closing bank accounts at Cuban financial institutions to engage in authorized or exempt transactions.

### c. Who is eligible for the Physical Presence Authorization?

- News bureaus whose primary purpose is the gathering and dissemination of news to the general public;
- Exporters of certain goods authorized for export or reexport to Cuba by the CACR and, if necessary, EAR (e.g., agricultural products, materials for construction or renovation of privately-owned buildings);
- Entities providing certain mail or parcel transmission services or certain cargo transportation services;
- Providers of certain telecommunications or internet-based services;
- Entities organizing or conducting certain educational activities;
- Religious organizations engaging in certain religious activities; and
- Providers of authorized carrier and travel services (which do not include providing lodging in Cuba).

### d. What related exports are now permitted?

Certain exports and reexports of items subject to U.S. jurisdiction for purposes of establishing, maintaining, or operating a "physical presence" in Cuba are also now authorized pursuant to the revised EAR License Exception Support for the Cuban People ("License Exception SCP"). This authorization is limited to items that are either (1) designated as EAR99 (i.e., non-controlled items) or (2) controlled for anti-terrorism ("AT") purposes only. Only end-users meeting the definition of "U.S. Person" in the EAR are eligible to receive items

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under this authorization, which raises questions about whether exports or reexports may be made to Cuban national employees or local representatives

## 2. Authorization for Business Presence in Cuba for Telecommunications and Internet-Based Transactions

Persons providing authorized telecommunications services or Internet-based services may go further and establish and maintain a "business presence" in Cuba to facilitate certain authorized telecommunications and internet-based transactions ("Business Presence Authorization").

### a. What is a permitted "business presence"?

A permitted "business presence" goes beyond a "physical presence" (See Part 1 above) in that it may include the establishment of subsidiaries, branches, offices, joint ventures, franchises, and agency or other business relations with any Cuban national.

### b. What types of transactions are authorized under the Business Presence Authorization?

- All transactions, including payments, necessary to establish and maintain a "business presence" in Cuba, and to enter into all necessary agreements or arrangements for the purpose of engaging in authorized telecommunications and internet-based activities; and
- Licensing and marketing authorized telecommunications and internet-based activities.

### c. Who is eligible for the Business Presence Authorization?

- Persons subject to U.S. jurisdiction engaging in transactions incident to the provision of "telecommunications services" (including data, telephone, telegraph, internet connectivity, radio, television, news wire feeds, and similar services, regardless of the medium of transmission) related to the transmission or receipt of telecommunications involving Cuba, including roaming service agreements with telecommunications services providers in Cuba;
- Persons subject to U.S. jurisdiction entering into contracts to provide telecommunications services to particular individuals in Cuba, except for prohibited officials of the Government of Cuba or prohibited members of the Cuban Communist Party;
- Persons subject to U.S. jurisdiction engaging in transactions incident to the establishment of facilities, including fiber-optic cable and satellite facilities, to provide telecommunications services linking the United States or third countries and Cuba, including facilities to provide telecommunications services in Cuba;
- Persons subject to U.S. jurisdiction providing services to Cuba incident to the exchange of communications over the internet (other than for the promotion of tourism);
- Persons subject to U.S. jurisdiction providing services to Cuba related to certain consumer communications devices or software used to develop software; and

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- Persons subject to U.S. jurisdiction entering into licensing agreements related to the services mentioned above and to market such services.

d. What related exports are now permitted?

Items designated as EAR99 or controlled only for "AT" reasons under the EAR may be exported/reexported to Cuba for purposes of establishing, maintaining, or operating a "physical presence" in Cuba pursuant to the revised EAR License Exception SCP. The end-users must be authorized by OFAC to provide telecommunications services and establish telecommunications facilities.

### **3. Expanded Authorizations for Telecommunications, Internet-Based Services, Software Development, and Technology Transfers**

Certain authorizations for telecommunications, internet-based services, software development, and technology transfers ("Existing Telecom and Tech Authorizations") have also been expanded to enhance the free flow of information to, from, and within Cuba, and to better provide efficient and adequate telecommunications services between the United States and Cuba.

a. What additional transactions are authorized under the Expanded Telecom and Tech Authorizations?

- Establishment and maintenance of a "business presence" for certain telecommunications and internet-based services, as described above in Part 2;
- Licensing and marketing of telecommunications and internet-based services, as described above in Part 2;
- Importation into the United States of Cuban-origin mobile applications and the hiring of Cuban nationals to develop such applications; and
- The provision of certain additional training services related to the installation, repair, or replacement of certain consumer communications devices.

b. What additional export-related changes are there?

- BIS has clarified that exports and reexports of eligible items under License Exceptions SCP and Consumer Communication Devices ("License Exception CCD") are not limited to sales or donations but may also include other transactions such as leases or loans.
- The EAR no longer require licenses for "deemed" exports or reexports of EAR99-classified technology or source code to Cuban nationals located outside of Cuba consistent with the position for other sanctioned country nationals.
- The September Amendments relax licensing requirements on exports and reexports of commodities or software to Cuba that will be used by certain end-users to develop software to improve the free flow of information or that will support certain private sector activities.

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## 4. New Travel and Vessel/Air Transportation Authorizations

While tourism remains prohibited, certain additional travel and transportation authorizations have also been implemented as part of the September Amendments.

a. What types of transactions are authorized under the new travel and transportation authorizations?

- Transportation by vessel (in addition to aircraft) of authorized travelers (i.e., those traveling under one of the existing 12 general licenses or a specific license for travel) between the United States and Cuba, provided the vessel does not make any third-country stops. This includes the booking of vessel transport and provision of onboard lodging, even while docked in Cuba (e.g., on a cruise). Vessels may remain in Cuba no more than 14 consecutive days before leaving for the United States or a third country;
- For persons subject to U.S. jurisdiction and their co-habiting family members, visiting or accompanying close relatives who are traveling to Cuba pursuant to authorizations for certain additional educational activities, journalistic activities, professional research, religious activities, humanitarian projects, and activities of private foundations or certain research or educational institutes;
- Establishment and maintenance of bank accounts by authorized travelers in Cuba in order to access funds for authorized transactions while in Cuba;
- Unlimited remittances carried to Cuba;
- Temporary exports or reexports (including hand-carries) of certain goods for use in specific authorized activities (including now professional meetings) while in Cuba; and
- Exports and reexports of parts and components to ensure the safety of civil aviation and the safe operation of commercial aircraft (including items for air traffic control, passenger security screening, and aviation communications) are now eligible for case-by-case licensing review.

b. Can authorized carrier service providers transport third-country nationals to/from Cuba?

The OFAC FAQ now clarify that authorized carrier service providers may transport third-country nationals to/from Cuba, but only when they are located in the United States and are traveling under one of the 12 OFAC travel general licenses or a specific license. Thus, booking or transport of third-country nationals located in or traveling from third countries remains prohibited.

c. What are the restrictions on temporary exports/hand carries to Cuba?

- Persons traveling to Cuba from the United States *or now from a third country* may hand-carry certain items subject to U.S. jurisdiction (including company-owned or personally-owned laptops, mobile phones, or other company-issued devices) into Cuba under the expanded EAR License Exception SCP, provided these items:



- are for the traveler's use in scientific, archaeological, cultural, ecological, educational, historic preservation, sporting activities, or professional meetings or research;
  - are classified as EAR99 or controlled solely for AT reasons;
  - remain under the traveler's effective control; and
  - return home with the traveler within two years.
- In addition, License Exception SCP now authorizes, subject to certain conditions, temporary exports or reexports to Cuba of certain EAR99 or AT-controlled "tools of the trade" (including goods, software, and technology) for up to one year including:
    - for use in installation, servicing or repair of items previously lawfully exported/reexported;
    - kits of replacement parts or components for certain items lawfully in Cuba; and
    - items for exhibition or demonstration.

## 5. Financial and Estate-Related Transactions

Certain new financial and estate-related authorizations ("Financial and Estate-Related Authorizations") have also been implemented as part of the September Amendments.

- a. What types of transactions are authorized under the Financial and Estate-Related Authorizations?
  - Unlimited donative remittances to certain non-prohibited Cuban nationals (previously remittances were capped at \$2000 and before that at \$500);
  - Receipt of remittances from Cuba or *from* certain Cuban nationals in third countries by U.S. financial institutions, including money transmitters (previously limited to remittances to Cuba);
  - Payments for authorized transactions via online payment platforms (clarified as ordinarily incident transactions);
  - Maintenance of accounts by depository institutions for certain Cuban nationals present in the United States in a non-immigrant status for use only while in the United States (and with no requirement to block the account when they leave); and
  - Additional remittances to Cuban nationals in connection with the administration of estates or payment of life insurance policies or annuities upon the death of the policy holder, obviating the need for specific licenses to unblock Cuban estates or remit estates of persons subject to U.S. jurisdiction to Cuban nationals.

## 6. Dealings with Cuban Nationals Located Outside Cuba

The September Amendments implement certain authorizations to ease day-to-day transactions involving Cuban individuals outside of Cuba.

- a. What types of transactions are now authorized with Cuban nationals outside Cuba?
- Provision by *any person subject to U.S. jurisdiction* (previously only entities owned or controlled by U.S. persons) of certain goods and services to individual Cuban nationals located outside of Cuba, so long as there is no commercial exportation of goods or services to or from Cuba;
  - Engaging in deemed exports or reexports of EAR99-classified technology or source code to Cuban nationals located outside of Cuba, as mentioned in Part 3.b above; and
  - Opening and maintenance of accounts by banking institutions for Cuban individuals for use while the Cuban national is located outside of Cuba.

## 7. Other Changes

In addition to the changes outlined above, the September Amendments revise or clarify provisions relevant to **legal services, the importation of gifts, educational activities, air ambulances and emergency medical services, humanitarian projects, support for diplomatic activities, and ordinarily incident transactions** as follows:

a. Legal Services

- OFAC's existing authorization permitting the provision of certain legal services to Cuba and Cuban nationals has been expanded to allow for the receipt of payment for such services, subject to certain limitations.
- Persons subject to U.S. jurisdiction are now authorized to receive, and make payment for, certain legal services from Cuba or Cuban nationals (e.g., Cuban lawyers).

b. Importation of Gifts

Imports of merchandise from Cuba or of Cuban-origin merchandise from a third country intended as gifts are now authorized to be sent to the United States, provided that: the merchandise is not carried by a traveler; the value of the merchandise is not more than \$100; the item is a type and in quantities normally given as a gift; and the merchandise is not alcohol or tobacco products.

c. Educational Activities

- The provision of standardized testing services (including professional certificate examinations, university entrance examinations, and language examinations, and related preparatory services for such exams) and internet-based courses to Cuban nationals, wherever

located, is now authorized, as well as travel-related transactions in connection with these activities.

- In addition, academic exchanges and joint non-commercial academic research with universities or academic institutions in Cuba are now authorized, as well as travel-related transactions in connection with these activities.

d. Air Ambulance and Emergency Medical Services

The provision of air ambulance and other related emergency medical services by persons subject to U.S. jurisdiction to travelers in Cuba is now authorized regardless of the nationality of the traveler or the traveler's purpose in Cuba. Also, the provision of nonscheduled emergency medical services to Cuban nationals in the United States is now authorized.

e. Humanitarian Projects

The existing authorization for transactions related to specified humanitarian projects has been expanded to cover disaster relief and historical preservation.

f. Support for Diplomatic Activities

The existing authorization for transactions with official missions of Cuba to the United States has been expanded to cover international funds transfers.

g. Ordinarily Incident Transactions

OFAC has confirmed that existing Cuba sanctions provisions allow most transactions that are ordinarily incident and necessary to give effect to a licensed transaction.

**Recommended Action: Proceed with Caution**

As noted, the U.S. embargo of Cuba remains in effect and most Cuba-related transactions continue to be prohibited for persons subject to U.S. jurisdiction. Only the transactions authorized as part of the September Amendments, the January Amendments, or any preexisting authorizations are permitted.

Furthermore, all of the above-described provisions of the September Amendments are subject to important caveats and limitations. Companies should, therefore, carefully review the revised CACR and EAR and proceed with caution when considering dealings with and/or exports/reexports to or involving Cuba or Cuban nationals.

\* \* \*

The foregoing is intended only to provide a general summary of recent developments regarding the relaxation of U.S. sanctions and export controls targeting Cuba. If you have any questions about how these changes might affect your company or if you require advice on any specific transactions or plans, please contact one of the members of Baker & McKenzie's International Trade Practice Group.

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