

Doing Business With Cuba: New Guidance Posted

March 16, 2016

As President Obama moves forward to revise policies toward Cuba, opportunities for carriers on the U.S.-route continue to arise. In addition to revisions to relevant FCC regulations, which we've covered [here](#) and [here](#), carriers are subject to requirements applicable to any business dealing with Cuba. Although most elements of the broader trade embargo, which only Congress has the power to revoke, still remain in effect, opportunities to establish a foothold in the Cuban marketplace are expanding. Our export compliance colleagues have prepared the following client advisory discussing new rules issued by the Departments of Treasury and Commerce as part of a series of Administration steps to expand trade with Cuba. We encourage all carriers considering providing service to or in Cuba to follow these developments closely.

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Of the changes that the Treasury Department's Office of Foreign Assets Control (OFAC) is implementing, the following appear to be most germane to businesses:

- Parties engaged in humanitarian projects in Cuba are now authorized to establish a physical presence in that country. Establishing a physical presence can include leasing physical premises (and securing related goods and services), marketing, and employing both Cuban nationals and persons subject to U.S. jurisdiction in Cuba. Authorized humanitarian projects include medical and health-related projects; construction projects intended to benefit legitimately independent civil society groups; disaster preparedness, relief, and response; historical preservation; environmental projects; projects involving formal or non-formal educational training on, among other things, vocational skills; projects suitable to the development of small-scale private enterprise; projects that are related to agricultural and rural development that promote independent activity; and projects to meet basic human needs.
- Previously, OFAC permitted persons subject to U.S. jurisdiction to establish a business presence (as opposed to merely a physical presence) in Cuba as a means of facilitating authorized telecommunications and internet-based services. (Establishing a business presence includes forming subsidiaries, branches, offices, joint ventures, franchises, and other business arrangements with Cuban nationals.) **OFAC is now extending that same privilege to, among others, parties authorized to export to Cuba under, e.g., License Exception SCP (Support for the Cuban People).** See below for more on License Exception SCP and how the Commerce Department's Bureau of Industry and Security (BIS) is modifying it.
- People-to-people educational travel to Cuba no longer requires a sponsoring organization. Individuals can now travel independently, provided that one's schedule is devoted entirely to

educational exchange activities involving “meaningful interaction” with individuals in Cuba and intended to enhance contact with Cubans, support civil society, or promote the Cuban people’s independence from Cuban authorities. The predominant portion of an individual’s activities must also not be with a prohibited Cuban Government or Communist Party official.

- In a complete U-turn from prior policy, OFAC is now allowing U-turn payments involving Cuba and Cuban nationals to pass through the U.S. financial system. “U-turn” transactions are those in which funds are transferred from one bank outside of the U.S. to another, with a U.S. financial institution acting as intermediary. This authorization only permits such transactions in situations where neither the payment’s originator nor its beneficiary are subject to U.S. jurisdiction.
- Importing Cuban-origin software is now allowed.

We mentioned above that BIS is amending License Exception SCP. This license exception allows exports and reexports of certain items to Cuba for purposes of, among other reasons, “supporting independent economic activity.” Items must be either EAR99 or controlled for Anti-Terrorism (AT) reasons only, and must be tools or equipment for use by private sector construction, agriculture, or entrepreneurs. This latest modification to License Exception SCP adds to this allowance, authorizing one to use it if one is permitted to establish a physical or business presence in Cuba (or if one has a specific license from OFAC). BIS is also adopting a “case-by-case” review policy regarding licenses for exports or reexports to Cuba that will in turn enable exports from Cuba, or by the Cuban private sector.

The key takeaway is that opportunities for U.S. companies to begin establishing a foothold in Cuba are increasing - if companies can find outlets for their goods and services among the Cuban private sector and/or civil society humanitarian efforts. The rules are still complex and a number of important restrictions on U.S. person and company activities exist, as do penalties for those who proceed incorrectly. As always, Kelley Drye’s nationally recognized international trade team stands ready to assist with evaluating opportunities and navigating the best path forward.

Kelley Drye’s [Communications](#) and [International Trade](#) practice groups are available to provide advice as policies toward Cuba continue to develop. Please feel free to contact us if you have any questions.