

**Alert | Export Controls & Economic Sanctions/Cuba Practice**

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## U.S. Implements President Trump's Cuba Policy

On Nov. 8, 2017, the U.S. Government announced new regulations in furtherance of the Trump Administration's policy regarding Cuba.

As discussed in our [prior GT Alert](#), in June 2017, President Trump published his National Security Presidential Memorandum "Strengthening the Policy of the United States Toward Cuba" (NSPM), which announced modification of U.S. policy with respect to Cuba to target the Cuban military, intelligence, and security agencies. In the NSPM, President Trump emphasized the need to promote the flow of economic benefits to the Cuban people, rather than to its military. The NSPM further directed the Commerce, State, and Treasury Departments to take various actions implementing the new policy.

Accordingly, regulations were released this week by the U.S. Department of State, Department of Treasury's Office of Foreign Assets Control (OFAC), and Department of Commerce's Bureau of Industry and Security (BIS) to implement the NSPM, and clarify the limitations imposed on U.S. persons wishing to travel to or do business in Cuba.

### The U.S. State Department's Cuba Restricted List (CRL)

In furtherance of the Trump Administration's policy, the State Department has published the CRL, identifying certain entities and sub-entities that are "under the control of, or acting for or on behalf of, the Cuban military, intelligence, or security services or personnel with which direct financial transactions would disproportionately benefit such services or personnel at the expense of the Cuban people or private enterprise in Cuba." The CRL is cross-referenced in both the new OFAC and BIS regulations defining activities prohibited with named entities on the CRL.

The full [CRL](#) includes:

- Ministries:
  - MINFAR — Ministerio de las Fuerzas Armadas Revolucionarias (Ministry of the Revolutionary Armed Forces), which oversees the Cuban military.
  - MININT — Ministerio del Interior (Ministry of the Interior), which oversees the internal Cuban security apparatus.
- Holding Companies:
  - CIMEX — Corporación CIMEX S.A., one of the largest Cuban conglomerates with operations across the Cuban economy, including many of the international financial transactions in Cuba. While CIMEX or its subsidiaries are involved in U.S. money remittances, the NSPM specifically excluded money remittance transactions from the ban on dealing with entities on the CRL.
  - Compañía Turística Habaguanex S.A., which operates many of the hotels and businesses in Old Havana.
  - GAESA — Grupo de Administración Empresarial S.A., another very large conglomerate with operations across the Cuban economy, particularly hotels.
  - Gaviota — Grupo de Turismo Gaviota, a military-controlled state tourism company, who also owns significant hotel properties across Cuba.
  - UIM — Unión de Industria Militar.
- 84 hotels throughout Cuba owned or operated by entities identified on the CRL, including the recently opened Gran Hotel Manzana Kempinski, a joint venture between Gaviota and Kempinski Hotels, S.A., a European hotel group.
- Several named tourist agencies, marinas, and stores in Old Havana owned or operated by entities identified on the Cuba Restricted List.
- 38 entities identified as directly serving the defense and security sectors.
- Additional named sub-entities of the five holding companies identified on the CRL.

#### OFAC Regulations

In conjunction with the contemporaneous BIS and State Department publications, OFAC announced its [amended Cuban Assets Control Regulations \(CACR\)](#) prohibiting persons subject to U.S. jurisdiction from engaging in “direct financial transactions” with the entities and sub-entities on the CRL. In a departure from other OFAC sanctions programs (and other sections of the CACR) the CRL-related measures make clear that:

- (1) Only entities specifically named on the CRL are restricted. Put another way, entities or sub-entities that are owned or controlled by a CRL-named entity are not in and of themselves restricted simply because they are owned or controlled. To be restricted, an entity or sub-entity must be expressly named on the CRL.
- (2) The restrictions prohibit only “direct” financial transactions (whereas most OFAC restrictions restrict all dealings, direct or indirect, related to a restricted person or entity). In the case of the CRL provisions, OFAC clarifies that “direct financial transactions” means the person subject to U.S. jurisdiction is the originator or ultimate beneficiary of funds in a transaction with an entity or sub-entity on the CRL, and that persons subject to U.S. jurisdiction are not prohibited from

participating in an indirect financial transaction (such as fund transfers) where that person is not the originator or beneficiary on a transfer of funds.

In addition, OFAC revised its regulations on educational travel to require that group “people-to-people” educational travel to Cuba is: (i) conducted under the auspices of an organization subject to U.S. jurisdiction; and (ii) conducted such that travelers are accompanied by a person subject to U.S. jurisdiction. Authorization for individual people-to-people travel has now been eliminated (though there are special provisions for an individual traveler who is an employee, paid consultant, or representative of a sponsoring organization). OFAC also amended its definition of “prohibited officials of the Government of Cuba” to list additional individuals.

OFAC has added several “grandfathering” provisions to its regulations that will allow certain transactions and planned trips in Cuba to proceed. In particular, previously authorized people-to-people travel will continue to be authorized if the traveler completed at least one travel-related transaction (such as booking a flight) prior to the president’s June 16, 2017, announcement; and previously authorized educational travel will continue to be authorized if the traveler has completed one travel-related transaction prior to Nov. 9, 2017. In addition, businesses will be able to proceed with certain pre-existing contractual obligations and commercial engagements.

### BIS Regulations

The new BIS regulations, available [here](#), clarify and simplify the Bureau’s authorization of the export of goods for use in the private sector of Cuba, as well as its general policy of denial for export or reexport of goods to Cuba for use by state-owned entities. The regulations now reference the State Department’s CRL and state that BIS will generally deny applications for export or reexport to the entities on the list. In addition, BIS has updated its Cuba license exception regulations to remain consistent with OFAC’s list of prohibited officials of the Government of Cuba.

### Impact of the New Regulations

The CRL and associated regulations published by OFAC and BIS introduce new complexity and potential risk to entities and individuals wishing to do business in Cuba. While the NSPM and regulations remain supportive of economic interactions with the Cuban private sector, it will be important for persons subject to U.S. jurisdiction to closely analyze proposed activities in order to anticipate and avoid transactions with newly-CRL-listed entities.

The regulations are designed to take effect prospectively, so that most existing contractual obligations and travel plans may still proceed. In performing existing obligations and contracts, however, parties should be careful to review the amended regulations and understand restrictions on activities not yet conducted.

The practical and logistical impact for authorized U.S. travelers to Cuba is not insignificant. Major Cuban-state-owned entities have been restricted: Habaguanex and Gaviota control a significant portion of the tourism market in Cuba, including hotels, restaurants, and travel agencies. Old Havana, one of the main tourist destinations in Cuba, is largely the purview of Havaguanex which has a near monopoly on hotels, restaurants, and retail stores in the area. The list of restricted hotels include some of the most comfortable and popular hotels among travelers, including the brand new Gran Hotel Manzana Kempinski. Some non-CRL listed private bed and breakfasts (B&B) and hotels (such as Grand Caribe hotels, a state-owned company which is the owner of the Hotel Nacional) may benefit, since U.S. travelers will be forced to book non-CRL-listed accommodations. The new measures might help some private Cuban entrepreneurs, but perhaps not as many as the U.S. Government would like-- on Aug. 1, 2017 the

Cuban Government temporarily suspended granting new B&B operator licenses to Cuban private entrepreneurs, so only those with existing B&B operator licenses may see some benefit from increased occupancy.

The CRL and companion U.S. regulations also affect the Cuban Government's interests on direct foreign investment in the Special Development Zone of Mariel (Mariel Zone), which was originally created to attract foreign investors by its generous tax benefits. Some U.S. companies were able to enter the Mariel Zone before the new restrictions, and they now may be the last U.S. entities to enter the Mariel Zone for the foreseeable future.

The timing of the new measures is problematic for the Cuban Government, which has just ended its annual International Trade Fair (in early November), expecting to promote investment on the island. The new Portfolio of Investment of Opportunities, published annually by the Cuban Government during the Trade Fair, includes 50 pre-approved projects in the Mariel Zone, which are now off limits for new U.S. investors.

While the new measures are seemingly narrow in scope they create a layer of complexity to even already-authorized activities by U.S. companies and persons. A careful review of the CRL and the companion regulations is advised for any person subject to U.S. jurisdiction with dealings involving Cuba.

Additional guidance discussing the impact of the new regulations on specific circumstances is available in [FAQs on OFAC's website](#).

Read about this and archived [Export Controls & Economic Sanctions Alerts](#) on [gtlaw.com](#).

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Based in Washington, D.C. and Miami, our Cuba Practice team provides a unique complement of experience in U.S. trade and sanctions regulations, as well as practical perspective on operating and doing business in Cuba.

## Authors

This *GT Alert* was prepared by **Sonali Dohale, Kara M. Bombach, Yosbel A. Ibarra, Osvaldo Miranda<sup>¥</sup>**, and **Carl A. Fornaris**. Questions about this information can be directed to:

- **Kara M. Bombach** | +1 202.533.2334 | [bombachk@gtlaw.com](mailto:bombachk@gtlaw.com)
- **Yosbel A. Ibarra** | +1 305.579.0706 | [ibarray@gtlaw.com](mailto:ibarray@gtlaw.com)
- **Renée A. Latour<sup>‡</sup>** | +1 202.533.2358 | [latourr@gtlaw.com](mailto:latourr@gtlaw.com)
- **Cyril T. Brennan** | +1 202.533.2342 | [brennanct@gtlaw.com](mailto:brennanct@gtlaw.com)
- **Carl A. Fornaris** | +1 305.579.0626 | [fornarisc@gtlaw.com](mailto:fornarisc@gtlaw.com)
- **Michael X. Marinelli<sup>‡</sup>** | +1 512.320.7236 | [marinellimx@gtlaw.com](mailto:marinellimx@gtlaw.com)
- **Sandra D. Gonzalez** | +1 512.320.7234 | [gonzalezsd@gtlaw.com](mailto:gonzalezsd@gtlaw.com)
- **Osvaldo Miranda<sup>¥</sup>** | +1 305.579.0599 | [mirandao@gtlaw.com](mailto:mirandao@gtlaw.com)
- **Sonali Dohale** | +1 202.533.2381 | [dohales@gtlaw.com](mailto:dohales@gtlaw.com)
- Or your **Greenberg Traurig attorney**

<sup>‡</sup>Admitted to practice only in Virginia. Practice in the District of Columbia limited to matters and proceedings before federal courts and agencies.

<sup>‡</sup>Admitted in the District of Columbia. Not admitted in Texas.

<sup>¥</sup>Admitted to the practice of law in Cuba and New York. Not admitted in Florida.

Albany. Amsterdam. Atlanta. Austin. Boca Raton. Boston. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Germany. <sup>~</sup>Houston. Las Vegas. London. <sup>\*</sup>Los Angeles. Mexico City. <sup>+</sup>Miami. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Sacramento. San Francisco. Seoul. <sup>∞</sup>Shanghai. Silicon Valley. Tallahassee. Tampa. Tel Aviv. <sup>^</sup>Tokyo. <sup>¤</sup>Warsaw. <sup>~</sup>Washington, D.C.. West Palm Beach. Westchester County.

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