



October 2016

While Cuban Embargo Remains, Latest Round of Historic U.S. Changes Fosters Increased Trade

While the nearly comprehensive U.S. embargo on trade with Cuba remains and will require an act of Congress to be eliminated, the U.S. government has issued another round of measures further easing the U.S. sanctions and export control restrictions against Cuba. Effective Oct. 17, 2016, the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) and the U.S. Department of Commerce's Bureau of Industry and Security (BIS) measures support expanded trade between the countries. Specifically, the U.S. Government amended the existing Cuba Regulations (Cuban Assets Control Regulations and Export Administration Regulations) in several key areas:

- (1) medical and pharmaceutical research and distribution;
- (2) contingent contracts (of all kinds);
- (3) infrastructure projects;
- (4) humanitarian activities;
- (5) exports/reexports and eCommerce;
- (6) civil aviation; and
- (7) certain travel and cargo-related transactions.

The new measures provide unprecedented opportunities (at least on paper) to U.S. businesses, but it remains to be seen how these allowances will be accepted or accommodated by U.S. companies, as well as their potential Cuban business partners and customers. The full text of the amendments is available [here](#) and [here](#). There is also a related U.S. government [fact sheet](#) and [FAQ](#). We provide insights on some of the most significant provisions below.

Medical Research and Pharmaceutical Imports into the United States

Persons subject to U.S. jurisdiction are authorized to engage in all transactions incident to:

- a) joint medical research projects with Cuban nationals,***
- b) obtaining approval from the U.S. Food & Drug Administration (FDA) for Cuban-origin pharmaceuticals, including development, research, importation into the United States, and/or***
- c) marketing, sale, or other distribution in the United States of FDA-approved Cuban-origin pharmaceuticals.***

Notably, these provisions do not authorize U.S. persons to establish a business or physical presence in Cuba, hire Cuban nationals, or export or reexport U.S.-origin items to Cuba that may require separate export authorization from BIS.

However, these new provisions could foster significant growth in the Cuban pharmaceutical industry, while simultaneously creating an environment for joint research and development and giving U.S. patients access to potentially life-saving drugs that have been developed in Cuba.

The Cuban pharmaceutical industry is one of the most developed fields in Cuba, with significant export-driven growth over the last five years. In 2014, Biocubafarma, a holding of all existing Cuban biotechnology companies, reported earnings of nearly \$2.8 billion USD for the exportation of Cuban pharmaceuticals to 58 countries worldwide. Biocubafarma holds approximately 1,800 patents for products that include the world's first therapeutic vaccine for the treatment of advanced lung cancer (CIMAVAX EGF), vaccines that fight malignant tumors, more than one hundred monoclonal antibodies, and diagnosis systems for diseases such as HIV/AIDS.

The potential opening of the U.S. market to the importation of Cuban pharmaceuticals and joint U.S.-Cuban development projects may aid Biocubafarma's goal of nearly doubling its export sales to \$5 billion USD. What remains to be seen, however, is how U.S. companies will receive the new regulations and the potential complexities of joint development projects with the Cuban government (including intellectual property considerations, royalties, and profit-sharing arrangements).

Contingent Contracts of All Kinds

Persons subject to U.S. jurisdiction are authorized to:

- a) enter into, and to engage in, all transactions ordinarily incident to the negotiation of, and entry into, contingent contracts for transactions that are prohibited by the Cuba Regulations, provided that . . .***
- b) performance is made expressly contingent upon prior authorization from all applicable U.S. Federal agencies.***

This historic provision permits U.S. persons to enter into contingent contracts in or with Cuba for *any activity* in Cuba, even those which are currently prohibited under the embargo. In the short-term, this provision opens up opportunities for U.S. business in the form of "placeholder" agreements in anticipation of the continued relaxation or termination of the U.S. embargo against Cuba. As a practical matter, we suspect this provision may lead more U.S. companies to explore opportunities in Cuba and travel to Cuba under the "professional meetings" provisions of the Cuba Regulations.

Under Cuban law, there is no legal prohibition against contingent contracts, though U.S. companies should understand that negotiations with Cuban entities are usually slow in comparison to U.S. standards and that, once negotiations are concluded, the Cuban government's approval process may exceed three months for commercial contracts and six months for foreign investment projects. Likewise, U.S. government authorizations, such as OFAC license approvals, may take many months as well. Nevertheless, the new provisions will allow both parties to commence negotiations and provide warranties and privileges while U.S. and Cuban government licenses and authorizations are processed.

Importantly, it remains unclear if the Cuban government will wish to enter into contingent contracts with U.S. companies when it can sign immediately enforceable contracts with non-U.S. business partners that are unhindered by the U.S. embargo. To be competitive with non-U.S. bidders, U.S. companies likely will need to make the case for offering better goods, services, and/or value to achieve a contingent contract with Cuban companies.

Given this increased competitive pressure, U.S. companies seeking to do business in Cuba should revisit their policies related to relevant anticorruption laws and regulations, including Cuban laws, and implement robust compliance programs. Unlike doing business in many other jurisdictions, U.S. companies should keep in mind that doing business in Cuba necessarily means, with few exceptions, dealing with counterparts who, under Cuban law, are deemed to be government officials.

Infrastructure Projects in Cuba

Persons subject to U.S. jurisdiction are authorized to provide to Cuba or Cuban nationals:

- a) services related to developing, repairing, maintaining, and enhancing Cuban infrastructure that directly benefit the Cuban people, provided . . .***
- b) those services are consistent with the export or reexport licensing policy of the U.S. Department of Commerce.***

This broad allowance permits U.S. companies to contract for and provide humanitarian and commercial services in numerous infrastructure categories and projects ranging from small-scale renovations of certain types of buildings (such as schools or hospitals) to large-scale energy-, environmental-, or transportation-related infrastructure projects. The new amendment specifies that “infrastructure” for these purposes means systems and assets used to provide public services to the Cuban people, as well as U.S. and Cuban environmental protection activities. The authorization does not specifically authorize the export to Cuba of materials, goods, technology or software used to perform the infrastructure services, so U.S. companies seeking to utilize this provision must determine whether separate export authorizations are required for items to be exported.

These provisions come at a critical time, as the Cuban government recently announced 12 construction-related projects in its annual Portfolio of Investment Opportunities. Cuba is looking to create contractual joint ventures with Cuban state companies to develop these projects, many of which are related to tourism and general infrastructure. While tourism-related projects may not fall within the scope of this new OFAC authorization, the new allowance may signal a willingness by the U.S. government to consider issuing specific licenses for such activities if sufficient local workforce and/or supplies are utilized to demonstrate a positive impact for the Cuban people.

Although the Cuban private construction sector remains relatively small, “construction worker” is one of the listed categories of private entrepreneur in Cuba authorized to form construction-purpose cooperatives in the private sector under Cuban law. Because the 2014 Cuban investment law (Law 118/2014) allows joint ventures between cooperatives and foreign entities, the new U.S. changes may prove key to opening the first joint ventures between U.S. companies and the Cuban private sector in construction-related business.

Exports to Individuals in Cuba

U.S. persons may export to Cuba:

- a) items classified as EAR99 or controlled only for anti-terrorism reasons . . .***
- b) as long as they are sold directly to individuals in Cuba for their personal use or their immediate family's personal use (other than prohibited Cuban Government officials).***

This expansion of BIS License Exception Support for the Cuban People (SCP) opens the opportunity for direct sales to customers in Cuba online or by other means. From a practical perspective, most Cubans do not have reliable or affordable online access, so the likelihood of significant eCommerce activities does not seem significant in the short term.

For other direct sales to customers in Cuba, U.S. exporters will need to navigate Cuban import requirements and may face challenges achieving a successful distribution model unless they have an authorized physical presence or dependable distribution channel that does not involve procurement through the Cuban government.

Other Notable Changes

Some of the other notable changes in the most recent amendments include:

- 1) removal of dollar value limits on imports from Cuba of goods for personal use by authorized travelers (including no limits on tobacco or alcohol imports for personal use or gifts);
- 2) permission for U.S. travelers to third countries to acquire Cuban-origin goods and import them into the United States;
- 3) permission for authorized travel and cargo carriers to transport goods in-transit by air through Cuba (so long as they are not removed from the aircraft);
- 4) permission for foreign vessels that entered Cuba from a third country carrying only items the equivalent of EAR99 (or controlled only for anti-terrorism reasons) to enter U.S. ports without the otherwise-required 180-day waiting period from the date of departure from Cuba, a change which may especially benefit Cuba's efforts to develop the Port of Mariel;
- 5) allowance for U.S. persons to make remittances to third country nationals for travel to, from, and within Cuba, provided the third-country traveler would meet one of the OFAC categories of authorized travel if the traveler were subject to U.S. jurisdiction;
- 6) permission for humanitarian grants to Cuba for scientific research and religious activities (in addition to previously authorized categories);
- 7) the narrowing of prohibited individual Cuban government official end users to members of the Cuban Council of Ministers and flag officers of the Cuban Revolutionary Armed Forces only, while prohibited members of the Cuban Communist Party have been narrowed to mean members of the Cuban Politburo; and
- 8) removal by OFAC of the provision limiting authorized reexports of "100% U.S. origin items" to Cuba to make clear that any reexports authorized by the U.S. Department of Commerce are permissible (as long as the transaction is not between a U.S. owned or controlled firm in a third country and Cuba for the exportation to Cuba of foreign made commodities).

Limits of Permissible Activities

Fundamentally, while the amendments of Oct. 17, 2016, March 16, 2016, Jan. 27, 2016, Sept. 21, 2015, and Jan. 16, 2015, ease certain restrictions on trade with Cuba, the Cuban embargo remains in place. U.S. businesses (as well as their non-U.S. subsidiaries) and U.S. individuals should continue to exercise caution before pursuing opportunities in Cuba and carefully review the sanctions and export regulations to determine whether proposed activities are in fact permissible. U.S. persons doing business with Cuba should consult with counsel to properly implement sanctions and export compliance programs to avoid even inadvertent violations of the relevant laws. Additionally, it is imperative to understand the domestic Cuban regulations and requirements that impact proposed trade dealings with, and investment in, Cuba.

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

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