

What's a President to Do? Options for Further Easing U.S. Sanctions against Cuba

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As we approach the first anniversary of President Obama's historic shift in Cuba policy, many are asking what if anything more the President could do without Congressional action to further ease U.S. sanctions against Cuba. The Obama Administration has already published two rounds of revisions to the applicable economic sanctions and export control regulations. Relative to the status quo of the last 50 years, these changes have been significant and have dramatically expanded opportunities for U.S. companies and individuals to engage with Cuba. At the same time, the embargo continues to be mandated by federal law and we remain a long way from full normal trade and investment relations. Given that the odds of Congress acting to lift the embargo in the near term seem slim, Administration officials have indicated that they are looking to do more.

Despite federal laws mandating the embargo, there is still significantly more that the Administration could do under executive authority to ease specific provisions of the Cuba sanctions regime in support of particular U.S. foreign policy objectives recognized by Congress, including the provision of support for the Cuban people and the promotion of democratic reforms. This authority is grounded in Constitutional, statutory and regulatory provisions that empower the President and the responsible executive branch agencies to grant exceptions to the sanctions through executive actions, regulations and licenses. (For a more detailed discussion of the statutory framework and the bases of the President's authority to modify the Cuba sanctions, see Stephen Propst, [Presidential Authority to Modify Economic Sanctions Against Cuba](#), February 15, 2011.)

In particular, the President arguably has sufficient legal authority to make the following additional changes to the current U.S. sanctions and export control regulations applicable to Cuba:

- **Travel to Cuba:** The Administration could further ease travel restrictions by broadening the 12 existing general licenses for authorized travel and eliminating applicable conditions and limitations.
 - For example, the Treasury Department's Office of Foreign Assets Control (OFAC) could amend the Cuban Assets Control Regulations (CACR) to eliminate the requirement that "people-to-people" exchanges must be conducted through a sponsoring U.S. organization. This would allow individual travelers to engage in "self-directed" trips to Cuba for the same educational exchange purposes.
 - Similarly, OFAC could further broaden the general license provisions for academic institutions by eliminating more of the conditions that are currently applicable to the covered activities. For example, OFAC could remove the requirement that participation in a formal course of study at a Cuban academic institution must count toward the student's degree program.
 - OFAC also could expand the scope of existing travel authorizations for "Support for the Cuban People" or public workshops and clinics to authorize more explicitly a broader range of activities (e.g., private training, strategic advice and other professional services) intended to enhance the professional, commercial and technical skills of private businesses and individuals.
- **Exports of Goods and Services:** The Administration could expand existing authorizations for exports to Cuba, particularly now that Cuba has been removed from the State Department's list of State Sponsors of Terrorism.
 - For example, the Commerce Department could expand existing License Exception "Support for the Cuban People" under the Export Administration Regulations (EAR) to cover commercial sales and donations of a much broader range of basic consumer products, electronics and appliances.
 - Similarly, the Commerce Department could amend the EAR to make the license exception for products containing encryption ("License Exception ENC") available for exports and reexports of telecommunications products that are classified as "unrestricted" encryption items.
 - With respect to exports of medicines and medical products, the Commerce Department currently interprets the relevant statutes to require the issuance of specific licenses. There is an argument that the provisions of the Trade Sanctions and Export Reform Act of 2000 directed the President to eliminate unilateral restrictions on exports of medical products (including the specific licensing requirements previously required under the Cuban

Democracy Act), and restored the Commerce Department's authority to establish a license exception for such products (similar to the license exception the agency established for agricultural products).

- OFAC could amend the CACR to authorize U.S. persons to provide services and engage in travel-related transactions involving a broader range of foreign-made products, consistent with the Commerce Department's licensing policies for U.S.-origin products. This is important, particularly in the telecommunications and IT sectors, because so much of the covered hardware is manufactured outside the United States. (Note, however, that this revision would still be subject to the statutory restriction under the Cuban Democracy Act and Section 515.559 of the CACR on exports by U.S.-owned or controlled foreign firms.)
- With respect to services, OFAC could amend its regulations to authorize persons subject to U.S. jurisdiction to provide a wider range of professional services (e.g., legal services, financial advice, commercial planning, strategic planning) to private Cuban entrepreneurs and individuals who are not officials of the Cuban government or members of the Communist Party.
- **Importation of Goods and Services:** The Administration could further expand and clarify the authorization for the importation of goods and services from Cuba. For example, the Administration could ease the documentary evidence requirements to allow for imports from individuals and private businesses that are not legally licensed by the Cuban government. The current authorization requires U.S. importers to obtain documentary evidence that the Cuban supplier is an individual who is licensed to be self-employed by the Cuban Government or a private legal entity that is not owned or controlled by the Cuban Government.
- **Physical Presence and Legal Entities:** OFAC could expand existing provisions of the CACR that authorize U.S. persons to establish representative offices and legal entities in Cuba.
 - In September 2015, OFAC amended the CACR to authorize certain categories of U.S. companies to establish a "physical presence" in Cuba, including representative or branch offices. OFAC could expand these authorizations to cover additional categories of U.S. persons and entities that are already covered under the existing travel authorizations, to include humanitarian organizations engaged in projects that benefit the Cuban people; private foundations, research institutes and educational institutes with an established interest in international relations; and non-governmental entities promoting democracy and strengthening of civil society.
 - The September 2015 amendments also included provisions authorizing providers of telecommunications and Internet-based services to establish legal entities in Cuba, including joint ventures with Cuban state-owned enterprises. Consistent with U.S. policy, OFAC could establish similar authorizations for other categories of U.S. entities engaged in transactions that are central to the provision of support for the Cuban people, such as exporters of medicines, medical products, and agricultural products.
- **Banking and Financial Transactions:** OFAC could take a number of steps to enable banks and financial institutions to more easily process payments incident to authorized transactions, particularly payments denominated in U.S. Dollars.
 - OFAC could expand available payment options to allow the extension of credit to Cuban customers and to allow payments for authorized transactions with Cuba (except sales of agricultural commodities or products, due to statutory restrictions) to be financed through letters of credit or other financing arrangements issued, confirmed or advised by U.S. financial institutions. Such transactions, however, still would need to be subject to statutory restrictions on the extension of credit for transactions involving "confiscated property".
 - The President also arguably has adequate legal authority to allow Cuban banks to open correspondent accounts at U.S. financial institutions for the limited purpose of processing payments incident to authorized transactions, such as the purchase of telecommunications equipment and services from U.S. suppliers. To do this, OFAC would need to issue general or specific licenses authorizing the necessary transactions and unblocking the funds transferred into such accounts. This step, however, would be complicated by a number of other legal and practical impediments, including the potential for such funds to be attached for the payment of default judgments issued by U.S. courts against the Cuban government.

- OFAC also could unblock the assets of private Cuban entrepreneurs, human rights activists and artists, and allow them to access accounts at U.S. financial institutions for purposes of funding or receiving payments for authorized activities even when such persons are not physically located in the United States.
- Even without amending its regulations, OFAC could issue additional guidance (such as FAQs) giving needed assurances to banks and financial institutions that they are permitted to rely on the representations of the parties and that they will not be subject to enforcement actions for processing payments related to Cuba. In November, OFAC issued such guidance related to the processing of travel-related payments for authorized travelers.
- **Insurance:** OFAC could expand the insurance-related provisions of the CACR to allow U.S. insurers to sell a broader range of insurance policies and products to non-U.S. travelers and carrier service providers, beyond the global health, life and travel policies that are currently authorized. For example, OFAC could authorize U.S. insurers to issue aviation and hull insurance to non-U.S. carriers operating flights or voyages between the United States and Cuba.

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Given the statutory framework enacted by Congress, new legislation or a transition to democracy in Cuba will be needed to fully lift the embargo. In the near term, Congress is unlikely to take action to lift the embargo fully until a number of difficult issues have been addressed, including the resolution of U.S. claims related to property expropriated by the Cuban government. In the interim, the President has sufficient legal authority to take these and similar actions to further ease the regulatory restrictions.

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