

Lawyer Insights

Expert Analysis: Another Rollback In US-Cuba Financial Relations

By Gustavo J. Membiela, Uriel A. Mendieta and Eric R. Markus
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On Sept. 6, the U.S. Department of the Treasury's Office of Foreign Assets Control took further steps to implement President Donald Trump's foreign policy toward Cuba by amending the Cuban Assets Control Regulations,¹ as it relates to remittances and certain financial transactions. Additionally, OFAC published a number of Frequently Asked Questions and a fact sheet concerning this amendment. The amendment to the CACR was published in the Federal Register on Monday, Sept. 9. These amendments take effect on Oct. 9.

The Bottom Line

OFAC is amending the CACR to eliminate the authorizations of the so-called U-turn general license for banking institutions subject to U.S. jurisdiction and impose new requirements regarding remittances to Cuba. Thus, financial institutions and other persons that are persons subject to U.S. jurisdiction, engaged in financial transactions involving Cuba should familiarize themselves with these amendments and actively monitor the development of U.S. sanctions toward Cuba to ensure that present and future transactions comply with the CACR.

The Full Story

Prior to OFAC's amendment of the CACR, U.S. banking institutions were authorized to process U-turn transactions, or fund transfers originating and terminating outside the United States, provided that neither the originator nor the beneficiary is a person subject to U.S. jurisdiction. The recent amendment, however, amends the general license relating to U-turn transactions, eliminating the authorization for banking institutions subject to U.S. jurisdiction to process such transactions.

Instead, the amended general license authorizes these banking institutions to reject U-turn transactions, subject to certain conditions. The result of this new, more limited authorization, once it becomes effective, will be that banking institutions subject to U.S. jurisdiction will be required to either block U-turn transactions or reject them.

Concurrently, OFAC has imposed new requirements and limitations regarding the types of remittances persons subject to U.S. jurisdiction are allowed to make to persons in Cuba. Specifically, OFAC has eliminated the authorization for donative remittances and amended the general licenses concerning family remittances and remittances to certain individuals and independent nongovernmental organizations in Cuba.

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Regarding family remittances, OFAC has placed a \$1,000 cap on the amount one remitter can send to one Cuban national as a family remittance in any consecutive three-month period. OFAC has also prohibited family remittances to prohibited Cuban officials and members of the Communist Party, as well as any of their “close relatives,” meaning any individual related to a prohibited Cuban official or member of the Communist Party by blood, marriage or adoption who is no more than three generations removed from that person or from a common ancestor with that person.²

Regarding remittances to independent nongovernment organizations, OFAC has added a provision to authorize remittances to support self-employed individuals (e.g., cuentapropistas) in Cuba in an attempt to promote the growth of the Cuban private sector. Effective Oct. 9, OFAC will include a new Section 340 to the CACR that will define “self-employed individual” as a Cuban national who is one or more of the following: (1) an owner or employee of a small private business or a sole proprietorship, including restaurants (paladares), taxis and bed-and-breakfasts (casas particulares); (2) an independent contractor or consultant; (3) a small farmer who owns his or her own land or (4) a small usufruct farmer who cultivates state-owned land to sell products on the open market.

All in all, these latest amendments to the CACR are a further rollback by the Trump administration of the substantial easing in Cuba sanctions that occurred under President Barack Obama, which the prior administration had adopted in an attempt to normalize relations between the two countries.

In particular, these latest amendments seek to deprive access to the U.S. financial system to many Cuban parties and restrict transactions that would generate revenue for the Cuban government, one of the consistent supporters of the Maduro regime in Venezuela, which has also been the subject of ramped-up sanctions in recent months and under the Trump administration generally.

Importantly, these amendments, taken together with Executive Order 13884 of Aug. 5, blocking the property of the government of Venezuela, show that the Trump administration’s general approach to U.S. sanctions toward these countries has been to restrict their general access to the U.S. financial system and U.S. person counterparties, while carving out permissible transactions between U.S. persons and the private sectors in such countries.

For example, Executive Order 13884 blocks the property of the government of Venezuela but leaves transactions with the Venezuelan private sector largely unaffected and uninhibited. Similarly, while the present amendments prohibit the processing of U-turn transactions through the U.S. financial system and restrict family remittances, they expressly seek to promote the private sector and independent activity in Cuba by allowing U.S. persons to provide remittances to self-employed individuals on a more unrestricted basis.

As evidence of OFAC’s commitment to crack down on the use of the U.S. financial system by or for the benefit of sanctioned persons, particularly through the use of U-turn transactions, on Sept. 17, OFAC published enforcement information regarding a settlement reached with British Arab Commercial Bank PLC. According to the enforcement information, BACB used the U.S. financial system to bulk fund USD-denominated wire transfers involving Sudan in violation of U.S. sanctions against the country.

According to OFAC, BACB maintained a nostro account — an account in the name of BACB — denominated in USD in a non-U.S. financial institution. BACB funded this nostro account by routing

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large, periodic USD-denominated wire transfers from non-U.S. financial institutions in Europe, through banks in the United States, for further credit to the nostro account.

The nostro account was then used by BACB to process individual payments involving a variety of Sudanese parties, including Sudanese financial institutions. Despite the USD-denominated wire transfers commencing and ending outside of the US, OFAC found that such use of the U.S. financial system to facilitate payments involving Sudan was sufficient to constitute an apparent violation of OFAC sanctions toward the country.

Financial institutions subject to U.S. jurisdiction and engaging in activities related to the U.S. sanctions toward Cuba should familiarize themselves with OFAC's amendment of the CACR in order to comply with OFAC's requirements.

To the extent a U.S. person is engaged in the business of providing money remittance services, such party will likely face increased due diligence and compliance costs, as it will have to determine whether remittances being sent from the United States or through the U.S. financial system are destined to a Cuban national as a family member — and therefore subject to the \$1,000 restriction applicable during each three-month period — or as a self-employed individual.

Notes

¹ 31 C.F.R. part 515.

² See 31 C.F.R. § 515.339 (defining “close relative”).

Gustavo J. Membiela is a partner in the commercial litigation practice group in the Miami office of Hunton Andrews Kurth. Gustavo's practice focuses on commercial litigation and arbitrations. He can be reached at +1 305 536 2688 or gmembiela@HuntonAK.com.

Uriel A. Mendieta is a partner in the mergers & acquisitions practice group in the Miami office of Hunton Andrews Kurth. Uriel's practice focuses on general corporate representation, including mergers and acquisitions, structured finance, and national and international project finance. He can be reached at +1 305 536 2729 or mendietau@HuntonAK.com.

Eric R. Markus is a partner in the mergers & acquisitions practice group in the Washington, DC office of Hunton Andrews Kurth. Eric has a broad practice that encompasses complex corporate transactions, mergers and acquisitions, securities law compliance and Exon-Florio and foreign asset control sanction matters. He can be reached at +1 202 662 2780 or ericmarkus@HuntonAK.com.

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