

Issue date:
March 2017

Trade Sanctions Against Cuba: What U.S. Universities Need to Know

The U.S. embargo against Cuba remains largely in effect, notwithstanding the Obama Administration's historic announcement in December 2014 that it was commencing the normalization of diplomatic relations with Cuba.¹ Tourist travel and commercial trade in most goods and services are still prohibited, and the conditions and limitations applicable to those activities that are allowed may entangle the unwary. This paper surveys the compliance hazards and havens from a university perspective.

Caveat lector: Federal sanctions laws are arcane and highly technical in many respects, and can be only summarized herein. Moreover, government restrictions may change with little notice. Readers are advised to scrutinize the most current versions of relevant sanctions regulations, executive orders, and agency guidance before making any decisions on which jobs, money, or acquittals might depend.

I. How the Cuba Sanctions Operate

U.S. sanctions against Cuba consist principally of two separate but related regulatory schemes: (1) the Cuban Assets Control Regulations (CACR),² which are administered by the Office of Foreign Assets Control (OFAC) within the U.S. Department of the Treasury, and (2) section 746.2 of the Export Administration Regulations (EAR),³ which belong to the Bureau of Industry and Security (BIS), a part of the U.S. Department of Commerce. In practical terms, these regulations prohibit persons subject to U.S. jurisdiction from engaging in travel, imports, exports, and financial transactions involving Cuba—except as authorized by the relevant U.S. government agency.

A. Who is subject to U.S. jurisdiction?

Persons subject to U.S. jurisdiction include—

- Any citizen or resident of the U.S., wherever located;
- Anyone within the U.S., regardless of immigration or citizenship status;
- Any corporation or other entity organized under the laws of the U.S. or of any state or local government; and
- Any corporation or other entity, wherever located or organized, that is owned or controlled by any of the individuals or entities listed above.⁴

¹ President Barack Obama, Statement by the President on Cuba Policy Changes (Dec. 17, 2014), *available at* <https://www.whitehouse.gov/the-press-office/2014/12/17/statement-president-cuba-policy-changes> (last visited Dec. 20, 2016).

² 31 C.F.R. pt. 515 (2017).

³ 15 C.F.R. pts. 730-774 (2017).

⁴ 31 C.F.R. § 515.329 (2017); *see also* 15 C.F.R. § 772.1 (2017) (definition of “U.S. person” for purposes of the EAR).

The jurisdictional reach of the sanctions regulations, then, is extensive and rarely in doubt with regard to the activities of U.S. universities and their personnel.

One enduring point of confusion occasionally surfaces, though. A sort of urban legend holds that dual U.S. citizens (for instance, someone who is a citizen of both the U.S. and Brazil) are somehow not subject to the embargo rules. This notion is incorrect for at least two reasons. First, dual citizenship does not operate like two different hats that a wearer can readily switch out to suit the occasion. A dual citizen is always a citizen of *both* countries conferring citizenship simultaneously. Second, when someone travels to Cuba as an employee (or agent) of a U.S. university or other entity, the legal doctrine of vicarious liability applies, and the law generally imputes the conduct of the traveler—of any citizenship—to his or her U.S. employer (or principal).

B. What activities require U.S. government authorization?

Put as simply as possible, the CACR impose default prohibitions⁵ on—

- financial transactions with Cuba and Cuban nationals;
- importing or receiving goods and services from Cuba and Cuban nationals;
- exporting or furnishing goods and services to Cuba and Cuban nationals; and
- travel to Cuba.⁶

In a related vein, section 746.2 of the EAR restricts exports of commodities, software, and technologies subject to the EAR.⁷ (The scope of items “subject to the EAR” is vast,⁸ and encompasses even the clothes, toiletries, jewelry, and other personal effects a traveler takes out of the U.S.)

OFAC and BIS tend to construe their regulations expansively, as a general matter. Teaching, training, collaborating on research projects, providing educational advice, and certain other academic activities fall within the scope of regulated services for purposes of the CACR, even if no money is changing hands. Similarly, travelers to Cuba are engaged in the “export” (albeit temporarily) of all the items they are bringing with them for purposes of section 746.2 of the EAR.

A single proposed trip or initiative may implicate several of these restrictions. For example, a U.S. university faculty member who plans to stay in Havana for a few weeks to collaborate on a research project with local experts will have to (a) travel to Cuba; (b) engage in financial transactions to pay for in-country lodging, meals, transportation, and other necessities; (c) exchange professional services with local colleagues; (d) temporarily export any gear and personal items from the U.S.; and (e) import any Cuban-origin samples, gifts, or souvenirs into the U.S. Activities (a), (b), (c) and (e) would be governed by the CACR, and (d) would be governed by section 746.2 of the EAR.

⁵ To read the prohibitions put less simply, see 31 C.F.R. §§ 515.201-208 (2017).

⁶ Strictly speaking, the CACR do not directly and explicitly ban travel to Cuba. Rather, they prohibit “dealing in property in which Cuba or a Cuban national has an interest,” which OFAC interprets as prohibiting “the receipt of goods or services in Cuba.” 31 C.F.R. § 515.420 (2017). Because one cannot travel to (or perhaps even survive in) Cuba without receiving any goods or services there, OFAC’s interpretation has the practical effect of a travel ban.

⁷ 15 C.F.R. § 746.2(a) (2017).

⁸ See 15 C.F.R § 734.3(a) (2017).

The sanctions regulations are not without some limitations. Of particular relevance to U.S. universities is the exemption for “information and informational materials.” “Publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, compact disks, CD ROMs, artworks, news wire feeds, and other information and informational articles”⁹ may generally be exported to and imported from Cuba without U.S. government authorization.¹⁰ To qualify for the exemption, the information or informational materials must be “fully created and in existence” at the time of transfer to or from Cuba, and must not contain technical data subject to the EAR.¹¹

C. How does authorization work?

Persons subject to U.S. jurisdiction may engage in activities restricted by the CACR or section 746.2 of the EAR if they are authorized by OFAC or BIS, as appropriate.

1. OFAC general and specific licenses

OFAC authorizes activities subject to the CACR via two kinds of licenses: *general licenses*, and *specific licenses*. General licenses are existing, on-the-books authorizations that anyone meeting the specified criteria may utilize, without the need to apply for particularized written permission from OFAC. CACR general licenses are set forth within the regulations. Several are especially relevant to members of the academic community.

- *Export-related transactions.* Section 515.533 of the CACR permits transactions that are ordinarily incident to the export of items subject to the EAR, provided the export itself is properly authorized by BIS (see below).
- *Transactions relating to informational materials and publishing.* Section 515.545 authorizes certain activities relating to the creation, editing, and distribution of informational materials, including printed publications, films, music, and other media. Along similar lines, section 515.577 allows a variety of transactions ordinarily incident to publishing, such as collaborating on, augmenting, and editing written materials.
- *Family travel.* Section 515.561(a) allows family members who “share a common dwelling” with a traveler going to Cuba to accompany or visit the traveler in specified research- and education-related situations.
- *Professional research and meetings.* Section 515.564 permits travel to Cuba (and related transactions) for the purpose of conducting full-time, *bona fide* research or attending meetings or conferences that relate to the traveler’s professional area of expertise (including graduate-level studies). This general license is available—but not limited—to university personnel.
- *Educational activities.* Section 515.565(a) authorizes persons subject to U.S. jurisdiction, including U.S. universities and their faculty, staff, and students, to engage in travel to Cuba (and related transactions) in order to—

⁹ 31 C.F.R. § 515.332(a)(1) (2017).

¹⁰ 31 C.F.R. § 515.206(a)(1) (2017).

¹¹ 31 C.F.R. § 515.206(a)(2)-(3) (2017). Moreover, U.S. persons may not export to Cuba any technical data or software subject to the International Traffic in Arms Regulations. 22 C.F.R. § 126.1(d)(1) (2017).

- Participate in a structured educational program as part of a course offered for credit by a U.S. degree-granting institution;
 - Engage in Cuba-specific research as part of a U.S. undergraduate or graduate program;
 - Study at a Cuban academic institution, provided the coursework will be accepted for credit towards a degree in the U.S.;
 - Teach temporarily at a Cuban academic institution, provided the traveler is regularly employed by a non-Cuban entity;
 - Sponsor a Cuban scholar to teach or conduct research in the U.S.;
 - Establish and operate educational exchanges for secondary school students;
 - Sponsor (or co-sponsor) non-commercial academic seminars or similar events relating to Cuba or global issues involving Cuba;
 - Establish academic exchanges and non-commercial joint research projects with Cuban academic institutions;
 - Provide certain standardized testing services or examinations;
 - Furnish online courses to Cubans, wherever located, at the undergraduate level or below;
 - Award educational grants, scholarships, *etc.* to Cuban nationals; and
 - Organize and prepare for any of the activities listed above.
- *Cuban nationals in the U.S.* Section 515.571 permits a number of activities in connection with the presence of a Cuban person in the U.S. on a valid visa or similar authorization.
 - *Physical presence.* Section 515.573 describes in-country leasing, employment, and other transactions in which academic institutions may engage as needed for the support of longer-term educational activities covered by section 515.565(a).
 - *Grants, scholarships, and awards.* Section 515.590 authorizes the provision of grants, scholarships and awards to Cuban nationals for educational activities (see section 515.565 above) and scientific research, as well as certain humanitarian and religious programs.

The travel-related general licenses authorize not only transactions directly related to the professional and educational activities described, but also the payment of in-country living expenses, certain banking activities, and the importation into the U.S. of Cuban merchandise for personal use or consumption only (*i.e.*, not for resale).¹²

Unlike general licenses, specific licenses are issued on a case-by-case basis. The process involves the submission of an application online,¹³ consideration of the matter by OFAC and other federal offices (which can take weeks or even months), and end results that may include approval, approval with special conditions, or denial. Applications describing activities consistent with U.S. policy priorities (education, humanitarian relief, civil and democratic society, rule of law, small business entrepreneurship, *etc.*) are more likely to be approved, while applications concerning recreational travel and most commercial transactions are more likely to be denied. In addition, if a request for a specific license describes facts that qualify for a general license, OFAC will likely return the application on the grounds that it is unnecessary because relevant authorization is already in effect.

¹² 31 C.F.R. § 515.560(c) (2017).

¹³ OFAC License Application Page, <https://www.treasury.gov/resource-center/sanctions/Pages/licensing.aspx> (last visited Dec. 20, 2016).

2. BIS license exceptions and licenses

BIS authorization to engage in exports covered by section 746.2 of the EAR operates much like OFAC authorization, although the terminology differs. While the CACR contain general licenses, section 746.2 of the EAR incorporates *license exceptions*, and while OFAC issues specific licenses, BIS issues simply *licenses*.

License exceptions are existing regulatory authorizations on which persons subject to the EAR may rely for qualifying exports, with no need to request written permission from BIS.¹⁴ The license exceptions of greatest utility to university travelers destined for Cuba are GFT (short for Gift Parcels and Humanitarian Donations), BAG (short for Baggage), CCD (short for Consumer Communications Devices), and SCP (Support for the Cuban People).

- *GFT*. Sections 746.2 and 740.12 (GFT) allow the export of gift parcels containing eligible items consigned to educational, religious, or charitable organizations in Cuba. This license exception is subject to limitations on each gift parcel's contents, value, and end-users.¹⁵
- *BAG*. Sections 746.2 and 740.14 (BAG) of the EAR authorize the export of specified belongings, such as personal effects and certain technology, for private use while in Cuba. Among other conditions, the items must be owned by the individual traveler/exporter, and cannot be sold or given away (in other words, they must be consumed abroad or returned to the U.S.).¹⁶ University-owned equipment is not eligible for export under BAG.
- *CCD*. Sections 746.2 and 740.19 (CCD) permit the permanent and temporary export of electronic devices and software listed at 740.19(b), such as certain computers and accessories, mobile phones, and digital cameras, *inter alia*. Specified Cuban government and Communist Party organizations and officials may not receive any items exported pursuant to CCD.¹⁷
- *SCP*. Sections 746.2 and 740.21 (SCP) authorize specified exports intended to improve living and economic conditions, strengthen civil society, and improve the free flow of information to, from, and within Cuba. Qualifying travelers engaged in educational, professional, or research activities may temporarily export a variety of personally- or University- owned commodities and software for their own use for up to two years, provided they maintain "effective control" of the exported items.¹⁸

Two additional license exceptions that exporters commonly invoke, but which universities generally may *not* use when sending items to Cuba, are TMP (short for Temporary Imports, Exports, Reexports, and Transfers (In-Country)) and AVS (short for Aircraft, Vessels, and Spacecraft). TMP, on which U.S. business travelers often rely to temporarily export work-related "tools of trade" to various countries,¹⁹ is

¹⁴ Not all of the EAR's many license exceptions, which are set forth in part 740 of the regulations, work for exports to Cuba. Only the license exceptions that are explicitly identified at section 746.2(a)(1) may be used.

¹⁵ 15 C.F.R. § 740.12(a)(2) (2017).

¹⁶ 15 C.F.R. § 740.14(c) (2017).

¹⁷ 15 C.F.R. § 740.19(c) (2017).

¹⁸ 15 C.F.R. § 740.21(c)(2) (2017).

¹⁹ 15 C.F.R. § 740.9(a)(1) (2017).

available to “the news media” alone for exports to Cuba.²⁰ As a result, university-owned equipment going to Cuba must be covered by either another exception (such as CCD or SCP) or a BIS license. AVS permits the temporary export of vessels (and aircraft) in many circumstances,²¹ but for journeys to Cuba, this license exception extends to only cargo and passenger vessels for hire, as well as certain recreational craft.²² Pure research vessels do not qualify, and must be the subject of a BIS license or other authorization.

As with OFAC’s specific licenses, BIS licenses are the product of online applications²³ that undergo (sometimes lengthy) federal agency review.

3. Recordkeeping

Both the CACR and the EAR impose record retention obligations of five years,²⁴ consistent with their five-year statutes of limitations for violations.

II. Penalties for Violations of the CACR and EAR

Potential penalties for inadvertent, civil violations of the CACR include fines not to exceed \$83,864 per infraction.²⁵ A willful, criminal violation may result in up to ten years in jail and a fine as high as \$1,000,000 for an organization, \$250,000 for an individual, or twice the monetary gain or loss connected to the violation.²⁶ With regard to the EAR, the civil penalties include a fine of up to either \$284,582²⁷ or twice the value of the relevant export, per infraction.²⁸ A willful, criminal violation of the EAR is punishable by a fine as high as \$1,000,000, as well as imprisonment for as long as twenty years.²⁹

The most recent public enforcement case involving a named university respondent is over ten years old. On May 5, 2006, OFAC announced that Augsburg College of Minneapolis, Minnesota remitted \$9,000 to settle allegations it had violated the CACR by facilitating the travel of non-Augsburg personnel to Cuba on four occasions between 2000 and 2004.³⁰

Guidance paper author:

J. Patrick Briscoe
University of Minnesota

²⁰ 15 C.F.R. § 746.2(a)(1)(i) (2017).

²¹ 15 C.F.R. § 740.15 (2017).

²² 15 C.F.R. §§ 746.2(a)(1)(x), 740.15(d)(6) (2017).

²³ BIS Licensing, <https://www.bis.doc.gov/index.php/licensing> (last visited Dec. 20, 2016).

²⁴ 31 C.F.R. § 501.601, 15 C.F.R. § 762.6(a) (2017).

²⁵ 31 C.F.R. § 501.701(a)(3) (2017).

²⁶ 31 C.F.R. § 501.701(a)(1), (b) (2017). Any property or funds involved in the unlawful activity may also be forfeit. 31 C.F.R. § 501.701(a)(2) (2017).

²⁷ Civil Monetary Penalty Adjustments for Inflation, 81 Fed. Reg. 36,454, 36,456 (June 7, 2016) (amending 15 C.F.R. pt. 6).

²⁸ 50 U.S.C. § 1705(b) (2016) (part of the statutory authority currently sustaining the EAR, the International Emergency Economic Powers Act of 1977, Pub. L. No. 95-223, tit. II, 91 Stat. 1625, 1626-29 (codified as amended at 50 U.S.C. §§ 1701-1708) (2017)).

²⁹ 50 U.S.C. § 1705(c) (2017).

³⁰ OFAC, Enforcement Information Through May 5, 2006, *available at* <https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/05052006.pdf> (last visited Dec. 20, 2016).