

Lawyer Insights

Expert Analysis: How Travel Cos. Should Respond To Trump Cuba Restrictions

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On June 5, 2019, the Trump administration introduced further restrictions on nonfamily travel to Cuba. The U.S. Department of the Treasury's Office of Foreign Assets Control amended the Cuban Assets Control Regulations, or CACR, to prohibit "people-to-people" travel to Cuba. In addition, the U.S. Department of Commerce's Bureau of Industry and Security issued a rule that denies export licenses for private and corporate aircraft and passenger and recreational vessels interested in travel to Cuba.

Persons and entities subject to U.S. jurisdiction, particularly those involved in the travel sector, should ensure that they are conducting their businesses and operations in accordance with the new Cuban travel restrictions introduced by the Trump administration. In order to ensure compliance, they should not engage in people-to-people travel and should not send private or corporate aircraft or passenger or recreational vessels to Cuba.

The Full Story

On Nov. 9, 2017, in order to implement the National Security Presidential Memorandum-5, "Strengthening the Policy of the United States Toward Cuba," or NSPM-5, OFAC amended Section 515.565(b) of the CACR to require that people-to-people educational travel be conducted "under the auspices of an organization that is subject to U.S. jurisdiction and sponsors such exchanges to promote people-to-people contact."

The effect of this amendment was to remove authorization for individual people-to-people educational travel, which had previously been authorized under the Obama administration. Both individual and group people-to-people travel allowed persons subject to U.S. jurisdiction to travel to Cuba for educational activities and cultural exchanges.

On April 17, 2019, National Security Advisor John Bolton announced additional regulatory changes to further enforce NSPM-5 and the Trump administration's foreign policy toward Cuba. He declared that the U.S. Department of Treasury would strengthen restrictions on nonfamily travel to Cuba.

OFAC removed the authorization for group people-to-people travel in § 515.565(b) of the CACR effective as of June 5, 2019. However, the amendment includes a "grandfathering provision" that permits previously authorized group people-to-people travel where the traveler has already completed at least one travel-related transaction, such as reserving accommodations or purchasing a flight.

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The remaining categories of authorized travel are as follows: family visits; official business of the U.S. government, foreign governments and certain intergovernmental organizations; journalistic activity; professional research and professional meetings; educational activities; religious activities; public performances, clinics, workshops, athletic and other competitions and exhibits; support for the Cuban people; humanitarian projects; activities of private foundations or research or educational institutes; exportation, importation or transmission of information or information materials; and certain authorized export transactions.

Furthermore, OFAC added a note to § 515.572(a)(2) of the CACR emphasizing that export or reexport of vessels or aircraft providing carrier services requires separate approval from the U.S. Department of Commerce. On its part, the U.S. Department of Commerce's Bureau of Industry and Security, or BIS, issued its own rule that will deny export licenses for passenger and recreational vessels and private and corporate aircraft interested in travel to Cuba.

BIS's Export Administration Regulations, or EAR, outlines licensing policy for exports and re-exports that generally will be approved, denied or reviewed on a case-by-case basis. BIS amended its EAR to create a general policy of denial for Cuba license applications involving passenger and recreational vessels and private and corporate aircraft, and to make such vessels ineligible for license exception. As a result, private and corporate aircraft, cruise ships, fishing boats, sailboats and other similar aircraft and vessels generally are prohibited from traveling to Cuba.

The new rules promulgated by the Trump administration are significantly impacting the travel sector. Tour companies and similar ventures must assess how to best modify their Cuban operations in order for them to remain viable. For example, some tour companies have discussed recharacterizing their trips from "people-to-people" travel to "support for the Cuban people" travel with a volunteerism component. Cruise lines are likely being hit the hardest by this regulatory change, as they are no longer permitted to travel to Cuba due to the EAR amendments. This restriction requires cruise lines to adjust itineraries and reroute trips while trying to keep passengers satisfied.

Tour companies offering "people-to-people" travel should, to the extent they have not done so, discontinue the offering of such travel services immediately and only carry out to completion those travel packages that were commenced prior to June 5, 2019, which would be subject to the "grandfathering provision" adopted by OFAC. Moving forward, such tour companies, if they want to continue to offer travel services to Cuba, may want to consider recharacterizing their services to fit a travel general license that continues in effect, such as "support for the Cuban people."

The recharacterization must not be just in name, however. The CACR narrowly defines "support for the Cuban people" activities as limited to those of (1) recognized human rights organizations; (2) independent organizations designed to promote a rapid, peaceful transition to democracy; or (3) individuals and nongovernmental organizations that promote independent activity intended to strengthen civil society in Cuba. Thus, beyond merely rebranding the travel packages offered to Cuba, tour companies may find themselves having to spin off their Cuba operations to special-purpose subsidiaries that meet one of these requirements, as a general tour company may not be able to meet such requirements.

Further, "support for the Cuban people" travel must be compliant with the CACR, including the requirement to engage in a full-time schedule of activities that is considered to be "support for the Cuban people." These activities include, but must be more than merely, staying in a room at a rented accommodation in a private

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Cuban residence (casa particular), eating at privately-owned Cuban restaurants (paladares) and shopping at privately-owned stores run by self-employed Cubans (cuentapropista).

However, other companies in the travel industry are also feeling the pressure of the Trump administration's tightening of restrictions with respect to travel to Cuba and active prosecution of violations thereof. On June 13, 2019, OFAC released civil penalties information against three different companies, Expedia Group Inc., Hotelbeds USA Inc. and Cubasphere Inc. In each case, the settlement with the company related to potential civil liability for apparent violations of the CACR, whether for (1) in the case of Expedia, assisting persons — some of whom were Cuban nationals — with travel or travel-related services for travel within Cuba or between Cuba and locations outside the United States between approximately April 22, 2011 to approximately Oct. 16, 2014; (2) in the case of Hotelbeds USA, providing Cuba-related travel services to non-U.S. persons in violation of the CACR between the approximate dates of December 2011 and June 2014; and (3) in the case of Cubasphere, dealing in property in which Cuba or Cuban nationals had an interest, in apparent violation of the CACR, by engaging in unauthorized Cuba travel-related transactions from approximately Dec. 30, 2013, to approximately Feb. 22, 2014.

Commercial issues may also arise for companies outside of the travel sector. It is important to note that whereas private and corporate aircraft are generally prohibited from traveling to Cuba, these amendments do not affect commercial aircraft travel to Cuba.

This most recent set of regulatory changes is motivated, at least in part, by Cuba's continued support of other countries subject to U.S. sanctions, such as Venezuela and Nicaragua. According to U.S. Treasury Secretary Steven Mnuchin, "Cuba continues to play a destabilizing role in the Western Hemisphere, providing a communist foothold in the region and propping up U.S. adversaries in places like Venezuela and Nicaragua by fomenting instability, undermining the rule of law, and suppressing democratic processes." It is expected that additional sanctions may be imposed with respect to Cuba, whether in the form of further travel restrictions or otherwise, so long as Cuba continues to support other countries subject to U.S. sanctions.

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