

Do Not Pass Go: Travel to Cuba and Go to Jail!

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Cuba is an island that is like no other. Travel to Cuba as an American citizen has become quite difficult since the embargo, and you can be fined heavily for doing so. So how exactly do you travel to Cuba as an American citizen and not risk being fined or charged with a crime?

The laws and regulations relating to Cuba travel are complex, and in many respects, vague and not subject to settled interpretations. The enforcement of those laws is inconsistent, indeed haphazard, affecting only a small portion of the many thousands of annual travelers to Cuba. Knowing and exercising your rights is powerful protection against the risk of penalties that some travelers face for violating the U.S. embargo that restricts travel to Cuba. It is especially important for non-citizens to consult with an immigration expert about the possible effect of a Cuba trip on their status in the United States. The laws and regulations relating to Cuba travel change with the political winds, sometimes to become more restrictive, sometimes less, as is being seen with the new Obama administration. There are two applicable laws with respect to travel to Cuba. First is the Trading with the Enemy Act (TWEA), enacted in 1917. Second is the Cuban Assets Control Regulations (CACRs), enacted in 1963.

History of the Embargo: Trading with the Enemy Act

As originally enacted, the TWEA pertained only to the president's use of economic powers in times of war. It was expanded in 1933 to deal with national emergencies that arose during peacetime.¹ Section 5(b) of the TWEA authorizes the president, through a designated agency, to "investigate, regulate . . . or prohibit . . . transactions involving any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States."² Section 16 criminalizes willful violations of any "order of the President issued in compliance with the provisions of the TWEA."³

Presidential authority under the TWEA has been delegated to the secretary of the treasury, who has in turn delegated that authority to the Office of Foreign Assets Control (OFAC).⁴

In 1963, the CACRs were promulgated pursuant to TWEA section 5(b) to impose an embargo against Cuba in an effort "to deal with the peacetime emergency created by Cuban attempts to destabilize governments throughout Latin America."⁵ The CACRs incorporated and expanded upon prior economic sanctions already imposed against Cuba.⁶ Thereafter in 1977, section 5(b) was amended to again limit the president's authority to times of war. However, the International Emergency Economic Powers Act (IEEPA) also contained a clause grandfathering existing exercises of the president's national emergency authority. This included the U.S. embargo against Cuba. The IEEPA permitted the president to extend the embargo in one-year intervals, where in the national interest.

CACR section 515.201(b) suggests that business transactions involving Cuba may be specifically authorized by OFAC.⁷ In the latter part of the 1970s and throughout the 1980s, liberal application of OFAC's licensing provision allowed U.S. subsidiaries abroad to develop significant trade with Cuba.⁸ This practice ended in 1992, when Congress enacted the Cuban Democracy Act, popularly known as "the Mack amendment," which rescinded OFAC's authority to issue licenses for the export of goods to Cuba by "persons subject to the jurisdiction of the United States."⁹ In March 1996, Congress further strengthened the embargo by enacting the Cuban Liberty and Democratic Solidarity Act, (LIBERTAD). The LIBERTAD continued the embargo indefinitely and effectively suspended the IEEPA's requirement that the president revisit the basis for the embargo each year.¹⁰ The LIBERTAD mandated that the embargo, including all restrictions imposed by the CACRs, "remain in effect," unless and until the embargo is suspended or terminated in

accordance with statutory procedures. Such procedures made suspension or termination of the embargo contingent upon a change of political power in Cuba.¹¹ The CACRs remain in force today. The basic goal of the sanctions is to isolate the Cuban government economically and deprive it of U.S. dollars.

Property Transactions

In addition to the prohibitions on exports to and imports from Cuba, the regulations prohibit any person subject to U.S. jurisdiction from dealing in any property in which Cuba or a Cuban national has an interest. Under the regulations, "property" includes contracts and services. For example, unless otherwise authorized, persons subject to U.S. jurisdiction (including U.S. overseas subsidiaries) may not purchase Cuban cigars in Mexico; may not sign a contract with a U.K. firm if the contract terms include Cuba-related provisions (even if those provisions are contingent upon the lifting of the embargo); and may not provide accounting, marketing, sales, or insurance services to a Cuban company or to a foreign company with respect to the foreign company's Cuba-related business.¹²

The prohibition on dealing in property in which Cuba or a Cuban national has an interest encompasses the receipt of goods or services in Cuba, even if provided free of charge by the government of Cuba, a national of Cuba, or a third-country national not subject to U.S. jurisdiction. The regulations also prohibit payment for air travel to Cuba on a third-country carrier unless the travel is pursuant to an OFAC general or specific license.¹³

The regulations currently provide that no specific licenses will be issued unless the following conditions are satisfied:

1. The contract underlying the proposed transaction was entered into prior to October 23, 1992.
2. The transaction is for the exportation of medicine or medical supplies from a third country to Cuba, which shall not

Who Can Go?

The following travelers are authorized, under OFAC general license, to engage in travel transactions while in Cuba:

- journalists and supporting broadcasting or technical personnel (regularly employed in that capacity by a news-reporting organization and traveling for journalistic activities)
- official government travelers (traveling on official business)
- members of international organizations of which the United States is also a member (traveling on official business)
- full-time professionals whose travel transactions are directly related to professional research in their professional areas, provided that their research 1) is of a noncommercial, academic nature; 2) entails a full work schedule in Cuba; and 3) has a substantial likelihood of public dissemination
- full-time professionals whose travel transactions are directly related to attendance at professional meetings or conferences in Cuba organized by an international professional organization, institution, or association that regularly sponsors such meetings or conferences in other countries. The organization, institution, or association sponsoring the meeting or conference may not be headquartered in the United States unless it has been specifically licensed to sponsor the meeting. The purpose of the meeting or conference cannot be the promotion of tourism in Cuba or other commercial activities involving Cuba, or to foster production of any bio-technological products.
- close family relatives may visit a national of Cuba once every 12-month period for an unlimited length of stay.*
- travelers who have received specific licenses from OFAC prior to going

* Legislation and United States Treasury, Office of Foreign Asset Control regulations enacted pursuant to section 621 of the Omnibus Appropriations Act, 2009. March 11, 2009. [This provision is effective immediately].

be restricted (except under certain laws or in certain cases).

3. The transaction is for the exportation of telecommunications equipment from a third country, when the equipment is determined to be necessary for efficient and adequate telecommunications service between the United States and Cuba.¹⁴

However, specific licenses may be issued for certain categories of transactions between U.S.-owned or -controlled firms in third countries and Cuba. Such licenses may be issued where local law requires, or policy in the third country favors trade with Cuba.¹⁵

Specially Designated Nationals

The regulations prohibit buying from or selling to Cuban nationals whether they are physically located on the island of Cuba or doing business elsewhere on behalf of Cuba. Individuals or organizations who

act on behalf of Cuba, regardless of where they are located, are considered by the U.S. Treasury Department to be “specially designated nationals” of Cuba. A non-exhaustive list of their names is published in the Federal Register. This list may be obtained from OFAC. The list, however, is only a partial one. As such, those engaging in transactions with foreign nationals must take reasonable care to make certain that such foreign nationals are not acting on behalf of Cuba. Individuals and organizations subject to U.S. jurisdiction that violate the regulations by transacting business with specially designated nationals of Cuba are subject to criminal prosecution or civil monetary penalties.¹⁶

Cuba-Related Travel Transactions

Only those whose travel falls into the categories discussed below may be authorized to spend money related to travel to, from, or within Cuba. Persons traveling to

Cuba to visit immediate family members pursuant to a specific license may spend no more than \$179 per day in Cuba on non-transportation-related expenses. Those licensed to engage in other travel-related transactions in Cuba may spend up to the per diem amount, set by the State Department based upon the locale of Havana, Cuba, for living expenses and purchases directly related to travel in Cuba. This includes hotel accommodations, meals, local transportation, and goods personally used by the traveler in Cuba.¹⁷ Most licensed travelers may also spend additional money for transactions directly related to the activities for which they received their license. For example, journalists traveling in Cuba, under the journalism general license (described below) may spend money over and above the current per diem for extensive local transportation, the hiring of cable layers, and other costs that are directly related to covering a story in Cuba. Purchases of services unrelated to travel or a licensed activity, such as non-emergency medical services, are prohibited. The purchase of publications and other informational materials is not restricted.¹⁸

Specific Licenses to Visit Immediate Family Members in Cuba

OFAC may issue specific licenses authorizing travel-related transactions for a close relative¹⁹ who is a national of Cuba on a case-by-case basis for transactions related to additional visits during the 12-month period, as well as for travel to Cuba to visit a close relative who is not a national of Cuba. For those who emigrated to the United States from Cuba, and have not since that time visited a family member in Cuba, the 12-month period will be counted from the date they left Cuba. For all others, the 12-month period will be counted from the date they last left Cuba pursuant to the preexisting family visit general license, or from the date their family visit specific license was issued. Travelers wishing to visit an immediate family member in Cuba who is authorized to be in Cuba but not a national of Cuba may be granted a specific license in exigent circumstances provided that the U.S. Interests Section in Havana concurs in the issuance

of such a license.²⁰

What happens if a U.S.-owned or -controlled company in a third country trades with Cuba in violation of the embargo? Both the company and the individual are subject to a range of civil enforcement penalties. What happens when an individual travels to Cuba in violation of CACR section 515? If OFAC learns of an individual's travel to Cuba without the requisite qualifying license, general or specific, it could send that person a "Requirement to Furnish Information" (RFI) letter.²¹ Violations of the travel-related regulations to Cuba could result in civil and/or criminal penalties.²² The inherent problem with an individual deciding whether to respond to this RFI faces three risks: First, do nothing and not respond to the RFI and be immediately subject to a civil penalty for failing to respond; second, file a response and if the response does not provide for a justifiable defense, be subject to the same civil penalties and possible criminal prosecution; third, file an untruthful response and be subject to criminal prosecution for false statements.²³ In the second and third scenarios, the person could be prosecuted criminally and face incarceration pursuant to the Federal Sentencing Guidelines. Criminal penalties for violating the sanctions range up to 10 years in prison, \$1,000,000 in corporate fines, and \$250,000 in individual fines. Civil penalties up to \$55,000 per violation may also be imposed. Please note that the regulations require those dealing with Cuba to maintain records and, upon request from the U.S. Treasury Department, to furnish information regarding such dealings.²⁴ It should be patently obvious that these regulations by Treasury put the responding party in a catch-22—you are damned if you do respond, and you are damned if you don't. Responding essentially requires the individual to waive his or her Fifth Amendment rights as guaranteed by the U.S. Constitution.

After an alleged offense involving the regulations, Treasury could bypass the RFI letter and proceed with imposing a penalty pursuant to a pre-penalty notice (PPN).²⁵ A company that trades with Cuba in violation of the TWEA or engages in

certain transactions prohibited by CACR section 515 is subject to this PPN issued by OFAC. A company that receives a PPN has a right to submit a written response within 60 days explaining why the company believes there should be no finding of a violation, why a monetary penalty should not be imposed, or why the monetary penalty should be in a lesser amount than proposed.²⁶ However, in most cases, a company or an individual may have no choice but to respond in writing, or else be subject to a fine of up to \$10,000 per day for each day they fail to respond.²⁷ Regardless of whether a written response is submitted, OFAC may and often does proceed with the issuance of a penalty notice (PN).²⁸ The penalty notice advises the company and/or individual of the civil penalty being imposed for the purported violation of the CACR. Upon receipt of a penalty notice, the company and/or individual has 30 days to respond to the PN²⁹ and request an administrative hearing, which will trigger OFAC to issue a hearing request acknowledgment, otherwise the penalty must be paid within 30 days. The party that receives any request from OFAC should respond in some fashion and seek legal advice prior to responding.³⁰ An Order Instituting Proceedings (OIP) is then issued and assigned to an administrative law judge.³¹ The individual has 45 days to file an answer³² and 30 days to make initial disclosures and demands for interrogatories.³³ A pre-hearing conference is then held within 14 days with a final hearing scheduled no fewer than 45 days from the prehearing conference.³⁴ Upon conclusion of the final hearing, the parties may propose findings within 30 days and respond in up to 90 days.³⁵ The administrative law judge then renders a decision dismissing the action or assesses a penalty. Either party may file an appeal to the secretary of treasury's designee within 10 days.³⁶ Respondents who exhaust this process may then seek judicial review.³⁷

Conclusion

Travel to Cuba without the risk of jail or civil penalties may become a possibility in the near future. For some, it means going home for the first time. For others, it means discovering an untouched place

full of culture and history. For most U.S. citizens, it means the end of an era and the beginning of countless opportunities for trade and business transactions. ■

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Endnotes

1. *Regan v. Wald*, 468 U.S. 222, 226 (1984).
2. *See* 50 U.S.C. App. § 5(b)(1)(B).
3. *See* 50 U.S.C. App. § 16.
4. *Regan*, 468 U.S. at 226 (citing Exec. Order No. 9193, 3 C.F.R. 1174, 1175 (1942) and Treas. Dept. Order No. 128 (Rev. 1, Oct. 15, 1962)).
5. *Id.*
6. *Id.*
7. CACR § 515.201(b).
8. RALPH H. FOLSOM, *INT'L BUS. TRANS.* § 18.4 (2d ed. 2004); Harry L. Clark, *Dealing with U.S. Extraterritorial Sanctions and Foreign Countermeasures*, 20 U. PA. J. INT'L ECON. L. 61, 66 (Spring 1999); John Ellicott, *Between a Rock and a Hard Place: How Multinational Companies Address Conflicts Between U.S. Sanctions and Foreign Blocking Measures*, 27 STETSON L. REV. 1365, 1368 (Spring 1998).
9. *See* 22 U.S.C. § 6005(a); Clara Davis, *Trading with Cuba: The Cuban Democracy Act and Export Rules*, 8 FLA. J. INT'L LAW 385 (Fall 1993).
10. *See* 22 U.S.C. §§ 6021-6091; *U.S. v. Plummer*, 221 F.3d 1298, 1307-1308 (11th Cir. 2000) (reviewing this history).
11. *See* 22 U.S.C. §§ 6064, 6065.
12. www.treas.gov/offices/enforcement/ofac/programs/cuba/cuba.shtml
13. *See* 31 C.F.R. § 515.420 (2009).
14. *See* 31 C.F.R. § 515.559(a) (2009).
15. *See* 31 C.F.R. § 515.559(b) (2009).
16. www.treas.gov/offices/enforcement/ofac/programs/cuba/cuba.shtml
17. www.treas.gov/offices/enforcement/ofac/programs/cuba/gl_omni2009.pdf
18. www.treas.gov/offices/enforcement/ofac/programs/cuba/cuba.shtml
19. www.treas.gov/offices/enforcement/ofac/programs/cuba/gl_omni2009.pdf; 31CFR 515 [close relative with respect to any person means any individual related to that person by blood, marriage, or adoption who is no more than three generations removed from that person or from a common ancestor with that person].
20. www.treas.gov/offices/enforcement/ofac/programs/cuba/cuba.shtml
21. 31 C.F.R. 501.602.
22. OFAC has attempted to fine some people up to \$10,000 merely for failing to timely reply to an RFI 31 C.F.R. 501.602 pursuant to its regulation. While the authors of this article believe such an action is both unconstitutional and unreasonable, a timely response is prudent.

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