

Future scenarios for US-Cuba relations

SUMMARY

On 17 December 2014, US President, Barack Obama, announced the start of a new phase in US-Cuba relations.

The US embargo to Cuba has been in place for more than 50 years. International opposition to the embargo has grown since the beginning of the 1990s when US embargo legislation started to present extraterritorial implications. More recently, domestic support for the embargo has also started fading. US economic interest in the island has risen since Cuba became an importer of US agricultural products, and a series of economic policy reforms were introduced by the Castro government opening the way toward a mixed economy model. In this context and after successfully concluding a prisoner-exchange deal with Cuba, President Obama announced a period of normalisation.

This normalisation process will most probably be constrained by the still strong opposition from Congress. The powers and discretion of the President to modify the embargo rules are limited by legislation dating back to the 1990s. Radical changes in relations between the two countries will therefore be dependent on Congress's willingness to amend or completely revoke embargo legislation. Opposition to major changes in the embargo rules is still strong in Congress, as political reforms in Cuba have lagged behind economic policy changes. This is likely to lead to a slower and more prudent process for dismantling the embargo.

The maintenance of the main embargo legislation means that some of the rules with extraterritorial implications will remain in place. In particular, the rules from the 1996 Helms Burton Act and Section 211 of the 1998 Omnibus Appropriations Act that the EU had challenged in the past will, for the moment, remain in place.



In this briefing:

- Introduction
- The political and economic context
- From the embargo to normalisation
- Beyond the embargo's dual approach?
- Implications for the EU
- Main references

Introduction

The US imposed its embargo on Cuba in the 1960s. When codifying the embargo rules in the early 1990s, Congress significantly restricted the President's ability to vary the conditions of the embargo. Successive Presidents have still taken various measures in this regard within the scope of the discretionary powers granted to them by the law. On 17 December 2014, following the successful conclusion of a prisoner-exchange deal, US President Barack Obama announced the start of a [new phase](#) in relations between the two countries. (See the timeline (figure 3) annexed to this briefing for a view of the development of the US embargo over the past five decades.)

The announcement came after a series of political and economic changes in both Cuba and the US. In particular, support for the embargo has been declining in the US, whereas the economic reforms introduced by Raul Castro have increased US interest in the developing Cuban private sector. However, economic reforms in Cuba remain limited and political reforms have stalled. Moreover, significant changes in the embargo policy are not in the hands of the US President alone, but require Congressional support to amend legislation, which at present seems hard to gain.

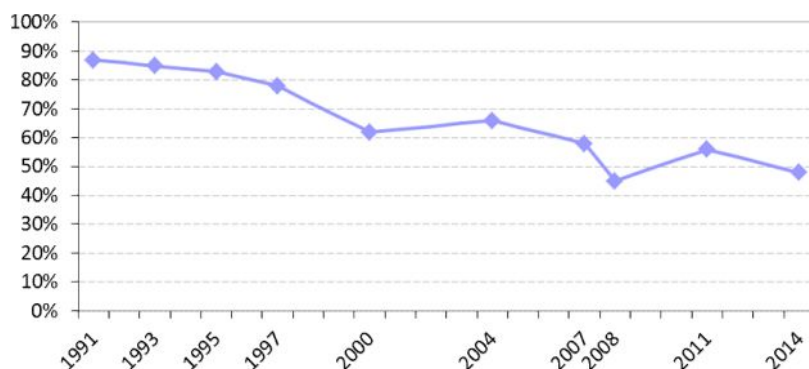
At present, there are still many questions as to what the normalisation process between the US and Cuba will bring. In particular it remains to be seen how far the President can go without Congressional support. And for the EU, there are also questions about the potential implications of a US-Cuban rapprochement.

The political and economic context

The changes in US-Cuba relations can be seen as a result of diminished support for the embargo both in the US and internationally.

In the past, Cuban-Americans, significant [swing voters](#) in Florida, had fiercely opposed the embargo being lifted. Recently, however, support for the embargo has decreased substantially among the Cuban-American population in Miami, although this change tends to reflect the opinion of the younger generations ([FIU Cuba Poll 2014](#), see figure 1).¹

Figure 1 – Declining support for the embargo in the Cuban-American population of Miami



Data source: [FIU Cuba Poll 2014](#).

The new thinking is that political and economic isolation through the embargo has not achieved its objective, and that democratic values might be better transmitted in Cuba through softer measures.

For years, the US has been isolated internationally on Cuba, as shown by the [many UN General Assembly](#) resolutions against the embargo and by the

[Organisation of American States' vote](#) in 2009 to allow Cuba to re-join the organisation after having been excluded since 1962.

At the same time, American economic interests vis-à-vis Cuba have grown. The US became [a major exporter of agricultural products](#) to Cuba, after Cuban agriculture was severely damaged by hurricanes. This explains US [farmers' support](#) for the lifting of the embargo. Moreover, the current economic instability in Venezuela led President Raul Castro, who replaced his brother at the head of the country, at first temporarily, in 2006, to initiate a series of [economic policy changes](#) aimed at reducing Cuba's dependence on Venezuela, attracting foreign investors and diversifying its international partners. Economic reforms included *inter alia*: allowing further private-sector activities (including credit markets and a real estate market), reforming SOE, creating special development zone for investments and a new foreign investment law.

Notwithstanding such economic changes, [political reforms](#) continue to lag far behind, with the exception of a new five-year term limit, renewable once, for top officials' positions. Cuba continues to restrict [major human rights](#) such as freedom of expression, association and assembly. In particular, the imprisonment of dissidents is frequent (see

figure 2 for numbers). According to the Cuban Commission on Human Rights and Reconciliation (CCDHRN), there were [6 424](#) short-term arrests for political reasons in 2013. [Expropriation and the arrest of foreign investors](#) who fall out of favour with the government are not uncommon. For example, the 2009 [imprisonment of Alan Gross](#), an American subcontractor, whose democracy projects were funded by USAID, was a setback in US-Cuba relations. He was arrested in Cuba on accusations of smuggling internet communications equipment and was sentenced to 15 years in prison. Although his arrest represented a major setback in US-Cuba relations, it led to negotiations, ultimately leading to [his release](#) on 17 December 2014 and the successful conclusion of a prisoner exchange deal. That triggered the move towards the normalisation of US-Cuba relations. In compliance with the prisoner-exchange deal, Cuba released [53 prisoners](#).

Figure 2 – Monthly arrests of political dissidents

	2010	2011	2012	2013	2014
January	117	268	631	364	1 052
February	235	390	604	504	1 051
March	83	264	1 158	354	813
April	162	244	402	366	905
May	120	349	423	375	1 120
June	104	212	427	180	963
July	125	251	406	233	
August	184	243	521	547	
September	90	563	533	708	
October	310	286	520	909	
November	244	257	410	761	
December	300	796	567	1 123	
Total	2 074	4 123	6 602	6 424	
Monthly average	172	343	550	536	984

Data source: [Cuban Commission on Human Rights and Reconciliation \(CCDHRN\)](#), 2014.

From the embargo to normalisation

In 1959, Fidel Castro established his rule, which led in 1976 to a new Constitution, under which power is concentrated in a single party, the Cuban Communist Party, and the head of state and government is also the head of the legislature. In 1960, the US imposed an [embargo](#) on exports to Cuba, administered by the Department of Commerce. This embargo was completed via the Treasury's Cuban Assets Control Regulations (CACR) with restrictions on imports, travel and remittances. The latter restrictions were further tightened from 1975 to 1992. Cuba was also added to the State Department's list of 'states sponsoring international terrorism' in 1982.

With the end of the USSR and the sudden end of Soviet support for Cuba, the US acknowledged the embargo's negative effect on the well-being of the Cuban population. From 1992, Congress therefore decided to start a dual approach. This dual approach consisted of maintaining sanctions while trying to mitigate some of their effect on Cuba's population.

Codification of the dual approach

The laws enacted by Congress after 1992 remain the main pillars of the current embargo rules, codifying previous legislation: the [Cuban Democracy Act of 1992](#), the [Cuban Liberty and Democratic Solidarity Act of 1996](#) (hereinafter referred to as the Helms-Burton Act) and the [Trade Sanctions and Export Enhancement Act of 2000](#), amended by the [2009 Omnibus Appropriations Act](#). Congress's codification of the dual approach to the embargo was characterised by:

- *on the one hand*, upholding and tightening [restrictions](#), for example by prohibiting unlicensed vessels from entering US ports from Cuba, as well as imposing a strict limit on remittances. A series of foreign policy actions to isolate Cuba internationally were also set out (US opposition to Cuba's participation in [international financial organisations](#) and in [American multilateral organisations](#), [sanctions against countries assisting Cuba](#), etc.).
- *on the other hand*, the easing of some prohibitions on [financial assistance](#) for [democracy and human rights projects in Cuba](#), [permission](#) to donate food for humanitarian assistance and to export medicines and medical equipment, the authorisation of some travel-related transactions as well as enhanced possibilities for providing telecommunications and [broadcasting](#) services to Cuba.

This Congressional codification of the embargo rules significantly curtailed the President's powers to lift or amend the prohibitions. This therefore has major consequences for the current normalisation process.

Modifying the embargo's rules through federal regulations

In recent years, the flexibility granted to the President in the post-1992 legislation has been used both to tighten and to loosen specific restrictions. This has been done through amendments to the Treasury's CACR, to the Department of Commerce's Export Administration Regulation (EAR), and through presidential directives implementing the embargo rules.

By amending these federal regulatory instruments, the US President can partly modify, *inter alia*:

- some travel restrictions,
- rules on authorised travel-related transactions,
- the thresholds of remittances allowed,
- the scope of humanitarian donations.

Through the modulation of these federal measures, since 2009 the Obama administration has been able to [ease restrictions](#): allowing travel for religious, educational and journalistic activities, as well as authorising remittances to non-family members in Cuba.

On 17 December 2014, [President Obama announced](#) his desire to take further measures: (a) re-establishing diplomatic relations with Cuba, (b) reviewing the designation of Cuba as a state sponsor of terrorism, and (c) further increasing travel,

commerce and the flow of information to Cuba. Some of these measures have already been implemented through changes to federal regulations (see annexes).

Beyond the dual approach?

The main question in the framework of the current normalisation process is how far the US President will be able to go without Congressional support; can he really go beyond the dual approach in place since 1992? Through this legislation, Congress has limited the President's discretion to lift some embargo measures on Cuba (see for example the box below) and questions have been raised concerning the President's authority actually to undertake the [steps](#) he set out in his December 2014 speech.

Under the Helms-Burton Act ([22 US Code § 6061-6066](#))

(a) The following restrictions can be *suspended* only if Cuba has a transition government; they may only be *lifted* if Cuba has a democratically elected government:

- Restriction on foreign assistance, US Plan for economic assistance to Cuba,
- Prohibition to assign an import quota for Cuban sugar,
- Prohibition on US support to Cuba in international financial and multilateral organisations,

(b) *Suspension and removal*, respectively, of all embargo restrictions can only be achieved if Cuba has a transition government, or if Cuba has a democratically elected government²

(c) The following acts can only take place once Cuba has a democratically elected government:

Full recognition of the Cuban State

- Establishment of trade relations (extension of MFN, FTA or other preferential treatment)

Most of the measures announced in December have already been enacted, through amendments on 16 January 2015 to the [Treasury's CACR](#) and to the [Department of Commerce's EAR](#) (see the tables in the annex). These measures continue the series of reforms undertaken since 2009 through federal regulations, introducing new exceptions, in particular to support the nascent Cuban private sector. However, Obama's intention to open an embassy in Cuba may be more difficult to achieve, since the Helms-Burton Act imposes conditions on full recognition of the Cuban State (i.e. also on the opening of a proper embassy). Further reforms, or the complete removal of some restrictions, would require amendment of the current legislation. For example, the limit on remittances cannot be completely lifted; the President can only redefine the limit, and therefore raise it in order to soften the restriction, as long as it remains a 'strict limit' as required by the 1992 Cuban Democracy Act.

The dual approach is therefore likely to remain in the near future. The possibilities of further dismantling the embargo rules depend on the willingness of Congress to amend embargo legislation, or on future political reforms in Cuba. Several legislative initiatives have been submitted by Members of the incoming Congress with the aim of lifting the embargo completely (*inter alia*: [HR 274 Rush](#) and [HR 403 Rangel](#)), but [opposition from Republicans](#) appears strong for now. A bill on freedom to travel to Cuba has also been introduced in Congress. While the text of this bill is not yet public, several similar bills have been submitted unsuccessfully in the House of Representatives since 2001; these bills simply proposed the repeal of travel bans (including the tourism ban) while maintaining other embargo rules. The removal of Cuba from the list of countries supporting terrorist groups would allow the possibility for [further actions](#) to be taken under Presidential authority.

Implications for the EU

The EU has established [relations with Cuba](#) both within the regional framework of the [EU-CELAC](#) and [EU-CARIFORUM](#) dialogues as well as bilaterally. The EU has long [opposed](#) the US embargo on Cuba, while advocating respect of human rights and fundamental freedoms by Cuba.

The [1996 Helms-Burton Act](#) and [Section 211 of the 1998 Omnibus Appropriations Act](#) introduced various extra-territoriality measures, with impacts on EU interests.

Main extra-territoriality measures of the US Cuba embargo:

- [Protection of US claims to confiscated goods](#): allows US citizens to file lawsuits for damages against foreign companies investing in confiscated US property in Cuba
- [Denial of entry to the US](#): of executives or shareholders of companies who own or traffic in confiscated US property in Cuba
- [Prohibition of indirect financing](#): no loan, credit or other financing may be given to any persons for transactions involving a confiscated property
- [Prohibition to enter US ports for vessels travelling from or to Cuba](#) (now partially lifted by 2015 amendment of the CACR)
- [Section 211 of the 1998 Omnibus Appropriations Act](#) prohibits any transaction or payment with respect to trademarks or trade names that are similar to those used in connection with a business or assets that were confiscated, unless the original owner agrees, and prohibits the recognition, enforcement or renewal of rights related to such trademarks unless the owner has expressly consented.

The EU challenged these extraterritorial measures, and reached an understanding with the US on the measures under the Helms-Burton Act's title III (protection in lawsuits of US claims to confiscated goods) and title IV (denial of entry to the US for executives and shareholders of companies involved with confiscated property). While no action has been taken under these titles against EU citizens (due to temporary waivers for actions under title III), permanent implementation of the understanding would require Congressional action, which has not yet been achieved.

Moreover the EU successfully challenged [measures under Section 211 of the 1998 Omnibus Appropriations Act](#) within the World Trade Organization (WTO). The US has still not complied with the [Appellate Body report](#), which considered the restrictions in Section 211 to be [in violation of National Treatment and Most Favoured Nation requirements](#) under Article 3.1 and 4 of [TRIPS](#).

US-Cuba normalisation could help find solutions to these issues. In particular, the prohibition concerning the transit of vessels coming from Cuba has been partially lifted for foreign ships involved in trade with Cuba in the January 2015 CACR amendments. However, removing the measures challenged by the EU with regard to titles III and IV of the Helms-Burton Act and Section 211 of the 1998 Omnibus Appropriations Act would need Congressional amendment of the embargo legislation.

In 2013, legislative initiatives [HR 1917](#) and [HR 872](#), calling for the lifting of the embargo, also aimed at lifting all the measures challenged by the EU, and would have instigated negotiation between the US and Cuba for the purpose of settling claims against Cuba for confiscated property. However, in 2013, [another legislative initiative](#) would have made application of the measures under Section 211 of the 1998 Omnibus Appropriation Act non-discriminatory. This would make these measures WTO compatible and therefore deprive the EU of its leverage against them. This seems to

suggest that Congress may not yet be ready to give up these measures, which protect US claims on confiscated goods in Cuba.

While EU problems connected with the embargo could persist, rapprochement between the US and Cuba signifies, in the words of EU High Representative, [Federica Mogherini](#), 'a choice of dialogue over confrontation', similar to the EU's approach to Cuba in recent years. With this in mind, the EU has already started [negotiations](#) for a Political Dialogue and Cooperation Agreement with Cuba.

Main references

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Annexes

Figure 3: Timeline of US embargo measures

Table 1: Measures introduced in the 2015 amendment of the CACR

Table 2: Measures introduced in the 2015 amendment of the EAR

Endnotes

¹ From regular poll carried out by the Cuba Research Institute at Florida International University; [2014 FIU Cuba poll](#), figure 14.

² For a detailed list of all restrictions concerned here, see: Dianne E. Rennack and M.P. Sullivan, 'Cuba Sanctions: Legislative Restrictions Limiting the Normalization of Relations', 29 January 2015, CRS.

Figure 3: Timeline of US embargo measures

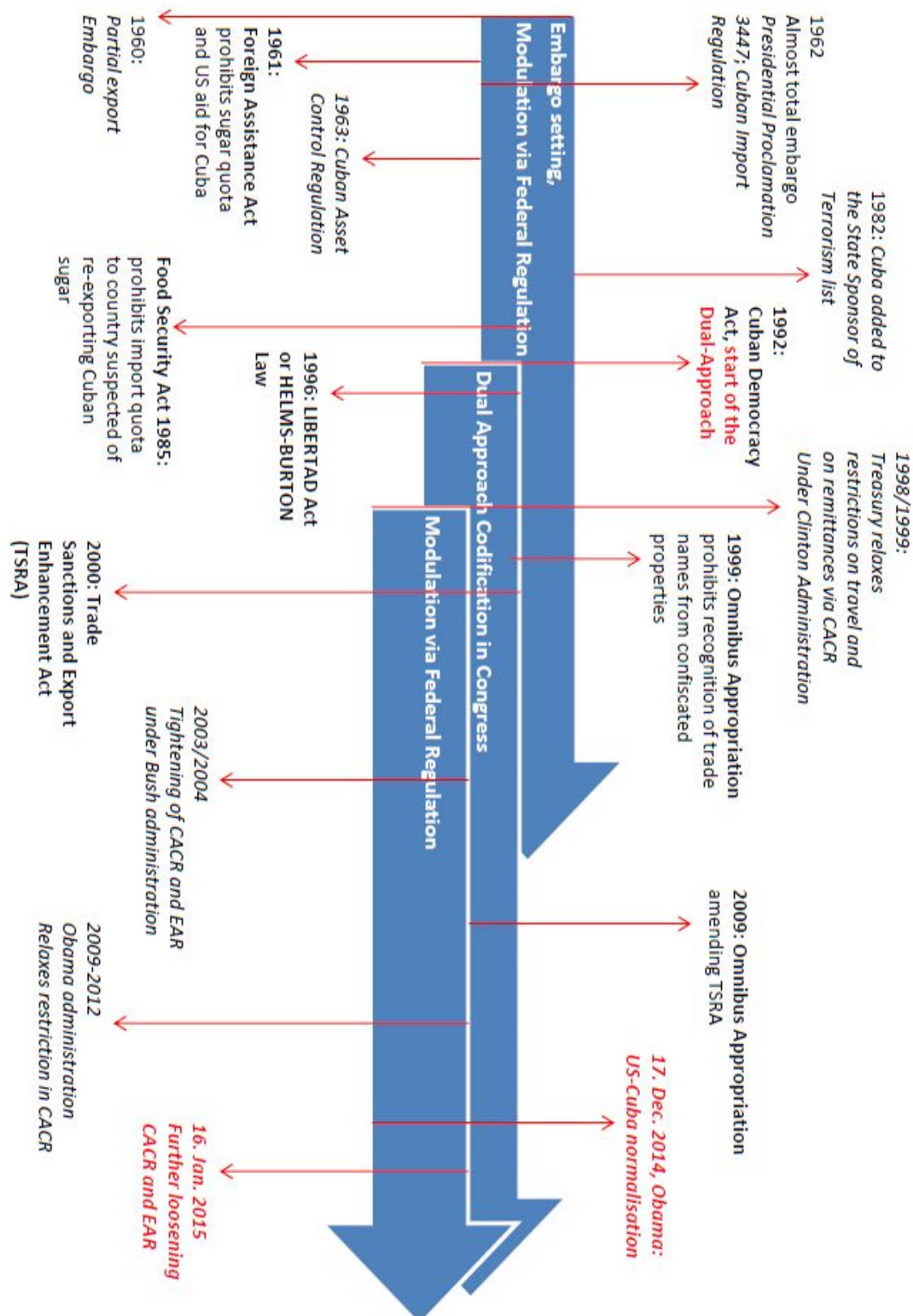


Table 1

Measures announced by President Obama and introduced in the 2015 amendment of the Cuban Assets Control Regulations (CACR)	
<i>Measure</i>	<i>Rule amended/added</i>
expansion of general licence applications for travel-related transactions	CACR: 515.533; 515.545; 515.560-515.567; 515.574-515.576
allowing certain travel services provided by persons under US jurisdiction to provide travel or carrier services for authorised remittances under general licence	CACR: 515.572
permitting allowances sent to Cuban nationals up to 2 000 dollars per quarter, while allowing further remittances (without limitations) on a case-by-case basis for humanitarian projects	CACR: 515.570
allowing total amount of remittances that a traveller may carry to Cuba up to 10 000 dollars	CACR: 515.560
allowing the use of US credit and debit cards as well as allowing US financial institutions to enrol merchants to process such transactions in Cuba for travel-related transactions authorised by law (under section 515.560)	CACR: 515.560-515.584
elimination of per diem spending limits on authorised transactions in Cuba and allowing travellers to import no more than 400 dollars' worth of goods including up to 100 dollars of alcohol or tobacco	CACR: 515.560; 515.584
allowing certain micro-financing transactions activities and training activities for private businesses and agricultural operations	CACR: 515.575
allowing the import of products by independent Cuban entrepreneurs	CACR: 515.582
additional general licence for financial institutions who wish to open correspondent accounts at Cuban financial institutions to facilitate the processing of authorised transactions	CACR: 515.584
'cash in advance' interpretation will be considered as 'cash before transfer of title and control'	CACR: 515.584
authorisation of transactions to provide telecommunications services linking third countries and Cuba and in Cuba	CACR: 515.542
authorising persons subject to US jurisdiction to provide additional services to internet-based communications and related exports and re-exports of communications items	CACR: 515.578
authorising US-owned or controlled entities in third countries to provide goods and services to Cuban nationals in third countries and unblock accounts of Cubans who are permanently relocated abroad; authorise persons subject to US jurisdiction to sponsor and participate in third-country meetings and conferences attended by Cuban nationals	CACR: 515.585; 515.505; 515.581
authorising transfer of funds through the US for third-country officials and international organisation in Cuba	CACR: 515.579
authorisation of transactions conducted by US government officials, foreign officials and international organisation officials in the conduct of their activities in Cuba; authorisation of transactions with Cuban officials on mission in the United States	CACR: 515.560; 515.586
authorising foreign vessels to enter the United States after engaging in certain trade with Cuba	CACR: 515.550
authorising global insurance companies to also cover third-country nationals travelling to Cuba	CACR: 515.580

Table 2

Measures announced by President Obama and introduced in the 2015 amendment of the Export Administration Regulation (EAR)		
<i>Measure</i>	<i>New or amended Licence Exception</i>	<i>Rule amended/ added</i>
authorising export and re-export of certain goods, commercially sold or donated, that can be for use as equipment, tools or materials by private sector business or entrepreneurs or privately owned residences	new licence exception 'Support for the Cuban People'	EAR: 740.21; 746.2
authorising <i>donated</i> items for use in scientific, archaeological, cultural, ecological, educational, historic preservation or sporting activities	new licence exception 'Support for the Cuban People'	EAR: 740.21; 746.2
authorising temporary export of certain items by persons departing from the US for their use in scientific, archaeological, cultural, ecological, educational, historic preservation or sporting activities for their use in their professional research	new licence exception 'Support for the Cuban People'	EAR: 740.21; 746.2
authorising the export and re-export of certain items to human rights organisations, individuals or non-governmental organisations promoting activities to strengthen civil society	new licence exception 'Support for the Cuban People'	EAR: 740.21; 746.2
authorising export and re-export of items for telecommunications, including internet services and internet infrastructure creation and upgrade; export and re-export to Cuba of items for use by media personnel and US news bureau	new licence exception 'Support for the Cuban People'	EAR: 740.21; 746.2
authorising export and re-export of consumer communications devices (such as computers, communication equipment and related items, including personal computers, mobile phones, televisions radios and digital cameras)	revision of the licence exception 'Consumer Communication Devices'	EAR: 740.19
removes the exclusion from eligibility consolidated of multiple parcels shipments for delivery to individuals residing in a third country (i.e. no need for individual licences for each single delivery)	revision of the licence exception 'Gift Parcels and Humanitarian Donations'	EAR: 740.12
export and re-export of items for environmental protection, international air quality, waters and coastlines (including materials for energy or energy efficiency)	new licensing policy for 'Environmental Protection'	EAR: 746.2

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