

# Further Relaxation of Sanctions for Commercial Aircraft Operations in Cuba

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On January 27, the **US Department of Commerce's Bureau of Industry and Security (BIS)** and the **Treasury Department's Office of Foreign Assets Control (OFAC)**, took steps to further ease trade restrictions against Cuba, including transactions relating to the export and operation of civil aircraft in Cuba.<sup>[1]</sup> In order to sell or lease a commercial aircraft to an airline in Cuba, a US national must obtain licenses for each transaction from BIS and OFAC. The changes by BIS relax its licensing policies for certain transactions with Cuba and Cuban nationals, while OFAC lifted financing and payment restrictions for authorized exports, and broadened the scope of authorizations for travel to and from Cuba.

On February 16, the United States and Cuba announced the resumption of scheduled commercial air services between the two countries, and the **US Department of Transportation (DOT)** invited US air carriers to apply for permission to operate scheduled flights to and from Cuba.

As outlined below, these actions may lead to easier opportunities to provide aircraft leasing and related services to prospective customers in Cuba. They also will facilitate travel between the United States and Cuba by allowing US and Cuban airlines to fly scheduled flights between the two countries.

## **BIS Eases Licensing Policy for Exports of Items Necessary to Ensure Civil Aviation Safety**

In light of moves earlier in 2015 to loosen restrictions on trade with Cuba, air travel to and from Cuba has significantly increased in that time. The policy change announced by BIS on January 27 emphasizes "the importance of civil aviation safety and . . . recognize[s] that access to aircraft used in international air transportation that meet US Federal Aviation Administration and European Aviation Safety Agency operating standards by Cuban state-owned enterprises contributes to that safety."

In its notice, BIS indicated that it would move to generally approve license applications for the export of items for the safe operation of commercial aircraft in lieu of reviewing such applications on a case-by-case basis. This policy includes approving license applications for the export of commercial aircraft leased to Cuban state-owned enterprises.

Both commercial passenger and cargo aircraft are eligible for treatment under this revised policy of license approval. However, BIS will continue to generally deny license applications for exports or re-exports of goods (including aircraft) for use by the Cuban military, police, intelligence and security services. BIS also will generally deny such license applications for the export or re-export of goods for use by Cuban government or state-owned entities that primarily generate revenue for the state, including those engaged in tourism and extraction of minerals or raw materials.

BIS also will move from a general policy of denial to a policy of case-by-case review for applications to export certain items to "meet the needs of the Cuban people," including those to Cuban state-owned entities that provide goods and services for the use and benefit of the Cuban people. This policy covers a number of categories, including goods for agricultural production, artistic endeavors, education, food processing, disaster preparedness, public health and sanitation, and public transportation.

## **OFAC Authorizes Certain Arrangements With Cuban Airlines to Facilitate Authorized Travel to Cuba**

In conjunction with BIS, OFAC published its own regulatory amendments to ease restrictions on certain transactions with Cuba and Cuban nationals, including measures to facilitate air carrier services with Cuban airlines.<sup>[2]</sup> OFAC's amendments authorize the entry by US persons into blocked space, code-sharing and leasing arrangements with Cuban nationals to facilitate the provision of authorized air carrier services. OFAC also is allowing travel-related and other transactions directly incident to the facilitation of the temporary sojourn of aircraft authorized for travel to Cuba. This allows US companies to engage with Cuba for services by personnel required for normal aircraft operation, such as aircraft crew, or to provide

services to an aircraft on the ground in Cuba. These allowances are part of a larger expansion of authorized travel to Cuba—from organizing professional meetings, professional sports competitions and other events, to the creation and dissemination of artwork and informational materials.

## **Resumption of Scheduled Air Service Between the United States and Cuba**

The memorandum of understanding signed by the United States and Cuba on February 16 allows for the re-establishment of scheduled commercial air service between both countries. For more than 50 years, there have been no scheduled flights between the United States and Cuba. As a result of the new agreement, a total of 110 daily scheduled round trip flights between the countries will be allowed to be conducted by each country's carriers. Each country will be able to operate up to 20 daily roundtrip flights between the United States and Havana, and up to 10 daily roundtrip flights between the United States and each of nine other destinations in Cuba.

Immediately upon the announcement of the agreement, the DOT invited US carriers to apply for allocation of the new flight opportunities.<sup>[3]</sup> Applications from the US carriers are due to the DOT by March 2. The DOT is to answer those applications by March 14 and carrier replies are due March 21. The scheduled services are expected to begin in the fall 2016. All US carriers to which frequencies are eventually allocated will still be required to comply with all applicable regulations and requirements of the DOT and other US agencies and all US laws. US carriers' ability to provide US-Cuba service through licensed charter flights continues unchanged.

## **Department of Transportation Matters Regarding Blocked Space, Code-Sharing and Wet-Leasing**

The new amendments announced on January 27 allow blocked space, code-sharing or wet-leasing arrangements. As is the case with such arrangements with foreign carriers in general, any proposed blocked space, code-sharing or wet-leasing arrangement between a US air carrier and a Cuban carrier will require the DOT's advance authorization. The DOT must determine whether the proposed operations are in the public interest, by assessing whether such operations meet an acceptable level of safety and security, and whether they will adversely impact competition in the US airline industry.

A US carrier seeking to conduct the activities allowed pursuant to the most recent OFAC amendments must first apply to the DOT for specific authorization for such planned operations.<sup>[4]</sup> The DOT will grant authorization only if the foreign carrier is from a country that complies with the safety standards of the US Federal Aviation Administration's (FAA) International Aviation Safety Assessment (IASA) program and the proposed foreign carrier partner meets the requisite safety standards.<sup>[5]</sup> As part of the DOT's analysis, the FAA will assess the safety oversight functions of the national aviation authority having jurisdiction over the proposed foreign partner's operations.

Based on publicly available information, to date, the safety oversight function of

Cuba's national aviation authority has not been assessed by the FAA.<sup>[6]</sup> In assessing the safety oversight provided by any country's civil aviation authority, the FAA will determine whether such oversight meets the minimum international safety standards established by the International Civil Aviation Organization (ICAO). Cuba is an ICAO member state and, according to the currently available ICAO information, in regard to the ICAO Universal Safety Oversight Audit Programme (USOAP), was audited by ICAO between February 19, 2008 and February 28, 2008, and meets the ICAO minimum safety standards. If the FAA determines that Cuba's USOAP rating satisfies the requirements of the IASA program, it should approve the first prong of the safety assessment of the proposed code-sharing arrangement.

With respect to the proposed foreign carrier, the US carrier seeking authorization for such operations must have an existing FAA-accepted code-share safety program and must conduct safety audits on the proposed foreign partner in accordance with that program. The FAA will review the US carrier's safety audit program, its initial safety audit report on the foreign carrier, and its statement that the foreign carrier is in compliance with international safety standards. Additionally, after authorization is granted, the US carrier must monitor its foreign partner's safety programs for continued compliance during the existence of the approved arrangement. The DOT authorization process also includes review of the terms of the parties' agreement for the proposed operations.

As for arrangements with foreign carriers that will provide service directly to the United States or to US territories, the Transportation Security Administration will provide the DOT with information regarding the security of the foreign carrier and its home country to aid the DOT in its assessment.

In assessing the impact of a proposed arrangement on competitiveness, the DOT will determine whether the agreements are adverse to the public interest because they would substantially reduce or eliminate competition.<sup>[7]</sup> In addition to serving the application for authorization on the requisite US government agencies, the US carrier seeking such authorization also must serve the application on each US-certificated carrier authorized to serve the general area in which the proposed transportation is to be performed. These other carriers may file any comments for consideration by the DOT.<sup>[8]</sup>

Of course, since most of the restrictions under the embargo remain in effect, operations under any such code-sharing, blocked space or wet-leasing arrangement, even if authorized by the DOT, may only be conducted within the scope of authorized US-Cuba transactions noted above.

## **Conclusion**

The actions by BIS and OFAC and the announcements by the DOT will allow for a further expansion of trade activity and facilitate opportunities between the United States and Cuba. However, OFAC and BIS have made clear that they intend to continue enforcing existing sanctions on and trade embargoes with Cuba. Many restrictions will remain in place until US legislators vote to end or modify the embargo against Cuba. For example, the sale or lease by US persons of aircraft or related services to Cuba without a license continues to be restricted. Furthermore,

as it stands now, any aircraft owned by the Cuban government arriving in the United States is subject to immediate seizure in settlement of the billions of dollars in judgments reached in US courts against Cuba in connection with Cuba's nationalization of property owned by Americans and other civil judgments against the Cuban government. Thus, we remind those looking to take advantage of opportunities to sell or lease aircraft or related services to review all licensing applications and potential transactions with Cuba carefully to ensure that they are in compliance with federal laws and regulations.

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[1] See *Cuba Licensing Policy Revisions*, 81 Fed. Reg. 4,580 (Dep't Commerce, Jan. 27, 2016); *Cuban Assets Control Regulations*, 81 Fed. Reg. 4,583 (Dep't Treasury, Jan. 27, 2016).

[2] OFAC now allows for financing and payment of authorized transactions through US banks or through sales on an open account. These changes were made to address the inability of customers in Cuba to obtain financing or for authorized transactions with the United States, due to more restrictive payment and financing arrangements.

[3] See, *Order Instituting Proceeding and Inviting Applications*, 2016 U.S. – Cuba Frequency Allocation Proceeding, issued by the US Department of Transportation, Docket DOT-OST-2016-0021, February 16, 2016.

[4] The foreign carrier also must comply with all other relevant regulations, and hold all requisite DOT authorizations, prior to conducting any of the newly-allowed operations.

[5] See Department of Transportation Office of the Secretary and Federal Aviation Administration Code-Share Safety Program Guidelines, 12/21/2006, Revision 1.

[6] As Cuban carriers have not provided service to the US or participated in code-sharing arrangements with US carriers, and the Cuban national aviation authority has not significantly interacted with the FAA, for a four-year period, Cuba is not included on the publicly available IASA program summary listing, in accordance with standard FAA procedures. Before Cuba can be rated in the IASA program, a full reassessment of its aviation safety oversight must be conducted by the FAA.

[7] 49 U.S.C. 41309(b). Further, in accordance with 49 U.S.C. 41308(b), if it is determined that competition would not be reduced or eliminated, the DOT must approve the proposed agreement. If it is determined that competition would be adversely affected, but the DOT finds that (1) the arrangement is nevertheless necessary to meet a serious transportation need or to achieve important public benefits, including US foreign policy goals, and (2) those public benefits cannot be met or achieved by reasonably available and materially less anticompetitive alternatives, the DOT must approve the agreement.

[8] The DOT, the FAA, the Department of Defense, the Anti-trust division of the Department of Justice and any other US agency the DOT deems necessary must be served, in addition to the other carriers. 14 C.F.R. 212.10(d)(6). See also, Code-Share Safety Program Guidelines, *infra* at n. 5.

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