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DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Cuba: Revisions to License Exceptions and Licensing Policy

15 CFR Parts 736, 740, and 746

[Docket No. 160303178-6178-01]

RIN 0694-AG86

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final rule.

SUMMARY: This rule allows vessels departing the United States on temporary sojourn to Cuba with cargo for other destinations to travel to Cuba under a license exception rather than having to obtain a license for the cargo bound for those other destinations to transit Cuba. This rule also authorizes exports of certain items to persons authorized by the Department of the Treasury to establish and maintain a physical or business presence in Cuba. Finally, the rule would adopt a licensing policy of case-by-case review for exports and reexports of items that would enable or facilitate export of items produced by the private sector in Cuba, subject to certain limitations.

DATES: Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Foreign Policy Division, Bureau of Industry and Security, Phone: (202) 482-4252.

SUPPLEMENTARY INFORMATION:

Background

On December 17, 2014, the President announced a historic new approach in U.S. policy toward Cuba. This approach recognized that increased engagement and commerce benefits the American and Cuban people, and sought to make the lives of ordinary Cubans easier and more prosperous. On January 16, 2015, the Bureau of Industry and Security (BIS) amended the Export Administration Regulations (EAR) to create License Exception Support for the Cuban People (SCP), which authorizes the export and reexport, without a license, of certain items to, among other objectives, improve the living conditions of the Cuban people (*see* 80 FR 2286). The rule also made other changes to license exceptions and licensing policy. *Id.*

On July 22, 2015, BIS published a rule implementing the May 29, 2015, rescission of Cuba's designation as a state sponsor of terrorism (*see* 80 FR 43314). That rule expanded certain license exception availability for exports and reexports to Cuba, including making general aviation aircraft eligible for temporary sojourns to Cuba.

On September 21, 2015, BIS published a rule to enhance support for the Cuban people (*see* 80 FR 56898). This rule expanded the scope of transactions that are eligible for License Exception SCP and made certain vessels on temporary sojourn to Cuba eligible for a license exception.

On January 27, 2016, BIS published a rule that amended the licensing policy in § 746.2 of the EAR to add a general policy of approval for certain exports and reexports previously subject to case-by-case review and a policy of case-by-case review for exports and reexports of items not eligible for License Exception SCP to meet the needs of the Cuban people, including exports and reexports made to state-owned enterprises and agencies and organizations of the

Cuban government that provide goods and services to the Cuban people, subject to certain restrictions (*see* 81 FR 4580).

Today, BIS is taking this action in coordination with the Department of the Treasury, Office of Foreign Assets Control (OFAC), which is amending the Cuban Assets Control Regulations (31 CFR part 515).

This rule revises License Exception Aircraft, Vessels and Spacecraft (AVS) in § 740.15 to authorize transit through Cuban territory of cargo, laden aboard a vessel on temporary sojourn to Cuba, that is destined for other countries rather than require a license for that cargo to transit Cuban territory provided that such cargo departs with the vessel at the end of its temporary sojourn, does not enter the Cuban economy and is not transferred to another vessel while in Cuba. This change allows for efficient use of vessels that carry cargo from the United States to Cuba and to other countries and allows exporter carriers to select efficient routes. This rule also adds a note reminding readers to consult Coast Guard regulations on unauthorized entry into Cuban territorial waters.

This rule revises License Exception SCP to authorize export or reexport of EAR99 items and items controlled on the Commerce Control List only for anti-terrorism reasons for use by persons authorized to establish and maintain a physical or business presence in Cuba by the Department of the Treasury, Office of Foreign Assets Control pursuant to 31 CFR 515.573 or pursuant to a specific license issued by OFAC. Prior to this rule, License Exception SCP enumerated the activities for which OFAC had authorized such physical or business presence by general license. Simultaneously with the publication of this rule, OFAC is publishing an amendment to 31 CFR 515.573 to authorize additional persons subject to U.S. jurisdiction to establish a business and physical presence in Cuba. BIS's intent is to authorize by license

exception the export and reexport of items needed to establish and maintain a physical or business presence in Cuba, to all persons authorized by OFAC to have such a presence. The simplest way to do this is to reference the applicable section in OFAC's Cuban Assets Control Regulations ("CACR"), *i.e.*, 31 CFR 515.573 and specific licenses issued by OFAC rather than to revise the EAR to repeat any changes made to that CACR section.

This rule also revises EAR licensing policy regarding Cuba to adopt a policy of case-by-case review of license applications to export or reexport items that will enable or facilitate exports from Cuba of items produced by Cuba's private sector. BIS is adopting this policy to reinforce the Cuba case-by-case licensing policy adopted prior to this rule, which focuses on exports and reexports that would be used in ways that meet the needs of the Cuban people. Enabling or facilitating exports of items produced by the Cuban private sector, under certain circumstances will also help meet the needs of the Cuban people and is consistent with the Administration's policy of supporting the ability of the Cuban people to gain greater control over their own lives and determine their country's future. However, BIS will conduct the case-by-case review consistent with the policy standard set forth in § 746.2(b)(3)(i) of the EAR, which provides that "BIS generally will deny applications to export or reexport items for use by state-owned enterprises, agencies, and other organizations that primarily generate revenue for the state, including those engaged in tourism and those engaged in the extraction or production of minerals or other raw materials. Applications for export or reexport of items destined to the Cuban military, police, intelligence or security services also generally will be denied."

This rule revises Note 1 to § 746.2(b)(3)(i) of the EAR, which describes a condition that will generally be included on licenses to prohibit reexport of the items authorized by the license or use of those items to enable or facilitate exports from Cuba. The revision makes clear that the

condition applies to reexports from Cuba or uses that enable or facilitate exports from Cuba that primarily generate revenue for the state. BIS is making this change because enabling or facilitating exports of items produced by the Cuban private sector under certain circumstances will help meet the needs of the Cuban people and is consistent with the Administration's policy of supporting the ability of the Cuban people to gain greater control over their own lives and determine their country's future.

Specific changes made by this rule.

This rule revises § 736.2(b)(8) of the EAR, which prohibits shipments from transiting certain destinations, to explicitly state that the prohibition does not apply if a license or license exception authorizes the in-transit shipment.

This rule revises § 740.15(d)(6) of the EAR to authorize temporary sojourn to Cuba of a vessel carrying cargo destined to other countries provided that such cargo departs with the vessel at the end of its temporary sojourn to Cuba, does not enter the Cuban economy and is not transferred to another vessel while in Cuba.

This rule revises § 740.21(e) to remove the individual references to categories of persons authorized by OFAC to establish and maintain a physical or business presence in Cuba pursuant to 31 CFR 515.573, and to authorize exports and reexports to all such persons and to persons whose physical or business presence is authorized by a specific license issued by OFAC.

This rule revises § 746.2(b)(3)(i), to add a paragraph (b)(3)(i)(D), which sets a policy of case-by-case review of items that will enable or facilitate export from Cuba of items produced by the Cuban private sector. It also revises Note 1 to clarify that the license condition described therein is intended to preclude use of items authorized by licenses bearing that condition from

being reexported from Cuba or being used to enable or facilitate exports from Cuba that primarily generate revenue for the state.

BIS is making these changes to facilitate further support of and engagement with the Cuban people.

Export Administration Act

Although the Export Administration Act expired on August 20, 2001, the President, through Executive Order 13222 of August 17, 2001, 3 CFR, 2001 Comp., p. 783 (2002), as amended by Executive Order 13637 of March 8, 2013, 78 FR 16129 (March 13, 2013), and as extended by the Notice of August 7, 2015, 80 FR 48233 (August 11, 2015), has continued the Export Administration Regulations in effect under the International Emergency Economic Powers Act. BIS continues to carry out the provisions of the Export Administration Act, as appropriate and to the extent permitted by law, pursuant to Executive Order 13222 as amended by Executive Order 13637.

Rulemaking Requirements

1. Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a “significant regulatory action,” although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget (OMB).

2. Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) control number. This rule involves a collection of information approved under OMB control number 0694-0088—Simplified Network Application Processing+ System (SNAP+) and the Multipurpose Export License Application, which carries an annual estimated burden of 31,833 hours. BIS believes that this rule will have no material impact on that burden. To the extent that it has any impact, BIS believes that the benefits of this rule justify any additional burden it creates. This rule does not impose any new license requirements, it creates less restrictive licensing policies (*i.e.*, the policies under which the decision to approve or deny a license application is made) for exports and reexports to Cuba. These less restrictive policies might increase the number of license applications submitted to BIS because applicants might be more optimistic about obtaining approval. However, the benefit to license applicants in the form of greater likelihood of approval justifies any additional burden. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to Jasmeet K. Seehra, Office of Management and Budget, by email at jseehra@omb.eop.gov or by fax to (202) 395-7285 and to William Arvin at william.arvin@bis.doc.gov.

3. This rule does not contain policies with Federalism implications as that term is defined under Executive Order 13132.

4. The provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking and the opportunity for public participation, and a delay in effective date,

are inapplicable because this regulation involves a military or foreign affairs function of the United States (*see* 5 U.S.C. 553(a)(1)). This rule is part of a foreign policy initiative to change the nature of the relationship between Cuba and the United States announced by the President on December 17, 2014. Delay in implementing this rule to obtain public comment would undermine the foreign policy objectives that the rule is intended to implement. Further, no other law requires that a notice of proposed rulemaking and an opportunity for public comment be given for this rule. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under 5 U.S.C. 553, or by any other law, the requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable.

List of Subjects

15 CFR Part 736

Exports

15 CFR Part 740

Administrative practice and procedure, Exports, Reporting and recordkeeping requirements

15 CFR Part 746

Exports, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 15 CFR Chapter VII, Subchapter C is amended as follows:

PART 736 – [AMENDED]

1. The authority citation for part 736 continues to read as follows:

Authority: 50 U.S.C. 4601 *et seq.*; 50 U.S.C. 1701 *et seq.*; 22 U.S.C. 2151 note; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13020, 61 FR 54079, 3 CFR, 1996 Comp., p. 219; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13338, 69 FR 26751, 3 CFR, 2004 Comp., p. 168; Notice of May 6, 2015, 80 FR 26815 (May 8, 2015); Notice of August 7, 2015, 80 FR 48233 (August 11, 2015); Notice of November 12, 2015, 80 FR 70667 (November 13, 2015).

2. Section 736.2 is amended by revising paragraph (b)(8)(i) to read as follows:

§ 736.2 General prohibitions and determination of applicability.

* * * * *

(b) * * *

(8) * * *

(i) *Unlading and shipping in transit.* You may not export or reexport an item through, or transit through a country listed in paragraph (b)(8)(ii) of this section, unless a license exception or license authorizes such an export or reexport directly to or transit through such a country of transit, or unless such an export or reexport is eligible to such a country of transit without a license.

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PART 740 – [AMENDED]

3. The authority citation for part 740 continues to as follows:

Authority: 50 U.S.C. 4601 *et seq.*; 50 U.S.C. 1701 *et seq.*; 22 U.S.C. 7201 *et seq.*; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 7, 2015, 80 FR 48233 (August 11, 2015).

4. Section 740.15 is amended by revising paragraph (d)(6) to read as follows:

§ 740.15 Aircraft, vessels and spacecraft (AVS).

* * * * *

(d) * * *

(6) *Cuba*—(i) *Eligible vessels and purposes.* Only the types of vessels listed in this paragraph (d)(6)(i) departing for Cuba for the purposes listed in this paragraph (d)(6)(i) may depart for Cuba pursuant to this paragraph (d). Vessels used to transport both passengers and items to Cuba may transport automobiles only if the export or reexport of the automobiles to Cuba has been authorized by a separate license issued by BIS (*i.e.*, not authorized by license exception).

(A) Cargo vessels for hire for use in the transportation of items;

(B) Passenger vessels for hire for use in the transportation of passengers and/or items; and

(C) Recreational vessels that are used in connection with travel authorized by the Department of the Treasury, Office of Foreign Assets Control (OFAC).

Note to paragraph (d)(6)(i)(C): Readers should also consult U.S. Coast Guard regulations at 33 CFR Part 107 Subpart B – Unauthorized Entry into Cuban Territorial Waters.

(ii) *Intransit cargo*. Cargo laden on board a vessel may transit Cuba provided:

(A) The vessel is exported or reexported on temporary sojourn to Cuba pursuant to this paragraph (d) or a license from BIS; and

(B) The cargo departs with the vessel at the end of its temporary sojourn to Cuba, does not enter the Cuban economy and is not transferred to another vessel while in Cuba.

Note to paragraph (d). A vessel exported or reexported to a country pursuant to this paragraph (d) may not remain in that country for more than 14 consecutive days before it departs for a country to which it may be exported without a license or the United States.

* * * * *

5. Section 740.21 is amended by:

a. Revising paragraph (e)(1);

b. Removing paragraph (e)(2);

c. Redesignating paragraph (e)(3) as (e)(2); and

d. Revising the note to paragraph (e).

The revisions read as follows:

§ 740.21 Support for the Cuban People (SCP).

* * * * *

(e) * * *

(1) The export or reexport to Cuba of items for use by persons authorized by the Department of the Treasury, Office of Foreign Assets Control (OFAC) to establish and maintain a physical or business presence in Cuba pursuant to 31 CFR 515.573 or pursuant to a specific license issued by OFAC. The items authorized pursuant to this paragraph (e)(1) are limited to those designated as EAR99 (i.e., items subject to the EAR but not specified in any ECCN) or controlled on the CCL only for anti-terrorism reasons.

* * * * *

Note to paragraph (e). Any resulting payments associated with establishing or maintaining a physical or business presence in Cuba, such as lease payments, are permitted only to the extent authorized by 31 CFR 515.573 or a specific license issued by OFAC.

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PART 746 – [AMENDED]

6. The authority citation for part 746 continues to read as follows:

Authority: 50 U.S.C. 4601 *et seq.*; 50 U.S.C. 1701 *et seq.*; 22 U.S.C. 287c; Sec 1503, Pub. L. 108-11, 117 Stat. 559; 22 U.S.C. 6004; 22 U.S.C. 7201 *et seq.*; 22 U.S.C. 7210; E.O. 12854, 58 FR 36587, 3 CFR, 1993 Comp., p. 614; E.O. 12918, 59 FR 28205, 3 CFR, 1994 Comp., p. 899; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13338, 69 FR 26751, 3 CFR, 2004 Comp., p 168; Presidential Determination 2003-23, 68 FR 26459, 3 CFR, 2004 Comp., p. 320; Presidential Determination 2007-7, 72 FR 1899, 3 CFR, 2006 Comp., p. 325; Notice of May 6, 2015, 80 FR 26815 (May 8, 2015); Notice of August 7, 2015, 80 FR 48233 (August 11, 2015).

7. Section 746.2 is amended by:

- a. Removing the word “and” from the end of paragraph (b)(3)(i)(B);
- b. Removing the period from the end of paragraph (b)(3)(i)(C) and adding “; and” in its place;
- c. Adding paragraph (b)(3)(i)(D); and
- d. Revising Note 1 to paragraph (b)(3)(i).

The addition and revision read as follows:

§ 746.2 Cuba.

* * * * *

(b) * * *

(3) * * *

(i) * * *

(D) Items that will enable or facilitate export from Cuba of items produced by the private sector.

Note 1 to paragraph (b)(3)(i): Licenses issued pursuant to the policy set forth in this paragraph generally will have a condition prohibiting both reexports from Cuba to any other destination and uses that enable or facilitate the export of goods or services from Cuba, that primarily generate revenue for the state.

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Dated: March 14, 2016

Kevin J. Wolf

Assistant Secretary for Export Administration

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