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DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Cuba: Revisions to License Exceptions

15 CFR Parts 740 and 746

[Docket No. 160915848-6952-01]

RIN 0694-AH12

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final rule.

SUMMARY: This rule amends a license exception to allow cargo aboard aircraft to transit Cuba when that cargo is bound for destinations other than Cuba. This rule also authorizes export and reexport of certain items sold directly to individuals in Cuba under a license exception. Finally, this rule revises the lists of ineligible Cuban officials for purposes of certain license exceptions. BIS is publishing this rule to further implement the administration's policy of increasing engagement and commerce that benefits the Cuban people.

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 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. In furtherance of that policy, and in coordination with the Department of the Treasury's Office of Foreign Assets Control (OFAC), the Bureau of Industry and Security published five rules amending the Export Administration Regulation (EAR) between January 16, 2015, and March 16, 2016 (*see* 80 FR 2286, 80 FR 43314, 80 FR 56898, 81 FR 4580, and 81 FR 13972). Collectively these rules established License Exception Support for the Cuban People (SCP) (§ 740.21 of the EAR) and revised existing license exceptions and licensing policy in the EAR for Cuba.

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

This rule continues the President's policy of increasing engagement and commerce between the United States and Cuba by making cargo transiting Cuba via aircraft on temporary sojourn eligible for License Exception Aircraft, Vessels and Spacecraft (AVS) (§ 740.15 of the EAR), placing it on par with such cargo aboard vessels on temporary sojourn to Cuba. This rule

also makes a non-substantive clarifying edit in describing the limits that apply to the transiting cargo. Previously, one of those limits read: “The cargo . . . does not enter the Cuban economy” This rule revises that limit to read: “The cargo . . . is not removed from the aircraft or vessel for use in Cuba. . . .” BIS believes that the latter more clearly expresses the underlying concept, *i.e.*, that the cargo must truly be in transit to be eligible for this license exception. This final rule continues to apply the other limits of License Exception AVS (that the cargo must not be transferred to another vessel and must leave with the same vessel when it departs) to aircraft as well as vessels without any substantive change.

In furtherance of the President’s policy to support the Cuban people, this rule also makes exports or reexports of eligible items sold directly to eligible individuals in Cuba for their personal use or their immediate family’s personal use eligible for License Exception SCP. To be eligible, the items must be designated as EAR99 or controlled on the Commerce Control List (CCL) (Supplement No. 1 to Part 774 of the EAR) only for anti-terrorism reasons. Additionally, the purchasers and end users must not be members of the Council of Ministers, flag officers of the Revolutionary Armed Forces, or members of the Politburo. This amendment to License Exception SCP facilitates direct sales to individuals in Cuba by online retailers and others that sell eligible consumer products directly to end users. This new provision of License Exception SCP complements existing authorizations in the EAR. License Exception SCP already authorizes the export or reexport to Cuba of certain items for use by the Cuban private sector. There is an existing case-by-case licensing policy for the export or reexport to Cuba of items that would meet the needs of the Cuban people, including items for wholesale and retail distribution for domestic consumption by the Cuban people. Additionally, certain donations to the Cuban people have been authorized pursuant to License Exceptions Gift Parcels and Humanitarian

Donations (GFT) (§ 740.12 of the EAR), Consumer Communications Devices (CCD) (§ 740.19 of the EAR), and SCP.

Finally, this rule revises the lists of Cuban government and Cuban Communist Party officials that are ineligible for provisions of three license exceptions: individual gift parcels (GFT, § 740.12(a) of the EAR), consumer communications devices (CCD, § 740.19 of the EAR), and software and commodities that will be used by the private sector or by individuals to improve the free flow of communications or support certain private sector activities in Cuba (SCP, § 740.21(d)(4) of the EAR). Under this rule, ineligible recipients are limited to members of the Council of Ministers, flag officers of the Revolutionary Armed Forces, and members of the Politburo. BIS is revising these lists to correspond to amendments that OFAC is making to its definitions of prohibited officials of the Government of Cuba and prohibited members of the Cuban Communist Party in §§ 515.337 and 515.338 of the CACR, respectively.

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 4, 2016, 81 FR 52587 (August 8, 2016), 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 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 significant impact on that burden. To the extent that it has any impact, BIS believes that this rule will reduce the paperwork burden to the public because it will make some transactions that currently require a license from BIS eligible for a license exception. In those instances, exporters and reexporters will be relieved of the burden of applying for a license.

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 a 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 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 740 – [AMENDED]

1. The authority citation for part 740 continues to read 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 4, 2016, 81 FR 52587 (August 8, 2016).

2. Section 740.12 is amended by revising paragraphs (a)(2)(v)(A) and (B) to read as follows:

§ 740.12 Gift parcels and humanitarian donations (GFT).

(a) * * *

(2) ***

(v) ***

(A) No gift parcel may be sent to any member of the Council of Ministers or flag officer of the Revolutionary Armed Forces.

(B) No gift parcel may be sent to any member of the Politburo.

3. Section 740.15 is amended by revising the introductory text and paragraph (d)(6), removing the second (duplicate) “note to paragraph (d),” redesignating paragraph (e) as paragraph (f), and adding a new paragraph (e) to read as follows:

§ 740.15 Aircraft, vessels and spacecraft (AVS).

This License Exception authorizes departure from the United States of foreign registry civil aircraft on temporary sojourn in the United States and of U.S. civil aircraft for temporary sojourn abroad; the export of equipment and spare parts for permanent use on a vessel or aircraft; exports to vessels or planes of U.S. or Canadian registry and U.S. or Canadian Airlines’ installations or agents; the export or reexport of cargo that will transit Cuba on an aircraft or vessel on temporary sojourn; and the export of spacecraft and components for fundamental research. Generally, no License Exception symbol is necessary for export clearance purposes; however, when necessary, the symbol “AVS” may be used.

(d) * * *

(6) *Cuba, eligible vessels and purposes.* Only the types of vessels listed in this paragraph (d)(6) departing for Cuba for the purposes listed in this paragraph (d)(6) 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).

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

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

(iii) 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)(iii): Readers should also consult U.S. Coast Guard regulations at 33 CFR part 107 Subpart B—Unauthorized Entry into Cuban Territorial Waters.

* * * * *

(e) *Intransit cargo.* Cargo laden on board an aircraft or vessel may transit Cuba provided:

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

(2) The cargo departs with the aircraft or vessel at the end of its temporary sojourn to Cuba, is not removed from the aircraft or vessel for use in Cuba and is not transferred to another aircraft or vessel while in Cuba.

* * * * *

4. Section 740.19 is amended by revising paragraphs (c)(2)(i) and (ii) to read as follows:

§ 740.19 Consumer communications devices (CCD).

(c) ***

(2) ***

(i) *Ineligible Cuban Government Officials.* Members of the Council of Ministers and flag officers of the Revolutionary Armed Forces.

(ii) *Ineligible Cuban Communist Party Officials.* Members of the Politburo.

5. Section 740.21 is amended by:

a. Removing the word “or” from the end of paragraph (b)(2);

b. Removing the period from the end of paragraph (b)(3) and adding in its place “; or”;

c. Adding paragraph (b)(4) and;

d. Revising paragraphs (d)(4)(ii) and (iii).

The addition and revisions read as follows:

§ 740.21 Support for the Cuban People (SCP).

(b) ***

(4) Items sold directly to individuals in Cuba for their personal use or their immediate family’s personal use, other than officials identified in paragraphs (d)(4)(ii) or (iii) of this section.

(d) ***

(4) ***

(ii) Members of the Council of Ministers and flag officers of the Revolutionary Armed Forces;
and

(iii) Members of the Politburo.

PART 746 – [AMENDED]

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

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 3, 2016, 81 FR 27293 (May 5, 2016); Notice of August 4, 2016, 81 FR 52587 (August 8, 2016).

7. Section 746.2 is amended by revising paragraph (a)(1)(x) to read as follows:

§ 746.2 Cuba.

(a) ***

(1) ***

(x) Aircraft, vessels and spacecraft (AVS) for certain aircraft on temporary sojourn; equipment and spare parts for permanent use on a vessel or aircraft, and ship and plane stores; vessels on temporary sojourn; or cargo transiting Cuba on aircraft or vessels on temporary sojourn (*see* § 740.15(a), (b), (d), and (e) of the EAR).

Dated: October 11, 2016

Matthew S. Borman

Deputy Assistant Secretary for Export Administration

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