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DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 740 and 746

[Docket No. 171013999-7999-01]

RIN 0694-AH47

Amendments to Implement United States Policy toward Cuba

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final rule.

SUMMARY: This rule amends the licensing policy for Cuba and portions of three license exceptions available for exports and reexports to Cuba: License Exceptions Gift Parcels and Humanitarian Donations (“GFT”), Consumer Communications Devices (“CCD”), and Support for the Cuban People (“SCP”). The Bureau of Industry and Security is publishing this rule to implement portions of the National Security Presidential Memorandum on Strengthening the Policy of the United States Toward Cuba, dated June 16, 2017.

DATES: This rule is 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 June 16, 2017, President Trump announced changes to U.S. policy toward Cuba that are intended to enhance compliance with United States law; hold the Cuban regime accountable for oppression and human rights abuses; further the national security and foreign policy interests of the United States and the interests of the Cuban people; and lay the groundwork for empowering the Cuban people to develop greater economic and political liberty. The President's policy is stated in the National Security Presidential Memorandum on Strengthening the Policy of the United States Toward Cuba ("Cuba NSPM"), dated June 16, 2017. The Cuba NSPM also directs the Secretary of Commerce, as well as the Secretaries of State and the Treasury, to take certain actions to implement the President's Cuba policy.

The Department of Commerce's Bureau of Industry and Security ("BIS") is issuing this final rule to implement portions of the Cuba NSPM. The Department of the Treasury's Office of Foreign Assets Control ("OFAC") and the Department of State are simultaneously publishing related actions in the *Federal Register*.

Specific Changes Made by This Rule

Cuba Licensing Policy

In accordance with the statutory embargo of Cuba, license applications for the export or reexport to Cuba of items subject to the Export Administration Regulations ("EAR") currently are subject to a general policy of denial unless the transactions are eligible for another review policy stated in § 746.2(b). License applications for certain export or reexport transactions are reviewed on a case-by-case basis or under a general policy of approval, depending upon the types of items, end uses, and end users involved, as described in the EAR.

On January 27, 2016, BIS created a case-by-case licensing policy in paragraph (b)(3)(i) of § 746.2 of the EAR for applications to export or reexport items to meet the needs of the Cuban people, including exports and reexports of such items to state-owned enterprises, agencies, and other organizations of the Cuban government that provide goods and services for the use and benefit of the Cuban people (81 FR 4580). Note 2 to paragraph (b)(3)(i) explains 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. Note 2 to paragraph (b)(3)(i) also explains that BIS generally will deny applications for the export or reexport of items destined to the Cuban military, police, intelligence, or security services.

Pursuant to section 3(a) of the Cuba NSPM, this rule amends note 2 to paragraph (b)(3)(i) of § 746.2 of the EAR to clarify that BIS also generally will deny applications for the export or reexport of items for use by certain entities or subentities the State Department identifies on its List of Restricted Entities and Subentities associated with Cuba (“Cuba Restricted List”), unless such transactions are determined to be consistent with the Cuba NSPM. Section 3(a)(i) of the Cuba NSPM directs the Secretary of State to publish a list of entities and subentities that it has determined 1) are under the control of, or act for or on behalf of, the Cuban military, intelligence, or security services or personnel and 2) with which direct financial transactions would disproportionately benefit such services or personnel at the expense of the Cuban people or private enterprise in Cuba (Cuba Restricted List). Today the Department of State is publishing that list in the *Federal Register* and posting it on its website at <https://www.state.gov/e/eb/tfs/spi/cuba/cubarestrictedlist/index.htm>.

Section 3(a)(ii) of the Cuba NSPM states that regulatory changes made pursuant to section 3(a) shall prohibit direct financial transactions with entities or subentities identified by the Department of State's Cuba Restricted List unless the transactions are determined by the Secretary of Commerce or the Secretary of the Treasury, in coordination with the Secretary of State, to be consistent with the policy in section 2 and the criteria specified in section 3(a)(iii)(A)-(I) of the Cuba NSPM. Consequently, license applications submitted to BIS that involve one or more parties on the Department of State's Cuba Restricted List generally will be denied unless the transactions are determined by BIS, in coordination with the Department of State, to be consistent with the aforementioned sections of the Cuba NSPM.

Prohibited Cuban Government Officials

License exceptions authorize certain exports and reexports pursuant to specified terms and conditions. Only the license exceptions specified in § 746.2(a)(1) of the EAR are available for exports and reexports to Cuba. License Exceptions Gift Parcels and Humanitarian Donations ("GFT"), Consumer Communications Devices ("CCD"), and Support for the Cuban People ("SCP") (§§ 740.12, 740.19, and 740.21 of the EAR, respectively) specify certain eligible and ineligible Cuban transaction parties. On October 17, 2016, BIS revised its list of ineligible Cuban government officials in §§ 740.12(a)(2)(v)(A), 740.19(c)(2)(i), and 740.21(d)(4)(ii) of the EAR to correspond to amendments OFAC made to its definition of prohibited officials of the Government of Cuba in § 515.337 of the Cuban Assets Control Regulations ("CACR") (31 CFR part 515) (81 FR 71365).

In accordance with section 3(d) of the Cuba NSPM, today OFAC is amending its definition of prohibited officials of the Government of Cuba to include certain additional

individuals. This rule amends the list of ineligible Cuban government officials in §§ 740.12(a)(2)(v)(A), 740.19(c)(2)(i), and 740.21(d)(4)(ii) of the EAR to conform with OFAC's amendment.

Cuban Private Sector

On January 16, 2015, BIS created License Exception Support for the Cuban People (SCP) in § 740.21 of the EAR to authorize the export and reexport of certain items to Cuba that are intended to improve the living conditions of the Cuban people; support independent economic activity and strengthen civil society in Cuba; and improve the free flow of information to, from, and among the Cuban people (80 FR 2286). On September 21, 2015, March 16, 2016, and October 17, 2016, BIS amended License Exception SCP to authorize additional categories of exports and reexports intended to further benefit the Cuban people (80 FR 56898, 81 FR 13972, and 81 FR 71365, respectively).

Consistent with section 2(d) of the Cuba NSPM, this rule revises § 740.21(b) to further support free enterprise in Cuba. Prior to this rule, the text in § 740.21(b)(1)-(3) identified certain types of items, such as tools and equipment, that were eligible for export or reexport to Cuba for 1) use by the private sector to construct or renovate privately-owned buildings, 2) private sector agricultural activities, or 3) use by private sector entrepreneurs. This rule simplifies and expands § 740.21(b) by creating a single provision authorizing the export and reexport to Cuba of items, without specifying types, for use by the Cuban private sector for private sector economic activities. To be eligible for this provision, the items may not be used to primarily generate revenue for the state or used to contribute to the operation of the state, including through the construction or renovation of state-owned buildings. Additionally, eligible items are limited to

those that are designated as EAR99 or controlled only for anti-terrorism reasons on the Commerce Control List (“CCL”). Of note, medicines, medical devices, and agricultural commodities are not eligible for any provision of License Exception SCP due to limitations in the Cuban Democracy Act of 1992, as amended (22 U.S.C. 6001-6010) and the Trade Sanctions Reform and Export Enhancement Act of 2000, as amended (22 U.S.C. 7201-7211).

Export Administration Act

Although the Export Administration Act of 1979 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 15, 2017, 82 FR 39005 (August 16, 2017), 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 of 1979, 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). This rule is not subject to the requirements of E.O. 13771 (82 FR 9339, February 3, 2017) because it is issued with respect to a foreign affairs function of the United States.

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. Although this rule makes certain additional Cuban government officials ineligible for specified license exceptions, BIS believes that this change will result in the submission of very few, if any, additional license applications.

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.

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 implements portions of the President Trump's policy toward Cuba, as directed by the National Security Presidential Memorandum on Strengthening the Policy of the United States Toward Cuba, dated June 16, 2017. 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 15, 2017, 82 FR 39005 (August 16, 2017).

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

§740.12 Gift parcels and humanitarian donations (GFT).

(a) * * *

(2) * * *

(v) * * * (A) No gift parcel may be sent to any of the following officials of the Cuban government: Ministers and Vice-Ministers; members of the Council of State; members of the Council of Ministers; members and employees of the National Assembly of People's Power; members of any provincial assembly; local sector chiefs of the Committees for the Defense of the Revolution; Director Generals and sub-Director Generals and higher of all Cuban ministries and state agencies; employees of the Ministry of the Interior (MININT); employees of the Ministry of Defense (MINFAR); secretaries and first secretaries of the Confederation of Labor of Cuba (CTC) and its component unions; chief editors, editors and deputy editors of Cuban state-

run media organizations and programs, including newspapers, television, and radio; or members and employees of the Supreme Court (Tribuno Supremo Nacional).

* * * * *

3. Section 740.19 is amended by revising paragraph (c)(2)(i) to read as follows:

§ 740.19 Consumer Communications Devices (CCD).

* * * * *

(c) * * *

(2) * * *

(i) *Ineligible Cuban Government Officials.* Ministers and Vice-Ministers; members of the Council of State; members of the Council of Ministers; members and employees of the National Assembly of People’s Power; members of any provincial assembly; local sector chiefs of the Committees for the Defense of the Revolution; Director Generals and sub-Director Generals and higher of all Cuban ministries and state agencies; employees of the Ministry of the Interior (MININT); employees of the Ministry of Defense (MINFAR); secretaries and first secretaries of the Confederation of Labor of Cuba (CTC) and its component unions; chief editors, editors and deputy editors of Cuban state-run media organizations and programs, including newspapers, television, and radio; or members and employees of the Supreme Court (Tribuno Supremo Nacional).

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4. Section 740.21 is amended by:

a. Revising paragraph (b)(1);

- b. Removing paragraphs (b)(2) and (3);
- c. Redesignating paragraph (b)(4) as new paragraph (b)(2); and
- d. Revising paragraph (d)(4)(ii) to read as follows:

§ 740.21 Support for the Cuban People (SCP).

* * * * *

(b) * * *

(1) Items for use by the Cuban private sector for private sector economic activities, except for items that would be used to:

- (i) Primarily generate revenue for the state; or
- (ii) Contribute to the operation of the state, including through the construction or renovation of state-owned buildings.

(2) 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) Ministers and Vice-Ministers; members of the Council of State; members of the Council of Ministers; members and employees of the National Assembly of People's Power; members of any provincial assembly; local sector chiefs of the Committees for the Defense of the Revolution; Director Generals and sub-Director Generals and higher of all Cuban ministries and state agencies; employees of the Ministry of the Interior (MININT); employees of the Ministry of Defense (MINFAR); secretaries and first secretaries of the Confederation of Labor of Cuba (CTC) and its component unions; chief editors, editors and deputy editors of Cuban state-run

media organizations and programs, including newspapers, television, and radio; or members and employees of the Supreme Court (Tribuno Supremo Nacional); and

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PART 746-[AMENDED]

5. 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 9, 2017, 82 FR 21909 (May 10, 2017); Notice of August 15, 2017, 82 FR 39005 (August 16, 2017).

6. Section 746.2 is amended by revising Note 2 to Paragraph (b)(3)(i) to read as follows:

§746.2 Cuba.

* * * * *

(b) * * *

(3) * * *

(i) * * *

NOTE 2 TO PARAGRAPH (b)(3)(i): The policy of case-by-case review in this paragraph is intended to facilitate exports and reexports to meet the needs of the Cuban people. Accordingly, 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. Additionally, pursuant to section 3(a) of the National Security Presidential Memorandum on Strengthening the Policy of the United States Toward Cuba (NSPM), dated June 16, 2017, BIS generally will deny applications to export or reexport items for use by entities or subentities identified by the Department of State in the *Federal Register* or at <https://www.state.gov/e/eb/tfs/spi/cuba/cubarestrictedlist/index.htm>, unless such transactions are determined to be consistent with sections 2 and 3(a)(iii) of the NSPM.

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Dated: November 6, 2017.

Richard E. Ashooh,

Assistant Secretary for Export Administration.
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