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DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Cuba Licensing Policy Revisions

15 CFR Part 746

[Docket No. 151208999-5999-01]

RIN 0694-AG79

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final rule.

SUMMARY: This rule amends the exceptions to the general policy of denial in the Export Administration Regulations (EAR) for exports and reexports to Cuba by identifying additional types of exports and reexports that are subject to a general policy of approval: items for safety of civil aviation and safe operation of commercial aircraft engaged in international air transportation, certain telecommunications and agricultural items, items to human rights organizations or individuals and non-governmental organizations that promote independent activity intended to strengthen civil society in Cuba, and items for use by U.S. news bureaus. This rule also amends the exceptions to the general policy of denial in the EAR for exports and reexports to Cuba by identifying types of exports and reexports that will be reviewed to determine, on a case-by-case basis, whether such transactions meet the needs of the Cuban people, including exports and reexports for this purpose made to state-owned enterprises and

agencies and organizations of the Cuban government that provide goods and services to the Cuban people. BIS is making these changes to further implement the Administration's policy of empowering and engaging the Cuban people. This rule retains the prohibition on the export or reexport of items subject to the EAR to Cuba without a license or applicable license exception.

DATES: This rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Foreign Policy Division, Office of Nonproliferation and Treaty Compliance, 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 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). That rule also established a licensing policy of case-by-case review of license applications for the export and reexport to Cuba of telecommunications items to contribute to the ability of the Cuban people to communicate with one another and with people in the United States and the rest of the world.

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.

To further engage and empower the Cuban people, this rule amends 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 for this purpose made to state-owned enterprises and agencies and organizations of the Cuban government that provide goods and services to the Cuban people. BIS is taking this action in coordination with the Department of the Treasury, Office of Foreign Assets Control, which is amending the Cuban Assets Control Regulations (31 CFR part 515). The specific terms and limitations of this policy are more fully discussed below.

Specific changes made by this rule.

This rule revises the licensing policy from possible approval on a case-by-case basis to a general policy of approval for exports and reexports of:

- Telecommunications items that would improve communications to, from, and among the Cuban people;
- Certain commodities and software to human rights organizations or to individuals and non-governmental organizations that promote independent activity intended to strengthen civil society in Cuba;

- Commodities and software to U.S. news bureaus in Cuba whose primary purpose is the gathering and dissemination of news to the general public; and
- Agricultural items that are outside the scope of “agricultural commodities” as defined in part 772 of the EAR (such as insecticides, pesticides and herbicides) as well as agricultural commodities not eligible for License Exception Agricultural commodities (AGR) (such as those that are specified in an entry on the Commerce Control List, *i.e.*, are not designated EAR99).
- Items that are necessary to ensure the safety of civil aviation and the safe operation of commercial aircraft engaged in international air transportation, including the export or reexport of such aircraft leased to state-owned enterprises. Given a substantial increase in air travel to and from Cuba, BIS is making the change to emphasize the importance of civil aviation safety and to recognize that access to aircraft used in international air transportation that meet U.S. Federal Aviation Administration and European Aviation Safety Agency operating standards by Cuban state-owned enterprises contributes to that safety.

These revisions are consistent with long-standing licensing practice for such exports and reexports.

This rule also amends the exceptions to the general policy of denial by adopting a case-by-case review policy for exports and reexports of certain items to meet the needs of the Cuban people, including exports and reexports 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. This case-by-case review policy includes exports and reexports of items for agricultural production, artistic endeavors (including the creation of public content, historic and

cultural works and preservation), education, food processing, disaster preparedness, relief and response, public health and sanitation, residential construction and renovation and public transportation. The policy also includes exports and reexports of items for use in construction of: facilities for treating public water supplies, facilities for supplying electricity or other energy to the Cuban people, sports and recreation facilities, and other infrastructure that directly benefits the Cuban people. Additionally, it includes exports and reexports to wholesalers and retailers of items for domestic consumption by the Cuban people.

BIS is implementing this policy to further facilitate exports and reexports to meet the needs of the Cuban people. This licensing policy is consistent with long-standing policy to support the Cuban people. Accordingly, BIS will continue to apply a general policy of denial for applications to export or reexport items for use by state-owned enterprises, agencies, or other organizations of the Cuban government 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. Additionally, applications to export or reexport items destined to the Cuban military, police, intelligence and security services remain subject to a general policy of denial. Licenses issued under this case-by-case review licensing policy 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 to third countries. BIS anticipates these revisions will significantly benefit the Cuban people, while not significantly increasing overall exports to Cuba's state-run economy.

This rule also adds the term "reexport" to the existing statement of a policy of case-by-case review of applications for aircraft or vessels on temporary sojourn to Cuba. The change

reflects BIS's practice of generally applying the same licensing policy to exports and reexports of a given item.

Finally, this rule consolidates the statements of licensing policy for exports and reexports to Cuba. Prior to this rule, the policies were described in six paragraphs and like policies existed in several non-adjacent paragraphs with slightly different wording. Under this rule, the policies will be stated in three paragraphs based upon licensing policy. One paragraph applies to medicine and medical devices, which are subject to certain statutorily mandated policies. This rule makes no changes to the text of that paragraph. A second paragraph describes transactions that are subject to a general policy of approval, including transactions for which the general policy of approval predates this rule. A third paragraph describes transactions that may be authorized on a case-by-case basis, including transactions for which the policy of case-by-case review predates this rule. Additionally, the rule adopts uniform terminology to describe case-by-case review of license applications and removes some superfluous text. All of the changes described in this paragraph are intended to improve clarity and readability of the EAR, and none of them are substantive changes to licensing policy.

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 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 in 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 746 – [AMENDED]

1. The authority citation for 15 CFR part 746 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *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 of May 7, 2003, 68 FR 26459, May 16, 2003; Presidential Determination 2007-7 of December 7, 2006, 72 FR 1899 (January 16, 2007); Notice of May 6, 2015, 80 FR 26815 (May 8, 2015); Notice of August 7, 2015, 80 FR 48233 (August 11, 2015).

2. Section 746.2 is amended by revising paragraphs (b)(2) and (b)(3) and removing paragraphs (b)(4), (b)(5) and (b)(6) to read as follows:

§746.2 Cuba.

* * * * *

(b) * * *

(2) *Exports and reexports that generally will be approved.* Applications for licenses to export or reexport the following generally will be approved:

(i) Telecommunications items that would improve communications to, from, and among the Cuban people;

- (ii) Commodities and software to human rights organizations or to individuals and non-governmental organizations that promote independent activity intended to strengthen civil society in Cuba;
 - (iii) Commodities and software to U.S. news bureaus in Cuba whose primary purpose is the gathering and dissemination of news to the general public;
 - (iv) Agricultural items that are outside the scope of agricultural commodities as defined in part 772 of the EAR, such as insecticides, pesticides and herbicides, and agricultural commodities not eligible for License Exception AGR;
 - (v) Items necessary to ensure the safety of civil aviation and the safe operation of commercial aircraft engaged in international air transportation, including the export or reexport of such aircraft leased to state-owned enterprises; and
 - (vi) Items necessary for the environmental protection of U.S. and international air quality, waters, or coastlines (including items related to renewable energy or energy efficiency).
- (3) *Exports and reexports that may be authorized on a case-by-case basis.* (i) Applications for licenses 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 may be authorized on a case-by-case basis. This policy of case-by-case review includes applications for licenses to export or reexport items for:
- (A) Agricultural production, artistic endeavors (including the creation of public content, historic and cultural works and preservation), education, food processing, disaster preparedness, relief and response, public health and sanitation, residential construction and renovation and public transportation;

(B) Wholesale and retail distribution for domestic consumption by the Cuban people; and
(C) Construction of facilities for treating public water supplies, facilities for supplying electricity or other energy to the Cuban people, sports and recreation facilities, and other infrastructure that directly benefits the Cuban people.

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 to third countries.

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.

(ii) Applications for exports or reexports of aircraft or vessels on temporary sojourn to Cuba either to deliver humanitarian goods or services, or consistent with the foreign policy interests of the United States, may be authorized on a case-by-case basis.

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Dated: January 21, 2016

Penny Pritzker

Secretary of Commerce

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