

U.S. Further Eases Trade Restrictions on Cuba

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On September 21, 2015, the Department of Commerce's Bureau of Industry and Security (BIS) published amendments to the Export Administration Regulations (EAR) in support of the Administration's new policy toward Cuba.[1] This action builds upon the regulatory changes published in January of this year, which paved the way for increased trade and engagement with Cuba, and the recent rescission of Cuba's designation as a State Sponsor of Terrorism. BIS's rule, published in conjunction with amendments to the Cuban Assets Control Regulations administered by the Treasury Department's Office of Foreign Assets Control (OFAC),[2] aims to promote further engagement between the U.S. and Cuban people by expanding authorizations for exports and reexports to Cuba and removing certain unintended restrictions on such transactions.

License Exception Support for the Cuban People (SCP)

License Exception SCP, which was added to the EAR earlier this year, authorizes certain exports and reexports that improve living conditions in Cuba; encourage independent economic activity by Cuba's private sector; strengthen civil society in Cuba; and facilitate the free flow of information to, from, and within Cuba. BIS's latest rule makes several changes to this license exception to further promote these activities:

- *Elimination of "Sold or Donated" Language:* BIS has now removed the requirement that items authorized for export to Cuba for private sector use and for telecommunications be "sold or donated." [3] By eliminating this language, other types of exports, such as leased or loaned items, are now expressly permitted under this exception.

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Practice Areas

International Trade

- *Temporary Exports and Reexports for Professional Meetings:* The rule also amends the temporary exports authorized to Cuba. Previously, License Exception SCP authorized persons departing the United States to make temporary exports (*i.e.*, for a two-year period) of items subject to low-level controls for their use in scientific, archeological, cultural, ecological, educational, historic preservation, or sporting activities or for use in the departing persons' professional research. BIS has now expanded this authorization to permit temporary reexports to Cuba and added "professional meetings" to the list of eligible end-uses.[4] This authorization now allows, for example, travelers to take company- or personally-owned laptops or mobile devices classified as EAR99 or controlled for export only for anti-terrorism reasons (*e.g.*, a mass market smartphone) to Cuba for the traveler's use in professional meetings and research, provided that the items remain under the traveler's "effective control" and all other criteria in the exception are satisfied.[5]
- *Development of Software to Improve Communications or Support the Private Sector:* Further, BIS has added a new authorization permitting exports and reexports of commodities and software classified as EAR99 or controlled only for anti-terrorism reasons to individuals and private sector entities in Cuba to facilitate these individuals' and entities' development of software meant to improve the free flow of information or otherwise support the private sector activities identified in License Exception SCP.[6] For example, the new provision allows a U.S. company to export an EAR99 general purpose software development kit for use in developing software in Cuba to improve the free flow of communication or support certain private sector activities, such as those by private sector entrepreneurs.
- *Exports to Establish a Physical Presence in Cuba:* The rule also adds a new authorization permitting exports and reexports to Cuba of certain items subject to low-level export controls for use by eligible end-users to establish, maintain, or operate a physical presence in Cuba. This provision is intended to further encourage activities that are consistent with the U.S. government's foreign policy objectives. Accordingly, eligible end-users are limited to those engaged in the following activities authorized by OFAC or BIS: (1) entities organizing or conducting educational activities; (2) entities providing mail or parcel transmission services or cargo transportation services; (3) religious organizations engaging in religious activities; (4) persons engaging in the transmission of information or informational materials, the donation of food to non-governmental organizations or individuals in Cuba, or other authorized export or reexport transactions; (5) providers of travel or carrier services; (6) entities that provide telecommunications services and establish telecommunications facilities; and (7) entities that provide internet-based services.[7]
- *Promotional Items:* For companies interested in promoting their businesses in Cuba, the new rule also authorizes EAR99 items that are normally given away for free as gifts for promotional purposes – such as pens, hats, or t-shirts – to be exported and reexported to Cuba.[8]
- *Other Authorized Temporary Exports:* Finally, the rule creates new temporary (*i.e.*, not to exceed a one-year period) export and reexport authorizations for items subject to low-level controls, including "tools of trade" used to install, service, or repair items that have been exported or reexported to Cuba under a license or license exception; kits of replacement parts or components of items that have been lawfully exported or reexported to Cuba; commodities and software for exhibition or demonstration at trade

shows or to parties eligible to receive the items under License Exception SCP; and containers necessary for shipment of commodities under a BIS license or license exception.[9] Like several of the other newly-added authorizations, this provision is intended to support travel and commerce authorized by and consistent with the foreign policy objectives of the U.S. government.

License Exception Consumer Communications Devices (CCD)

License Exception CCD authorizes exports and reexports of specified consumer communications devices (*e.g.*, mobile phones, computers, modems, etc.) to eligible individuals and independent non-governmental organizations in Cuba.[10] As it did with License Exception SCP, BIS removed the requirement that items be sold or donated to meet this exception, thereby eliminating unintended restrictions on the use of this exception.

License Exception Aircraft, Vessels and Spacecraft (AVS)

In addition to the revisions highlighted above, BIS made several changes to License Exception AVS.[11] BIS has added a note stating that an aircraft authorized for temporary sojourn pursuant to this exception may not remain in the country (*e.g.*, Cuba) for more than seven consecutive days before it departs for the United States or another country to which it may be exported without a license.[12] Prior to the addition of this note, BIS interpreted temporary sojourns of aircraft to consist of just one overnight stay in-country.

Beyond aircraft on temporary sojourn, the new rule now allows certain categories of vessels – including cargo vessels, passenger vessels, and recreational vessels used in connection with travel authorized by OFAC – for temporary sojourn to Cuba, provided that the vessel does not remain in-country for more than 14 consecutive days prior to departing for the United States or a country to which the vessel may be exported without a license.[13]

BIS's new rule also now permits certain items subject to low-level export controls to be exported or reexported to Cuba as equipment and spare parts for permanent use on a vessel or aircraft pursuant to this license exception, as well as certain exports of ship and plane stores for use or consumption on board vessels and aircraft.[14]

License Policy for Civil Aviation Safety

Subject to a few exceptions, BIS's general policy is to deny license applications involving Cuba. BIS has now amended its policy to provide for case-by-case review of license applications for exports and reexports of items to ensure safety in civil aviation, including the safe operation of commercial passenger aircraft.[15] BIS has indicated that items subject to this new policy may include, for example, aircraft parts and components for safe flight, weather observation stations, airport safety equipment, and security screening commodities.

Deemed Exports and Reexports to Cuban Nationals

Under the EAR, an export of technology or software may occur when technology or software source code is provided or released to a foreign national, whether the foreign national is located in the United States or in a foreign country. This is called a “deemed export” because such release is deemed to be an export to the home country or countries of the foreign national. BIS’s new rule states that, although a license is required for the release of technology or source code on the Commerce Control List to Cuban nationals, no deemed export or reexport license is required to provide technology or source code designated as EAR99 to Cuban nationals in the United States or a third country (*i.e.*, not the United States or Cuba).[16] This change makes BIS’s deemed export/reexport policy for Cuba consistent with its policies for other sanctioned countries.

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Although the Cuba embargo remains in place, BIS’s new rule, along with its OFAC counterpart, represents another important step in the continuing evolution of the U.S. government’s policy on Cuba. The incremental changes made to the existing U.S. regulatory landscape via BIS’s new rule should contribute to advancing the Administration’s goal of building a more open and stronger relationship between the two nations.

[1] *Enhancing Support for the Cuban People*, 80 Fed. Reg. 56,898 (Dep’t Commerce, Sept. 21, 2015) (final rule).

[2] *Cuban Assets Control Regulations*, 80 Fed. Reg. 56,915 (Office of Foreign Assets Control, Sept. 21, 2015) (final rule).

[3] 15 C.F.R. § 740.21(b) and (d)(1).

[4] *Id.* § 740.21(c)(2).

[5] U.S. Department of Commerce, Bureau of Industry and Security, *Cuba Frequently Asked Questions, Effective September 21, 2015*, at FAQ #42, available at: http://www.bis.doc.gov/index.php/forms-documents/doc_download/1292-bis-cuba-consolidated-faqs-final-091715.

[6] 15 C.F.R. § 740.21(d)(4).

[7] *Id.* § 740.21(e)(1) and (2).

[8] *Id.* § 740.21(e)(3).

[9] *Id.* § 740.21(f).

[10] *Id.* § 740.19.

[11] *Id.* § 740.15.

[12] *Id.* § 740.15(a), Note to paragraph (a).

[13] *Id.* § 740.15(d)(6).

[14] *Id.* § 740.15(b).

[15] *Id.* § 746.2(b)(6).

[16] *Id.* § 746.2(a)(2).