

Trump Administration Moves to Further Restrict Exports and Reexports to Cuba

October 21, 2019

On October 21, 2019, the Bureau of Industry and Security (BIS) within the U.S. Department of Commerce published a final rule amending the Export Administration Regulations (EAR) to further restrict exports and reexports of items to Cuba. BIS explained that it is making these amendments, bolstering previously-imposed restrictions, to support the Administration's national security and foreign policy decision to hold the Cuban regime accountable for its repression of the Cuban people and its support for the Maduro regime in Venezuela. Specifically, this final rule amends U.S. export policy on Cuba in the following ways:

- **De Minimis Threshold**: Pursuant to Section 734.4 of the EAR, foreign-made items located abroad are subject to the EAR under certain circumstances, including when they incorporate, or are bundled or commingled with, specified levels of controlled U.S.-origin commodities, software, or technology, by value. With some exceptions for items for which there is no *de minimis* level, either a 10% *de minimis* rule or a 25% *de minimis* rule applies, depending upon the destination of the foreign-made products. In 2015, the U.S. government rescinded Cuba's designation as a State Sponsor of Terrorism, making the country eligible for the more favorable 25% *de minimis* threshold. The new rule rolls back this liberalization, such that a BIS license or an applicable license exception now is required to ship foreign-made items that contain greater than 10% U.S.-origin controlled content to Cuba by value; for Cuba, even EAR99 content is considered "controlled," and thus the rule significantly limits the ability of foreign companies that rely on U.S. parts and components to do business with Cuba.

Authors

John R. Shane
Partner
202.719.7222
jshane@wiley.law

Lori E. Scheetz
Partner
202.719.7419
lscheetz@wiley.law

Practice Areas

Export Controls and Economic Sanctions
International Trade
National Security

- **License Exception Support for the Cuban People:** This rule revises and narrows the scope of License Exception Support for the Cuban People (SCP), which was added to the EAR in 2015 to authorize certain U.S. exports to improve living conditions and promote economic activity in Cuba, as follows:
 - Paragraph (c)(1) of License Exception SCP authorizes the export or reexport to Cuba of certain donated items for use in scientific, archeological, cultural, ecological, educational, historic preservation, or sporting activities. The new rule amends this authorization to exclude donations to organizations administered or controlled by the Cuban government or communist party.
 - Paragraph (d)(1) of License Exception SCP authorizes the export or reexport to Cuba of certain items for telecommunications infrastructure creation and upgrades. This rule clarifies that the telecom authorization is limited to infrastructure to improve the free flow of information to, from, and among, the Cuban people. For infrastructure items that would be used to connect specific end-users (*i.e.*, non-backbone items), those items may be used to connect individual Cubans or the Cuban private sector only. A license is required for telecommunications infrastructure that would be used to connect other specific end-users, such as Cuban government ministries and state-owned hotels.
 - Formerly, paragraph (e)(2) of License Exception SCP authorized exports of EAR99 free gifts for promotional purposes (*e.g.*, a pen with a company logo). The new rule eliminates this authorization, as the Administration believes that it primarily has benefitted the Cuban government given its near monopoly on importing items to the country.
- **Aircraft- and Vessel-Related Amendments:** This rule also revises the licensing policy and authorizations applicable to aircraft and vessels, as follows:
 - The rule changes BIS's Cuba licensing policy by removing the general policy of approval for applications to export or reexport aircraft leased to Cuban state-owned airlines. These applications are now subject to a general policy of denial, like most other export applications involving Cuba. BIS also plans to revoke licenses within seven days, through individual notifications to licensees, for aircraft leased to Cuban state-owned airlines under the former, more favorable policy.
 - This rule amends License Exception Aircraft, Vessels and Spacecraft (AVS) to further restrict authorized activities involving Cuba.
 - Paragraph (a) of License Exception AVS authorizes the export or reexport to Cuba of certain aircraft on temporary sojourn. This rule clarifies that aircraft leased to or chartered by a Cuban national (or a Country Group E:1 national) are not eligible for License Exception AVS. This rule also adds Cuba to restrictions in License Exception AVS regarding the sale or transfer of operational control of U.S. and foreign-registered aircraft availing themselves of this license exception.
 - Paragraph (d) of License Exception AVS authorizes the export or reexport to Cuba of cargo vessels for hire on temporary sojourn. As it did with the aircraft-related authorization, BIS's new rule clarifies that vessels leased to or chartered by a Cuban national (or a Country Group E:1 national) are not eligible for License Exception AVS. The rule also adds Cuba to restrictions

regarding the sale or transfer of operational control of U.S. and foreign flagged vessels relying on this license exception.

Wiley Rein continues to closely monitor the Trump Administration's export policy relating to Cuba. Should you have any questions about the new restrictions, or the potential for further action, please do not hesitate to contact one of the attorneys listed on this alert.