

Client Alert

October 2019

BIS Further Restricts Export and Reexport of Items to Cuba

What Happened: On October 21, 2019, the US Department of Commerce's Bureau of Industry and Security (**BIS**) amended the Export Administration Regulations (**EAR**) to implement additional restrictions on exports and reexports to Cuba. The rule amends the Cuba licensing policy in the EAR and the License Exception Aircraft, Vessels and Spacecraft; lowers the 25 percent de minimis rule to a general 10 percent de minimis level for Cuba; and revises the License Exception Support for the Cuban People. Any person or entity that violates the EAR may be subject to civil and/or criminal penalties specified in Section 1760 of the Export Control Reform Act of 2018 (50 U.S.C. 4801—4852) and any other sanctions under US law.

The Bottom Line: BIS amended the EAR to further limit the Cuban government's access to items subject to the EAR. Persons engaged in exports and reexports involving Cuba should familiarize themselves with these amendments and actively monitor the development of US sanctions toward Cuba to ensure that present and future transactions comply with US regulations.

The Full Story:

On October 21, 2019, BIS amended the EAR to restrict the Cuban government's access to items subject to the EAR. The amendments include changes to the Cuba licensing policy in the EAR, the License Exception Aircraft, Vessels and Spacecraft (**AVS**) and the License Exception Support for the Cuban People (**SCP**). They also establish a general 10 percent de minimis level for Cuba, lowered from 25 percent.

Consistent with the president's foreign policy toward Cuba, individuals and entities are required to obtain BIS's authorization in the form of a license or license exception in order to export or reexport items subject to the EAR to Cuba. Though prior to BIS's amendment of the Cuba Licensing Policy the US had a general policy of approval for applications to export or reexport aircraft leased to Cuban state-owned airlines, such license applications are now subject to a general policy of denial unless otherwise stated in Section 746.2(b) of the EAR. Further, BIS will revoke the licenses for aircraft leased to Cuban state-owned airlines under the former policy. Moreover, the recent amendments to the License Exception AVS clarify that aircraft and vessels leased to or chartered by Cuban nationals or State Sponsors of Terrorism are not eligible for License Exception AVS. Therefore, license applications for the export or reexport of aircraft or vessels leased to or chartered by, or on behalf of, the Cuban government will generally be denied pursuant to the licensing policy of the EAR.

Additionally, the amendments make Cuba subject to the general 10 percent de minimis rule in Section 734.4(c) of the EAR. Therefore, if a foreign-made item contains more than 10 percent of US-origin content, it is subject to the EAR unless it is an item for which there is no de minimis level, which is subject to the EAR if it contains any US origin content. Prior to this amendment, it was permissible to reexport foreign-made items that contained less than 25 percent US-origin content to Cuba, provided that such reexportations otherwise complied with US sanctions. Now, however, a BIS license or an applicable license exception is required to reexport foreign-made items that incorporate more than 10 percent of US-origin content.

Finally, BIS amended the License Exception Support for the Cuban People in Section 740.21, which was created to authorize certain exports and reexports intended to support the Cuban people. The rule amends the paragraph that authorizes the export or reexport of donated items for use in scientific, archaeological,

cultural, ecological, educational, historic preservation or sporting activities to exclude donations to organizations controlled by the Cuban government or the Communist Party. Therefore, any exporter or reexporter who intends to donate items to organizations controlled by the Cuban government must submit a license application to BIS, allowing BIS to determine whether the donations would indeed benefit the Cuban people. As such, the License Exception is still available for exporters and reexporters whose donations are used to support activities, individuals and organizations that are independent of the Cuban government and the Communist Party. Similarly, the rule amends the License Exception relating to improving communications in that it clarifies that telecommunications infrastructure items that would be used to connect specific end users may only be used to connect individual Cubans or the Cuban private sector and not to connect Cuban government ministries or state-owned enterprises. It also eliminates the authorization for promotional items to be given away for free, though items for use by the Cuban private sector for private economic activities remain eligible for License Exception SCP. License applications for the export and reexport of infrastructure items that would be used to connect specific end users related to the Cuban government ministries and of promotional items to the Cuban government are subject to the general policy of denial in Section 746.2(b) of the EAR.

Persons subject to US jurisdiction and engaging in activities related to the US sanctions toward Cuba should familiarize themselves with BIS's recent amendments to the EAR in order to comply with BIS's regulations.

The Latin America group practice at Hunton Andrews Kurth LLP will continue to closely monitor related developments regarding US sanctions with respect to Cuba. Please contact us if you have any questions or would like further information regarding the Export Administration Regulations or sanctions governing the Cuban embargo.

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