



# US Government Expands Restrictions Against Cuba: BIS Further Restricts Exports to Cuba and DOT Suspends Scheduled Air Service for Cuba

NOVEMBER 4, 2019 by **BART M. MCMILLAN**, **JENNIFER TROCK** AND **EUNKYUNG KIM SHIN** - 5 MINS READ



On October 21, 2019, the US Commerce Department's Bureau of Industry and Security ("BIS") amended the Export Administration Regulations ("EAR") to further restrict exports and reexports of items to Cuba ("the **Amendment**"). According to BIS, the Amendment was made to further restrict the Cuban government's access to items subject to the EAR, thereby supporting the US government's national security and foreign policy decision to hold the Cuban regime accountable for its repression of the Cuban people and its continuing support for the Maduro regime in Venezuela. The Amendment further implements President Trump's June 2017 National Security Presidential Memorandum on Strengthening the Policy of the United States Toward Cuba. BIS also updated **Frequently Asked Questions** regarding Cuba, and the US Commerce Department issued a related press release **here**.

The same week, Secretary of State Michael R. Pompeo wrote to the Secretary of Transportation noting the Administration's policy and requested that the Department of Transportation ("DOT") suspend all scheduled US carrier flights between the United States and all airports in Cuba, except José Martí International Airport (HAV) in Havana. DOT issued an **order** suspending service on October 25, 2019. US air carriers have 45 days to discontinue all scheduled air service between the United States and all airports in Cuba, except José Martí International Airport. Please see **here** for the State Department's press release.

A summary of specific changes/clarifications made by the Amendment are described below:

## 1. Cuba Licensing Policy for Aircraft Leased to Cuban State-Owned Airlines

The Amendment removes the general policy of approval for license applications to export or reexport aircraft leased to Cuban state-owned airlines. License applications to lease aircraft to Cuban state-owned airlines are now subject to the general policy of denial in §746.2(b) of the EAR. BIS will also revoke licenses within seven days, through individual notifications to licensees pursuant to §750.8 of the EAR, for aircraft leased to Cuban state-owned airlines under the former policy.

## 2. License Exception Aircraft, Vessels, and Spacecraft ("AVS")

The Amendment restricts certain aspects of License Exception AVS which are summarized as follows:

- The Amendment clarifies that aircraft and vessels are not eligible for License Exception AVS if they are leased to or chartered by a Cuban national or a national of a destination in Country Group E:1. License applications for aircraft or vessels leased to or chartered by Cuban nationals will be reviewed pursuant to the applicable licensing policy described in § 746.2(b) of the EAR while license applications for aircraft or vessels leased to or chartered by, or on the behalf of, the Cuban government, including state-owned airlines or other enterprises, will generally be denied.
- The Amendment adds Cuba to restrictions of License Exception AVS regarding (i) the sale or transfer of operational control of foreign registered aircraft or foreign flagged vessels and (ii) the operational control of foreign and US registered aircraft or foreign and US flagged vessels.

## 3. *De Minimis* Rule

The Amendment revises the EAR to establish a 10% *de minimis* level for Cuba, although (i) the US State Department has not re-designated Cuba as a State Sponsor of Terrorism and (ii) BIS has not re-included Cuba into Country Group E:1 and Cuba remains in Country Group E:2. For background, in 2015, the US State Department rescinded the designation of Cuba as a State Sponsor of Terrorism, and BIS amended the EAR and removed Cuba from Country Group E:1, which resulted in increasing the *de minimis* level from 10% to 25% for Cuba. The current return to the 10% *de minimis* level by making Country Group E:2, which currently only includes Cuba, subject to the 10% *de minimis* level is unusual because the 10% *de minimis* threshold is normally reserved for State Sponsors of Terrorism.

## 4. License Exception Support for the Cuban People ("SCP")

The Amendment restricts certain aspects of License Exception SCP which are summarized as follows:

- License Exception SCP (paragraph (c)(1)) no longer covers donations to organizations administered or controlled by the Cuban government or communist party. Donations to the Cuban people and civil society organizations, however, are still eligible for License Exception SCP, provided the items would be used to support activities independent of the Cuban government and communist party.
- License Exception SCP (paragraph (d)(1)) is clarified that it is limited to the creation and upgrades of telecommunications 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 (*e.*, non-backbone items), those items may be used to connect individual Cubans or the Cuban private sector only, and not Cuban government ministries or state-owned hotels.

License Exception SCP (paragraph (e)(2)) no longer authorizes the export or reexport of items to be given away for free for promotional purposes. Items for use by the Cuban private sector for private sector economic activities, however, remain eligible for License Exception SCP, provided the associated terms and conditions are met.

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Mr. McMillan's practice involves compliance counseling; compliance programs; licensing; compliance reviews; internal investigations; voluntary disclosures; administrative enforcement actions; criminal investigations; customs inquiries, audits, detentions, and seizures; and trade-compliance due diligence and post-acquisition integration in mergers and acquisitions. His practice includes matters that implicate the US International Traffic in Arms Regulations (ITAR), US Export Administration Regulations (EAR), US National Industrial Security Program (NISP), the US Committee on Foreign Investment in the United States (CFIUS), and equivalent non-US laws. Mr. McMillan regularly advises on and represents clients in matters involving technology, including its control, protection, accidental disclosure, diversion, or unauthorized collection. Mr. McMillan has extensive experience working with companies in the aerospace and defense industry, as well as companies in the Middle East and other parts of Asia.



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Eunkyung advises clients on various regulatory compliance and trade issues, concentrating on the US export controls such as the Export Administration Regulations (EAR) and International Traffic in Arms Regulations (ITAR), economic and trade sanctions, US customs and import laws, the US Foreign Corrupt Practices Act (FCPA), and foreign anti-bribery laws.



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