

U.S. Export Controls Amended to Eliminate Cuba as State Sponsor of Terrorism

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The U.S. Department of Commerce, Bureau of Industry and Security ("BIS") today published a rule removing Cuba as a State Sponsor of Terrorism under the Export Administration Regulations ("EAR"). See "Cuba: Implementing Rescission of State Sponsor of Terrorism Designation," 80 Fed. Reg. 43314 (July 22, 2014). With this change, foreign companies not owned or controlled by U.S. persons can send to Cuba foreign-made products with up to 25% U.S. content. Previously, foreign companies could not send products with more than 10% U.S. content to Cuba. As a practical matter, this makes it easier for foreign companies with Cuban customers to use U.S. products in their goods. In addition, the change makes it easier for U.S. companies to use export license exceptions that apply to replacement parts, certain government end users, hand-carried equipment and aircraft. However, the comprehensive trade embargo against Cuba still applies to U.S. persons and the foreign subsidiaries they own or control.

I. Change in *De Minimis* Thresholds for U.S. Reexport Jurisdiction

Pursuant to President Obama's December 14, 2014 announcement of his intention to restore diplomatic relations between the United States and Cuba, on May 29, 2015 Secretary of State Kerry rescinded Cuba's status under U.S. law as a State Sponsor of Terrorism. Today, BIS implemented that rescission into the EAR. The principal impact of this change is to increase the *de minimis* U.S. content threshold, which would subject a foreign-made item to U.S. jurisdiction, for purposes of reexport to Cuba. Previously, any foreign-made item with more than 10% U.S. content (measured by value) was restricted for reexport to Cuba. Now, the general threshold is 25%.

Specifically, under the EAR, which controls the export and reexport of most dual-use and non-nuclear items, U.S. reexport controls attach to foreign items (including goods, software and technology) if such items incorporate greater than a minimum value of U.S. content. For reexports of foreign items to countries that the U.S. formally has designated as State Sponsors of Terrorism, the minimum U.S. content threshold that triggers U.S. reexport controls is 10%; for all other countries, the threshold is 25%. With the rescission of Cuba's status as a State Sponsor of Terrorism, Cuba now moves to the 25% threshold.

II. Products with Military-Related Content Not Impacted

This change does not, however, affect reexports to Cuba of foreign made items controlled by other U.S. Government agencies, such as defense articles and services controlled by the State Department's International Traffic in Arms Regulations ("ITAR"). Nor does this change apply to foreign-made items whose U.S. content consists of military-related items regulated in the 600 Series or in the 9x515 Series on the Commerce Control List. For such items, there is no *de minimis* content threshold, and U.S. jurisdiction applies for reexports to Cuba if the foreign item has any ITAR or 600/9x915 Series content.

III. U.S. Persons Still Must Comply with Comprehensive Cuba Embargo

This change primarily affects trade with Cuba by non-U.S. companies that are not owned or controlled by U.S. persons. The new BIS rule does nothing to relax the unilateral U.S. trade embargo against Cuba, which applies to all U.S. companies, U.S. nationals, and their owned or controlled foreign entities. For U.S. persons and their owned and controlled non-U.S. subsidiaries, the only trade allowed with Cuba is that authorized by license exceptions in the EAR and general licenses in the Cuban Assets Control Regulations administered by the Treasury Department's Office of Foreign Assets Control.

Today's regulatory change removes Cuba-specific carve-outs within four existing EAR licenses exceptions, which already were available for Cuba to some degree, for exports or reexports by U.S. persons. Those include:

- License Exception "RPL" (15 C.F.R. § 740.10), removing exclusions that applied to certain one-for-one replacement parts for items previously lawfully exported;
- License Exception "GOV" (15 C.F.R. § 740.11), now authorizing activities relating to nuclear safeguards and chemical weapons inspection, and exports or reexports relating to the International Space Station;
- License Exception "BAG" (15 C.F.R. § 740.14), now authorizing exports and reexports of encryption commodities and software carried as personal baggage by individuals travelling to Cuba; and
- License Exception "AVS" (15 C.F.R. § 740.15), expanding the authorization for use and transfer of aircraft involving Cuba or Cuban nationals.

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