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**DEPARTMENT OF HOMELAND SECURITY**

**8 CFR Part 234**

**U.S. Customs and Border Protection**

**19 CFR Part 122**

**[USCBP-2016-0015; CBP Dec 16-06]**

**RIN 1651-AB10**

**Flights to and from Cuba**

**AGENCY:** U.S. Customs and Border Protection, DHS.

**ACTION:** Interim final rule; request for comments.

**SUMMARY:** Current U.S. Customs and Border Protection (CBP) regulations contain a separate subpart O addressing flights to and from Cuba. The provisions in that subpart are either obsolete due to intervening regulatory changes or are duplicative of regulations applicable to all other similarly situated international flights. This rule therefore amends the regulations by removing subpart O. These amendments are consistent with the President's policy promoting the normalization of relations between the United States and Cuba.

**DATES:** This interim final rule is effective on [Insert date of publication in the **Federal Register**]. Comments must be received by [Insert date 30 days after date of publication in the **Federal Register**].

**ADDRESSES:** You may submit comments, identified by docket number, by one of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments via docket number USCBP-2016-0015.
- Mail: Border Security Regulations Branch, Regulations and Rulings, Office of International Trade, U.S. Customs and Border Protection, 90 K Street, N.E., 10<sup>th</sup> Floor, Washington, D.C. 20229-1177.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>. Comments submitted will be available for public inspection during regular business days between the hours of 9:00 a.m. and 4:30 p.m. at Regulations and Rulings, Office of International Trade, U.S. Customs and Border Protection, 90 K Street, NE, 10th Floor, Washington, DC 20229-1177. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 325-0118.

**FOR FURTHER INFORMATION CONTACT:** Arthur A.E. Pitts, Sr., U.S. Customs and Border Protection, Office of Field Operations, by phone at (202) 344-2752 or by email at [arthur.a.pitts@cbp.dhs.gov](mailto:arthur.a.pitts@cbp.dhs.gov).

**SUPPLEMENTARY INFORMATION:**

**Public Participation**

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of the interim final rule. DHS also invites comments that relate to the economic, environmental, or federalism effects that

might result from this interim final rule. Comments that will provide the most assistance to DHS will reference a specific portion of the interim final rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

## **Background**

As part of the President's new approach to Cuba policy, DHS and CBP examined their regulations and policies pertaining to Cuba, particularly as they relate to air travel between the two countries.<sup>1</sup> The existing regulations pertaining to flights to and from Cuba (codified at 19 CFR part 122, subpart O) are no longer needed because they are either obsolete in light of intervening regulatory changes or substantively identical to the general CBP requirements applicable to aircraft seeking to fly into or out of the United States. Accordingly, DHS is amending 19 CFR part 122 to remove subpart O and to make conforming amendments to other provisions.

Under 19 CFR part 122, subpart O, only certain CBP-approved airports may accept aircraft traveling to or from Cuba. Section 122.153 (19 CFR 122.153) provides a process by which a port authority must submit a written request to CBP requesting that an airport receive approval to accept flights to or from Cuba. Section 122.153 also contains a list of approved airports. The remaining sections in subpart O pertain to other requirements for flights to and from Cuba, including notice of arrival, documents to be presented upon arrival, the release of passengers arriving from Cuba, and documents required for clearance. None of the regulatory requirements that apply specifically to flights to and from Cuba is mandated by statute, but rather are authorized by the broad

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<sup>1</sup> See [Fact Sheet: Charting a New Course on Cuba](https://www.whitehouse.gov/the-press-office/2014/12/17/statement-president-cuba-policy-changes), The White House (Dec. 17, 2014), <https://www.whitehouse.gov/the-press-office/2014/12/17/statement-president-cuba-policy-changes>.

authority granted to the Secretary of Homeland Security respecting all aircraft arriving in and departing from the United States under 19 U.S.C. 1433, 1644 and 1644a.<sup>2</sup>

Prior to 2011, only three U.S. airports were authorized to accept flights to and from Cuba: John F. Kennedy International Airport, Los Angeles International Airport, and Miami International Airport. In 2011, the President announced a series of changes to ease certain restrictions on travel to and from Cuba.<sup>3</sup> The announcement stated that the regulation should be modified to allow a U.S. airport to apply to accept authorized flights if the airport has adequate customs and immigration capabilities and if an authorized carrier has expressed an interest in providing service between Cuba and the airport.<sup>4</sup> In response, DHS issued a final rule in the **Federal Register** (76 FR 5058) on January 28, 2011, that amended 19 CFR 122.153 to allow additional airports to request approval to accept Cuba flights.

On December 17, 2014, the President announced that the United States would begin the process of normalizing relations with Cuba, including taking steps to re-establish diplomatic relations (which occurred on July 20, 2015), adjust regulations to more effectively empower the Cuban people, and facilitate an expansion of authorized travel under general licenses for the twelve existing categories of travel to Cuba authorized by law.<sup>5</sup> As part of the President's new approach to relations with Cuba, the

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<sup>2</sup> Specifically, 19 U.S.C. 1433(c) provides that the pilot of any aircraft arriving in the United States or the U.S. Virgin Islands from any foreign location is required to comply with such advance notification, arrival reporting, and landing requirements as regulations may require. Under 19 U.S.C. 1644 and 1644a, the Secretary can designate ports of entry for aircraft and apply vessel entry and clearance laws and regulations to civil aircraft.

<sup>3</sup> Reaching Out to the Cuban People, The White House (Jan. 14, 2011), <https://www.whitehouse.gov/the-press-office/2011/01/14/reaching-out-cuban-people>.

<sup>4</sup> Id.

<sup>5</sup> Fact Sheet: Charting a New Course on Cuba, The White House (Dec. 17, 2014), <https://www.whitehouse.gov/the-press-office/2014/12/17/fact-sheet-charting-new-course-cuba>.

Department of the Treasury's Office of Foreign Assets Control (OFAC), and the Department of Commerce's Bureau of Industry and Security (BIS) have issued five sets of amendments to the Cuban Assets Control Regulations (CACR) and Export Administration Regulations (EAR), respectively.<sup>6</sup> In February 2016, representatives from the Departments of State and Transportation signed an arrangement with Cuba that provides the basis for the restoration of scheduled air services between the United States and Cuba.<sup>7</sup>

In light of these intervening regulatory changes, the regulations specifically addressing flights to and from Cuba in 19 CFR part 122, subpart O are no longer necessary. Accordingly, DHS is removing that subpart. DHS is also making conforming amendments to certain provisions in titles 8 and 19 of the CFR: 8 CFR 234.2, 19 CFR 122.31, and 19 CFR 122.42. The removal of part 122, subpart O, will make clear that flights to and from Cuba are subject to the same entry and clearance requirements in 19 CFR part 122 as all other similarly situated international flights.

#### Removal of 19 CFR Part 122, Subpart O

Part 122, subpart O, of title 19 CFR, consists of eight sections numbered from 122.151 to 122.158 (19 CFR 122.151-122.158). A description of each section follows, along with an explanation as to why it is no longer necessary, desirable, or consistent with the U.S. government's current approach towards Cuba.

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<sup>6</sup> See 81 FR 13989 (Mar. 16, 2016), 81 FR 4583 (Jan. 27, 2016), 80 FR 56915 (Sept. 21, 2015), 80 FR 34053 (June 15, 2015), and 80 FR 2291 (Jan. 16, 2015) (amending the CACR); 81 FR 13972 (Mar. 16, 2016), 81 FR 4580 (Jan. 27, 2016), 80 FR 56898 (Sept. 21, 2015), 80 FR 43314 (July 22, 2015), and 80 FR 2286 (Jan. 16, 2015) (amending the EAR).

<sup>7</sup> United States, Cuba Sign Arrangement Restoring Scheduled Air Service, U.S. Dep't of Transp. (Feb. 16, 2016), <https://www.transportation.gov/briefing-room/united-states-cuba-sign-arrangement-restoring-scheduled-air-service>.

Section 122.151 (19 CFR 122.151) consists of two definitions, one for the “United States” and one for “Cuba,” which apply within subpart O. The definition for the “United States” is duplicative of the one in 19 CFR 122.1(l), and is therefore unnecessary. “Cuba” is not defined in 19 CFR 122.1, but this definition is also unnecessary in light of the removal of the special regulations governing flights to and from Cuba.

Section 122.152 (19 CFR 122.152), regarding the application of subpart O, provides that the subpart applies to all aircraft entering or departing the United States to or from Cuba, except for public aircraft. As explained below, the other sections in subpart O are unnecessary, so there is no longer a need for this section.

Section 122.153 (19 CFR 122.153) covers the limitation on airports of entry and departure for flights to and from Cuba. Under this section, flights to or from Cuba are limited to the Miami International Airport, John F. Kennedy International Airport, Los Angeles International Airport, or any other airport approved by CBP according to the procedures in paragraph (b). Paragraph (b) of § 122.153 outlines the approval process, which allows an international airport, landing rights airport, or user fee airport to request CBP approval to become an airport of entry and departure for aircraft traveling to and from Cuba. Under this process, CBP would determine whether the airport is properly equipped to facilitate passport control and baggage inspection and whether there is an OFAC licensed carrier that is prepared to provide flights between the airport and Cuba. Approved airports are listed on the CBP website and in updates to a list of approved airports in paragraph (c) of § 122.153.

The limitations regarding airports authorized to provide flights to and from Cuba are not required by statute. The regulation, now codified at 19 CFR 122.153, was originally promulgated in 1980 and appeared at 19 CFR 6.3a. The preamble for the **Federal Register** document implementing the regulation stated that “[b]ecause of the present situation involving aliens attempting to reach the U.S. from Cuba, there is serious reason to believe that unsafe and unlawful means of transportation will be utilized.”<sup>8</sup> As to the authority underlying the new limits, the preamble stated the rule was being undertaken in accordance with regulations propounded by the Federal Aviation Administration (14 CFR 91.101), the Immigration and Naturalization Service (8 CFR parts 231 and 239), and the Department of Commerce (15 CFR 371.19). None of these authorities limits the number of airports that can service flights to or from Cuba or requires an application process to qualify airports to service Cuban flights in particular.

DHS has determined that the approval process set forth in § 122.153(b) is no longer necessary because the criteria for obtaining approval to accept flights to and from Cuba are not materially different than the requirements applicable to all other similarly situated airports and aircraft operators seeking to conduct international flights. In evaluating requests by aircraft for permission to land at an international, landing rights or user fee airport, CBP researches and evaluates the impact on the overall operations at a given airport regardless of its classification. CBP also evaluates, in consultation with the airport authority where appropriate, the ability of the proposed airport to handle the flight, travelers, baggage, and cargo. CBP ensures that each airport for which a new international flight is requested is equipped to facilitate passport control and baggage

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<sup>8</sup> 45 FR 29247 (May 1, 1980).

inspection, and has the appropriate infrastructure to properly service the plane from the runway to its assigned gate.<sup>9</sup>

The requirement in § 122.153 that the requesting airport must have an OFAC-licensed carrier service provider that is prepared to provide flights between the airport and Cuba is obsolete. OFAC no longer requires an air carrier to obtain a specific license to provide carrier services to or from Cuba. Rather, an air carrier may fly to or from Cuba pursuant to a general license under the CACR, so long as the air carrier is providing carrier services in connection with travel or transportation of persons, baggage, or cargo that is itself authorized under the CACR, 31 CFR part 515, and is no longer required to obtain a specific license from OFAC.<sup>10</sup> See 31 CFR 515.317 and 515.572(a).

Accordingly, by eliminating § 122.153, CBP will make clear that it follows the same process in certifying flights to and from Cuba as it does with all international flights.

Aircraft operators will be required to follow the usual procedures for international flights

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<sup>9</sup> Certain aircraft arriving from areas south of the United States are subject to a modified process. Such flights are subject to specific notice of arrival requirements and must land at the airport listed under 19 CFR 122.24(b) that is nearest the point at which the aircraft crosses the border, unless an overflight exemption is granted. See 19 CFR 122.23-122.25. In designating the airports listed in 19 CFR 122.24(b), CBP has determined that these airports have adequate facilities and resources available to inspect and process aircraft subject to the regulation and their attendant crew, passengers, and cargo. If an exemption is sought pursuant to 19 CFR 122.25, CBP considers whether the proposed destination airport has adequate resources to handle the flight, travelers, baggage, and cargo, just as it considers these factors when deciding whether to grant permission to land a new international flight that is not subject to 19 CFR 122.24. This modified process does not apply to 1) public aircraft, 2) aircraft operated on a regularly published schedule, pursuant to a certificate of public convenience and necessity or foreign aircraft permit issued by the Department of Transportation, authorizing interstate, overseas air transportation; or 3) aircraft with a seating capacity of more than 30 passengers or a maximum payload capacity of more than 7,500 pounds which are engaged in air transportation for compensation or hire on demand. See 19 CFR 122.23(a). With the removal of 19 CFR part 122, subpart O, the requirements in 19 CFR 122.23-122.25 would apply to flights to and from Cuba that fall within the scope of those regulations.

<sup>10</sup> According to OFAC, “A general license authorizes persons subject to U.S. jurisdiction to provide carrier services by vessel or aircraft to, from, or within Cuba, in connection with authorized travel, without the need for a specific license.” Frequently Asked Questions Related to Cuba, U.S. Department of Treasury (last updated Mar. 15, 2016), [https://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba\\_faqs\\_new.pdf](https://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_faqs_new.pdf). See also 31 CFR 501.801(a) (“General licenses have been issued authorizing under appropriate terms and conditions certain types of transactions which are subject to the prohibitions contained in this chapter.”).

found in governing law, including the regulations in 19 CFR part 122, subpart B, for obtaining permission to land and to secure new international routes. The specific requirements vary depending on whether the airport is an international airport, a landing rights airport, or a user fee airport. See 19 CFR 122.11-122.13 (international airports); 122.14 (landing rights airports); 122.15 (user fee airports).

Section 122.154 (19 CFR 122.154) sets forth notice of arrival requirements. This section provides that all aircraft entering the United States from Cuba (except for OFAC-approved scheduled commercial aircraft of a scheduled airline) must give advance notice of arrival, not less than one hour before crossing the U.S. coast or border. The notice must provide the type of aircraft; name of the aircraft commander; number of U.S. citizen and alien passengers; place of last foreign departure; estimated time of crossing the border; and estimated time of arrival. Section 122.154 is being removed as it is redundant with other provisions within part 122. Generally, all inbound aircraft (not just those arriving from Cuba) are required to provide notice to CBP prior to arriving in the United States. Section 122.22 (19 CFR 122.22) generally requires all private aircraft pilots to transmit notice of arrival and manifest information to CBP at least 60 minutes prior to departure of the aircraft from the foreign port or place.<sup>11</sup> The data required under § 122.22 includes the data required under § 122.154. Section 122.23 (19 CFR 122.23) requires similar notice of arrival information for certain non-public aircraft arriving from locations south of the United States. Section 122.31 (19 CFR 122.31) requires advance notice of arrival from all other aircraft, with the exception of aircraft of a scheduled airline arriving under a regular schedule. In addition, 19 CFR 122.49a, 122.49b, 122.49c,

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<sup>11</sup> If the United States is not the original destination and the flight is diverted to the United States due to an emergency, the information is required no later than 30 minutes prior to arrival. 19 CFR 122.22(b)(2)(ii).

and 8 CFR 231.1(a) require commercial carriers to transmit electronic manifest information for all passengers and crew.

Section 122.155 (19 CFR 122.155) requires the aircraft commander of a flight arriving from Cuba to present to CBP the manifest required by 8 CFR 231.1(b),<sup>12</sup> and the documents required by subpart E of 19 CFR part 122, upon arrival in the United States. As § 122.155 merely cross-references subpart E of 19 CFR part 122 and 8 CFR 231.1(b), the information referred to in this section is already required of all aircraft that are subject to the cited provisions. Furthermore, 19 CFR 122.22 imposes electronic manifest requirements on private aircraft that are commensurate with the electronic manifest requirements for commercial aircraft contained in subpart E.

Section 122.156 (19 CFR 122.156) concerns the release of passengers and aircraft. This section provides that neither passengers arriving from Cuba, nor the aircraft, will be released by Customs before the passengers are released by the Immigration and Naturalization Service or a Customs officer acting on behalf of that agency. This section is outdated due to the reorganization in 2002 which prompted the creation of CBP, in which customs and immigration functions were consolidated.<sup>13</sup> Moreover, the requirement that all arriving persons report to a Customs officer and that

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<sup>12</sup> While 19 CFR 122.155 refers to the manifest required by 8 CFR 231.1(b), § 231.1(b) actually requires the submission of a properly completed Arrival/Departure Record, Form I-94 for each arriving passenger, with certain exceptions; § 231.1(a) requires the submission of an electronic manifest.

<sup>13</sup> Pursuant to the Homeland Security Act of 2002, Public Law 107–296, 116 Stat. 2135 (HSA), as of March 1, 2003, the legacy Immigration and Naturalization Service (INS) of the Department of Justice and the legacy Customs Service of the Department of the Treasury were transferred to DHS and reorganized to become CBP, U.S. Immigration and Customs Enforcement (ICE), and U.S. Citizenship and Immigration Services (USCIS). All inspectional functions previously assigned to legacy INS were transferred to DHS. As provided in 6 U.S.C. 552(d), references relating to an agency that is transferred to DHS in statutes, executive orders, rules, regulations, directives, or delegations of authority that precede the effective date of the HSA are deemed to refer to DHS, its officers, employees, or agents, or to its corresponding organizational units or functions.

all aliens seeking admission undergo immigration inspection is set forth in various provisions in the United States Code and titles 19 and 8 of the CFR.<sup>14</sup> Clearance of aircraft departing the United States is covered generally in 19 CFR part 122, subparts F, G, H and I.

Section 122.157 (19 CFR 122.157) sets forth the documents that are required to clear an aircraft for departure. Under this section, the aircraft commander must present documents required by subpart H and a license issued by the Department of Commerce under 15 CFR 371.19 or by the Department of State under 22 CFR part 123. This section is outdated and is no longer necessary. First, 15 CFR 371.19 no longer exists. Under the current regulations, flights on a “temporary sojourn” to or from Cuba generally qualify for a license exception under the EAR provided they meet certain conditions, which are administered by BIS. In general, flying an aircraft to Cuba, even temporarily, constitutes an export or re-export to Cuba.<sup>15</sup> However, the governing EAR provision authorizes departure from the United States of foreign registry civil aircraft on temporary sojourn in the United States and of U.S. civil aircraft for temporary sojourn abroad.<sup>16</sup> Thus, if the aircraft departing the United States for Cuba meets the “temporary sojourn” definition to

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<sup>14</sup> See, e.g., 19 U.S.C. 1459(b) and (d) (requiring all individuals arriving aboard a reported conveyance to report to the designated customs facility and prohibiting departure from the facility until authorized to do so by the appropriate customs officer); 8 U.S.C. 235(a) (requiring all aliens who are applicants for admission or otherwise seeking admission or readmission to the United States to undergo an immigration inspection); 8 CFR 235.1(a) (requiring application to lawfully enter the United States to be made in person to an immigration officer at a U.S. port-of-entry); and 8 CFR 234.2(c) (prohibiting aircraft carrying passengers or crew required to be inspected from discharging or permitting to depart any passenger or crewman without permission from an immigration officer).

<sup>15</sup> Cuba, Bureau of Industry and Security, <https://www.bis.doc.gov/index.php/policy-guidance/country-guidance/sanctioned-destinations/cuba> (last accessed Feb. 24, 2016); see also 15 CFR 746.2(a) (requiring a license to export or re-export all items subject to the EAR to Cuba, except as provided in the regulation).

<sup>16</sup> 15 CFR 740.15. Former 15 CFR 371.19, which is referenced in 19 CFR 122.157, described general licensing requirements for aircraft on a temporary sojourn to or from the United States, reflecting a prior regulatory regime that relied on general licenses, rather than license exceptions. See 61 FR 12714, 12778 (Mar. 25, 1996) (interim rule replacing general license requirement with license exceptions).

qualify for the license exception, there is no license requirement imposed on such aircraft. Second, clearance requirements for all international flights are currently covered under 19 CFR part 122, subparts C, F, G and H. 22 CFR part 123, which pertains to the importation or exportation of certain defense articles, contains other potential requirements for clearance. These requirements, however, are not specific to flights to and from Cuba and would apply regardless of the removal of 19 CFR part 122, subpart O.

Section 122.158 (19 CFR 122.158) states that all other provisions of part 122 relating to entry and clearance of aircraft are applicable to aircraft subject to subpart O. This section is duplicative of 19 CFR 122.0(a), which provides that the regulations in part 122 relate to the entry and clearance of aircraft and the transportation of persons and cargo by aircraft, and are applicable to all air commerce.

For the reasons discussed above, DHS has determined that 19 CFR part 122, subpart O is no longer necessary to regulate air travel to and from Cuba due to changes in the regulatory requirements governing travel and trade between the United States and Cuba, and the implementation of robust reporting requirements that apply to international flights generally. Therefore, DHS is amending 19 CFR part 122 to remove 19 CFR part 122, subpart O, pertaining to flights to and from Cuba. Flights to and from Cuba will continue to be subject to the remaining entry and clearance requirements in 19 CFR part 122, as well as all other legal requirements relating to travel and trade between the United States and Cuba including, but not limited to, the CACR and the EAR.

#### Conforming Amendments

DHS is amending various sections in title 8 CFR and title 19 CFR to bring these sections into conformity with the removal of 19 CFR part 122, subpart O. These amendments are described below.

Section 234.2 of title 8 (8 CFR 234.2) sets forth landing requirements for aircraft carrying passengers or crew required to be inspected under the Immigration and Nationality Act. Section 234.2(a) specifies the general requirements regarding the place of landing for such aircraft and also includes a special requirement for flights to and from Cuba. Specifically, the last sentence in § 234.2(a) specifies that aircraft carrying passengers or crew required to be inspected on flights originating in Cuba land only at airports that have been authorized by CBP pursuant to 19 CFR 122.153 as an airport of entry for flights arriving from Cuba, unless advance permission to land elsewhere has been obtained from the Office of Field Operations at CBP Headquarters. DHS is amending § 234.2(a) to remove the last sentence.

Section 122.31 of title 19 (19 CFR 122.31) sets forth notice of arrival requirements for aircraft entering the United States from a foreign area. Paragraph (c)(1)(ii) specifies that aircraft arriving from Cuba must follow the advance notice of arrival procedures set forth in § 122.154 in part 122, subpart O. Paragraph (c)(1)(iii) specifies that certain aircraft arriving from areas south of the United States (other than Cuba) must follow the notice of arrival procedures set forth in § 122.23 in part 122. As a result of removing subpart O, flights arriving from Cuba will now give advance notice of arrival in accordance with the other provisions in 19 CFR part 122. Accordingly, DHS is removing paragraph (c)(1)(ii) from § 122.31 and making other conforming amendments to paragraph (c)(1).

Section 122.42 of title 19 (19 CFR 122.42) sets forth certain aircraft entry requirements. Paragraph (d) provides that an aircraft of a scheduled airline which stops only for refueling at the first place or arrival in the United States shall not be required to enter provided it meets certain conditions, except for flights to Cuba (provided for in subpart O of this part). To conform with the removal of subpart O, DHS is removing this exception language from paragraph (d) of § 122.42.

#### Additional Requirements for Aircraft Traveling To or From Cuba

All aircraft entering/departing the United States from/to Cuba must be properly licensed or otherwise authorized to travel between the United States and Cuba. Several federal agencies administer the necessary authorizations, and it is the responsibility of the owner or person in command of the aircraft to ensure that the aircraft has the necessary authorization to travel.

OFAC administers the CACR, 31 CFR part 515, which prohibit, in relevant part, all persons subject to the jurisdiction of the United States from engaging in travel-related transactions involving Cuba unless authorized by OFAC. As mentioned before, air carriers are authorized to provide service to and from Cuba under a “general license” so long as the air carrier complies with the terms and conditions of the general license.

BIS administers the EAR, 15 CFR parts 730 through 774, which prohibit certain exports and re-exports to Cuba unless authorized by a license or license exception. As discussed above, flying an aircraft to Cuba constitutes an export or re-export under the EAR, but certain flights on a “temporary sojourn” qualify for a license exception. An aircraft that fails to qualify for the “temporary sojourn” license exception under 15 CFR 740.15 may require an individually validated license under the EAR in order to depart the

United States for Cuba. Baggage and cargo onboard the aircraft may also require a license if it does not qualify for a license exception under the EAR.

Additionally, an aircraft traveling between the United States and Cuba may require a license from other federal agencies, as applicable, and must obtain economic and safety authorizations to provide air transportation service as an air carrier from the Office of the Secretary of Transportation and the Federal Aviation Administration. Air carriers and other commercial operators are required to adopt and implement the security requirements established by the Transportation Security Administration for individuals, property, and cargo aboard aircraft (see 49 CFR chapter XII, subchapter C (Civil Aviation Security)).

#### **Inapplicability of Notice and Delayed Effective Date Requirements, the Regulatory Flexibility Act, and Executive Order 12866**

The Administrative Procedure Act (APA) requirements in 5 U.S.C. 553 govern agency rulemaking procedures. The APA generally requires that an agency provide prior notice and an opportunity for public comment before issuing a final rule.<sup>17</sup> The APA also requires that a final rule have a 30-day delayed effective date.<sup>18</sup> The APA provides a full exemption from the requirements of section 553 for rules involving a foreign affairs function of the United States.<sup>19</sup> The APA also provides an exception from the prior notice and public comment requirement and the delayed effective date requirement if the agency for good cause finds that such procedures are impracticable, unnecessary or contrary to the public interest.<sup>20</sup>

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<sup>17</sup> 5 U.S.C. 553(b) and (c).

<sup>18</sup> 5 U.S.C. 553(d).

<sup>19</sup> 5 U.S.C. 553(a)(1).

<sup>20</sup> 5 U.S.C. 553(b)(B) and 553(d)(3).

This interim final rule is excluded from the rulemaking provisions of 5 U.S.C. 553 as a foreign affairs function of the United States because it concerns international flights between the United States and Cuba, consistent with U.S. foreign policy goals. These amendments to clarify and simplify the regulations regarding air travel between the United States and Cuba are consistent with the President's continued effort to normalize relations between the two countries.

Accordingly, DHS is not required to provide public notice and an opportunity to comment before implementing the requirements under this interim final rule.

In addition, with respect to the removal of the regulations in 19 CFR part 122, subpart O, that are duplicative of the entry and clearance requirements in the rest of part 122, DHS finds that good cause exists for dispensing with the prior notice and comment procedure as unnecessary under 5 U.S.C. 553(b)(B) and for dispensing with the requirement for a delayed effective date under 5 U.S.C. 553(d)(3). The Department, however, is interested in public comments on this interim final rule and, therefore, is providing the public with the opportunity to comment without delaying implementation of this rule. All comments received will become a matter of the public record.

In addition, DHS does not consider this rule to be a "significant regulatory action" under Executive Order 12866, section 3(f), Regulatory Planning and Review. Rules involving the foreign affairs function of the United States are exempt from the requirements of Executive Order 12866. As discussed above, DHS is of the opinion that clarifying and simplifying the regulations regarding restrictions on travel between the United States and Cuba is a foreign affairs function of the United States Government and as such, this rule is exempt from the requirements of Executive Order 12866. Finally,

because DHS is of the opinion that this rule is not subject to the requirements of 5 U.S.C. 553, DHS does not consider this rule to be subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

### **SIGNING AUTHORITY**

This interim final rule is being issued in accordance with 8 CFR 2.1 and 19 CFR 0.2(a). Accordingly, this interim final rule is signed by the Secretary of Homeland Security.

### **LIST OF SUBJECTS**

#### 8 CFR Part 234

Air carriers, Aircraft, Airports, Aliens, Cuba.

#### 19 CFR Part 122

Administrative practice and procedure, Air carriers, Aircraft, Airports, Alcohol and alcoholic beverages, Cigars and cigarettes, Cuba, Customs duties and inspection, Drug traffic control, Freight, Penalties, Reporting and recordkeeping requirements, Security measures.

### **AMENDMENTS TO THE REGULATIONS**

For the reason stated in the preamble, 8 CFR part 234 and 19 CFR part 122 are amended as set forth below.

### **8 CFR CHAPTER 1**

#### **PART 234 – DESIGNATION OF PORTS OF ENTRY FOR ALIENS ARRIVING BY CIVIL AIRCRAFT**

1. The general authority for part 234 continues to read as follows:

**Authority:** 8 U.S.C. 1103, 1221, 1229; 8 CFR part 2.

§234.2 [Amended]

2. Amend §234.2 by removing the last sentence of paragraph (a).

## **19 CFR CHAPTER 1**

### **PART 122 – AIR COMMERCE REGULATIONS**

3. The authority citation for part 122 continues to read in part as follows:

**Authority:** 5 U.S.C. 301; 19 U.S.C. 58b, 66, 1431, 1433, 1436, 1448, 1459, 1590, 1594, 1623, 1624, 1644, 1644a, 2071 note.

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§122.31 [Amended]

4. Amend §122.31 as follows:

- a. Remove and reserve paragraph (c)(1)(ii);
- b. In paragraph (c)(1)(iii), remove the text “(other than Cuba)”; and
- c. In paragraph (c)(1)(iv), remove the text “, (c)(1)(ii)”.

5. Amend §122.42 by revising the introductory sentence of paragraph (d) to read as follows:

**§122.42 Aircraft entry.**

\* \* \* \* \*

(d) Exception to entry requirement. An aircraft of a scheduled airline which stops only for refueling at the first place of arrival in the United States will not be required to enter provided:

\* \* \* \* \*

**Subpart O [Removed and Reserved]**

6. Remove and reserve subpart O, consisting of §§122.151 through 122.158.

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Jeh Johnson,  
Secretary.

[FR Doc. 2016-06371 Filed: 3/18/2016 8:45 am; Publication Date: 3/21/2016]