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DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 234

U.S. Customs and Border Protection

19 CFR Part 122

[Docket No. USCBP-2016-0015; CBP Decision No. 19-06]

RIN 1651-AB10

Flights to and from Cuba

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

ACTION: Final rule.

SUMMARY: This rule adopts as final, without change, interim amendments to the U.S. Customs and Border Protection (CBP) regulations published in the *Federal Register* on March 21, 2016, that removed certain provisions regarding flights to and from Cuba that were either obsolete due to intervening regulatory changes or were duplicative of regulations applicable to all other similarly situated international flights.

DATES: This rule is effective on **[Insert date of publication in the *Federal Register*]**.

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.

SUPPLEMENTARY INFORMATION:

I. Background

On March 21, 2016, the Department of Homeland Security (DHS) published an interim final rule (IFR) in the *Federal Register* (81 FR 14948) amending CBP regulations to remove regulations previously codified at 19 CFR, part 122, subpart O. The removed regulations imposed certain restrictions and reporting requirements on flights to and from Cuba. The implementation of robust reporting requirements that generally apply to all international flights rendered much of subpart O redundant. Additionally, the Department of the Treasury's Office of Foreign Assets Control (OFAC) and the Department of Commerce's Bureau of Industry and Security (BIS) issued changes to the Cuban Assets Control Regulations (CACR) and the Export Administration Regulations (EAR) that rendered many sections of subpart O obsolete.¹

Despite the removal of subpart O, flights to and from Cuba continue to be subject to the same entry and clearance requirements in 19 CFR part 122 as all other similarly situated international flights. Additionally, flights to and from Cuba continue to be subject to other legal requirements relating to travel and trade between the United States and Cuba including, but not limited to, the CACR and the EAR.

In the IFR, DHS also amended several provisions of title 8 CFR (8 CFR 234.2) and title 19 CFR (19 CFR 122.31 and 122.42) to bring these sections into conformity with the removal of 19 CFR part 122, subpart O.

II. Discussion of Comments

¹ Following the publication of the IFR, BIS and OFAC published additional changes to the CACR and the EAR in order to implement the National Security Presidential Memorandum on Strengthening the Policy of the United States Toward Cuba (June 16, 2017). See 82 FR 51983 (Nov. 9, 2017) and 82 FR 51998 (Nov. 9, 2017). These changes did not affect provisions related to former subpart O and do not require modification to the IFR.

A. Overview

Although the interim regulatory amendments were promulgated without prior public notice and comment procedures pursuant to the foreign affairs exemption in 5 U.S.C. 553(a)(1), the IFR provided for the submission of public comments that would be considered before adoption of the interim regulations as a final rule. The prescribed 30-day public comment period closed on April 20, 2016. DHS received submissions from 30 commenters.

The vast majority of commenters supported the removal of subpart O. Those commenters supported the removal of subpart O based on the expectation that it would benefit the U.S. airline industry and other U.S. businesses hoping to expand to Cuba, lower the cost of flights to and from Cuba by increasing flight options available to U.S. consumers, and potentially lead to future trade agreements and other economic cooperation between the United States and Cuba. Three of the commenters that supported the rule requested that DHS impose additional restrictions on international flights and individuals arriving in the United States. Two commenters opposed the IFR due to legal and policy concerns regarding Cuba. A summary of the comments and comment responses follow.

B. Discussion

Comment: One commenter expressed concern that the removal of subpart O would encourage the spread of communist beliefs and stated that DHS should take steps to continue to isolate Cuba. Another commenter stated that the removal of subpart O was inconsistent with federal laws that restrict trade with Cuba and with CBP's putative duty to prevent trade with Cuba. Specifically, it is the position of the commenter that section 6063 of title 22 of the U.S. Code prohibits CBP from removing subpart O until there is a transition government in place in Cuba.

Response: DHS disagrees that the removal of subpart O is inconsistent with U.S. law or CBP's obligations under the law. As noted above and explained in detail in the IFR, each section previously codified in subpart O is either redundant of other regulatory provisions or is obsolete due to intervening regulatory changes issued by OFAC and BIS pursuant to OFAC's and BIS's statutory authority to regulate travel and trade with Cuba. Additionally, none of the regulatory requirements previously codified in subpart O is mandated by statute. Rather, subpart O was promulgated pursuant to the Secretary of Homeland Security's broad authority to regulate all aircraft arriving to and departing from the United States. *See* 19 U.S.C. 1433, 1644, and 1644a. The elimination of subpart O, therefore, merely updates CBP's regulations to conform to OFAC's and BIS's regulations and does not conflict with the existing statutory or regulatory scheme restricting travel or trade with Cuba.

The removal of subpart O also does not conflict with title II of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Public Law No. 104-114, sections 201-207, 110 Stat. 785, 805-814, which includes the provisions codified at 22 U.S.C. 6063. Those provisions do not specifically address DHS's authority to regulate aircraft flying to or from Cuba. The President is authorized to suspend aspects of the economic embargo of Cuba only if certain conditions are met, including the determination that "a transition government in Cuba is in power." 22 U.S.C. 6064(a). As explained above, however, the removal of the provisions in subpart O, which are either redundant or obsolete, merely conforms CBP's regulations to the BIS and OFAC requirements. It does not affect the existing embargo, and therefore does not require a determination that a transition government is in power in Cuba.

Comment: Two commenters expressed support for the removal of subpart O but requested that individuals arriving in the United States from any foreign place, including individuals arriving from Cuba, be subject to criminal background checks in order to enter the United States. One commenter requested that additional restrictions be placed on flights to and from any foreign place.

Response: The requirements applicable to foreign individuals seeking entry into the United States are beyond the scope of this rule. However, DHS notes that despite the removal of subpart O, all travelers arriving in the United States from Cuba must still report to a CBP officer and undergo a customs and immigration inspection, as required by various provisions in the United States Code and titles 8 and 19 and of the CFR. DHS and its component agencies also work closely with the Department of State and other agencies responsible for enforcing the sanctions regime against Cuba, including OFAC and BIS, to ensure that individuals on the Specially Designated National (SDN) list are prohibited entry into the United States.

In addition, despite the removal of subpart O, all aircraft arriving in the United States from Cuba are subject to the various reporting and inspection requirements of title 19 CFR.

Comment: One commenter requested that DHS amend section 122.153(c) of title 19 (19 CFR 122.153) to permit Key West International Airport to receive flights to and from Cuba.

Response: Section 122.153 of title 19 is within subpart O and, therefore, has been removed. However, it is not necessary to amend the list of airports authorized to accept

flights to and from Cuba previously contained in 122.153(c) to add Key West International Airport, or any other airport, in order for that airport to receive flights to and from Cuba. With the removal of subpart O, any airport, including Key West International Airport, may request a new international flight to or from Cuba under the same procedures and requirements applicable to all other similarly situated airports and aircraft operators seeking to conduct international flights. In order to operate flights between the United States and Cuba, all airports and aircraft operators must comply with applicable regulatory requirements of DHS and its component agencies, such as CBP, the Transportation Security Administration (TSA), U.S. Immigration and Customs Enforcement (ICE) and the U.S. Coast Guard, as well as the regulatory requirements of OFAC, BIS, and the Department of Transportation's Federal Aviation Administration.

III. Conclusions – Regulatory Amendments

After careful consideration of the comments received, DHS is adopting the interim regulations, as set forth in the IFR published in the *Federal Register* at 81 FR 14948 on March 21, 2016, as final without change.

STATUTORY AND REGULATORY REQUIREMENTS

A. Statutory Requirements

The Administrative Procedure Act (APA) requirements in 5 U.S.C. 553 govern agency rulemaking procedures. Among other procedural requirements, the APA generally requires that a final rule have a 30-day delayed effective date. The APA provides a full exemption from the requirements of section 553 for rules involving the foreign affairs function of the United States. *See* 5 U.S.C. 553(a)(1). This 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 clarify and simplify the regulations regarding air travel between the United States and Cuba and are consistent with President Trump's continued efforts to ensure that engagement between the United States and Cuba advances the interests of the United States and the Cuban people, including the mutual interest in facilitating lawful travel and safe civil aviation.² *See* 82 FR 48875. Accordingly, this final rule is not subject to the 30-day delayed effective date requirement.

Additionally, because this rule is not subject to the requirements of 5 U.S.C. 553, it is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.).

B. Executive Orders 12866 and 13771

Executive Order 12866 ("Regulatory Planning and Review") directs agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Rules involving the foreign affairs function of the United States are exempt from the requirements of Executive Order 12866. Executive Order 13771 ("Reducing Regulation and Controlling Regulatory Costs") requires that whenever an agency promulgates a new regulation, it must identify at least two existing regulations to be repealed. It further directs that any new incremental costs associated with new regulations must be offset by the elimination of existing costs associated with two prior regulations. Pursuant to section 4(a), Executive Order 13771 does not apply to regulations issued with respect to a foreign affairs function of the United States.

As discussed above, DHS has concluded that clarifying and simplifying the regulations regarding restrictions on travel between the United States and Cuba is a foreign

² National Security Presidential Memorandum on Strengthening the Policy of the United States Toward Cuba (June 16, 2017) § 2(d), (f).

affairs function of the United States Government. Accordingly, this rule is exempt from the requirements of Executive Orders 12866 and 13771.

SIGNING AUTHORITY

This final rule is being issued in accordance with 8 CFR 2.1 and 19 CFR 0.2(a). Accordingly, this 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 Regulations

For the reasons set forth above, the IFR amending part 122 of the CBP regulations (19 CFR part 122), which was published in the *Federal Register* at 81 FR 14948 on March 21, 2016, is adopted as a final rule without change.

Dated: June 14, 2019.

Kevin K. McAleenan,
Acting Secretary.

[FR Doc. 2019-13431 Filed: 6/24/2019 8:45 am; Publication Date: 6/25/2019]