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DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 734 and 748

[Docket No. 100707291-0292-01]

RIN: 0694 –AE94

**The Jurisdictional Scope of Commodity Classification Determinations and Advisory
Opinions Issued by the Bureau of Industry and Security**

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Interim final rule with request for comments.

SUMMARY: In this interim final rule, the Bureau of Industry and Security (BIS) amends the Export Administration Regulations (EAR) to clarify that commodity

classification determinations and advisory opinions BIS issues or has issued under the EAR are not and may not be relied upon as U.S. Government determinations that the items described therein are subject to the EAR, as opposed to the jurisdiction of another U.S. Government agency.

DATES: This rule is effective [INSERT DATE OF PUBLICATION]. Comments must be received [INSERT 60 DAYS AFTER DATE OF PUBLICATION].

ADDRESSES: You may submit comments, identified by RIN 0694-AE94, by any of the following methods:

- Federal e-Rulemaking Portal: www.Regulations.gov. Please follow the instructions for submitting comments.
- E-mail: publiccomments@bis.doc.gov Include “RIN 0694-AE94” in the subject line of the message.
- Fax: (202) 482-3355. Please alert the Regulatory Policy Division, by calling (202) 482-2440, if you are faxing comments.
- Mail or Hand Delivery/Courier: Sheila Quarterman, U.S. Department of Commerce, Bureau of Industry and Security, Regulatory Policy Division, 14th Street & Pennsylvania Avenue, NW, Room 2705, Washington, DC 20230, Attn: RIN 0694–AE94.

Send comments regarding the collection of information associated with this rule, including suggestions for reducing the burden to Jasmeet Seehra, Office of Management and Budget (OMB), by e-mail to [Jasmeet K. Seehra@omb.eop.gov](mailto:Jasmeet_K._Seehra@omb.eop.gov) or by fax to (202)

395-7285. Comments on this collection of information should be submitted separately from comments on the final rule (i.e., RIN 0694-AE94) – all comments on the latter should be submitted by one of the three methods outlined above.

FOR FURTHER INFORMATION CONTACT: Sheila Quarterman, Bureau of Industry and Security, Office of Exporter Services, Regulatory Policy Division, by phone at (202) 482-2440 or by fax (202) 482-3355.

SUPPLEMENTARY INFORMATION:

Background

BIS has jurisdiction over only those items and activities that are “subject to the EAR” as described in §§ 734.2(a) and 734.3(a) of the EAR. Items that are exclusively controlled for export or reexport by another agency of the U.S. Government are not “subject to the EAR.” 15 C.F.R. § 734.3(b)(1). If an item is exclusively subject to the jurisdiction of another agency, for example, the Department of State’s Directorate of Defense Trade Controls (DDTC), the Department of the Treasury’s Office of Foreign Assets Controls (OFAC), the U.S. Nuclear Regulatory Commission (NRC), the Department of Energy (DOE), or the Patent and Trademark Office (PTO), then one must comply with the regulations administered by that agency and need not consider the provisions of the EAR. 15 C.F.R. §§ 732.2(a)(1) and 734.3(b)(1). In order to determine whether an item is “subject to the EAR” or whether the item is subject to the exclusive export control jurisdiction of another U.S. government agency, a person is entitled to make jurisdictional determinations with respect to particular items based on a review of the

relevant regulations. A person may also seek and receive official guidance from the other U.S. Government agencies regarding whether an item is subject to the exclusive export control jurisdiction of such agencies. In particular, DDTC has a process by which one may seek and receive a “commodity jurisdiction” (CJ) determination whether an item is subject to the International Traffic in Arms Regulations (ITAR). 22 C.F.R. § 120.4.

Unlike the ITAR, the EAR does not provide authority to make commodity jurisdiction determinations. Rather, as described in § 748.3(a) of the EAR, an exporter or other party may request that BIS provide (i) an official determination—called a “commodity classification”—of which, if any, of the EAR’s Export Control Classification Numbers (ECCNs) describe the items subject to the request and (ii) advisory opinions, which are official guidance regarding how BIS interprets the EAR. ECCNs are the numbers and letters that identify items on the EAR’s list of items controlled for export and reexport, and are found in the Commerce Control List (CCL) in Supplement No. 1 to Part 774 of the EAR. No other agency of the U.S. Government has the authority to issue determinations about the ECCN that applies to an item. Because BIS assigns all commodity classifications a Commodity Classification Automated Tracking System (CCATS) number, classifications are sometimes called CCATS. Sections 748.3(b) and 748.3(c) of the EAR describe the procedures for submitting commodity classification and advisory opinion requests, respectively.

Because BIS does not have the authority to issue commodity jurisdiction determinations, a BIS commodity classification only reflects whether each item identified in the

commodity classification request is described in the CCL. Thus, prior to seeking a commodity classification, the applicant should have already determined – through a self-determination or with the assistance of another U.S. Government agency – that the item is not subject to the exclusive export control jurisdiction of another U.S. Government agency. In issuing a commodity classification, BIS is not making a determination of whether the item is or is not subject to the EAR. Similarly, although advisory opinions (unlike commodity classifications) may opine on matters beyond the interpretation of CCL provisions, advisory opinions also may not be relied upon or cited as evidence of whether or not the pertinent items are subject to the EAR.

The purpose of this interim final rule amending §§ 748.3(a), (b), and (c) of the EAR is to remind the public of the long-standing principle that commodity classifications and advisory opinions are not and may not be relied upon as U.S. Government determinations that the items described therein are subject to the EAR as opposed to the jurisdiction of another U.S. Government agency.

To further the educational and compliance objectives of this amendment, BIS will begin inserting the following reminder on all commodity classifications it issues:

“This commodity classification sets forth the classification of the above-listed items if they are subject to the EAR. This commodity classification is not a determination by BIS as to whether the above-listed items are “subject to the EAR.” As defined and described in sections 734.2 through 734.4 of the EAR, the term “subject to the EAR” means, among other

things, that the item(s) are not exclusively controlled for export or reexport by another agency of the U.S. Government. See 15 C.F.R. § 734.3(b)(1). Thus, this document is not, and may not be relied upon as, a U.S. Government determination that the above-listed items are not, for example, subject to the export control jurisdiction of the International Traffic in Arms Regulations (ITAR) (22 C.F.R. Parts 120-130), which are administered by the U.S. Department of State.

BIS reminds the public of the availability of a webpage where sources of publicly available information on commodity classification may be found. The public may go to the following webpages for more information:

<http://www.bis.doc.gov/commodityclassificationpage.htm>, or the main BIS webpage at www.bis.doc.gov and click on the link “Commodity Classifications.”

Since August 21, 2001, the Export Administration Act has been in lapse and the President, through Executive Order 13222 of August 17, 2001 (3 CFR, 2001 Comp., p. 783 (2002)), as extended most recently by the Notice of August 13, 2009 (74 FR 41325 (August 14, 2009)), has continued the EAR in effect under the International Emergency Economic Powers Act.

Rulemaking Requirement

1. This rule has been determined to be not significant for the purposes of Executive Order 12866 of September 30, 1993 (58 FR 1735 (October 4, 1993)).

2. Notwithstanding any other provisions of law, no person is required to respond to nor be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This rule involves collections previously approved by OMB under control number 0694-0088, “Multi-Purpose Application,” which carries a burden hour estimate of 58 minutes to prepare and submit form BIS-748. This rule is expected to result in a decrease in license applications submitted to BIS. Total burden hours associated with the PRA and OMB control number 0694-0088 are not expected to increase significantly as a result of this rule.

3. This rule does not contain policies with Federalism implications as that term is defined under Executive Order 13132.

4. The Department finds that there is good cause under 5 U.S.C. 553(b)(B) to waive the provisions of the Administrative Procedure Act requiring prior notice and the opportunity for public comment as unnecessary. This rule only clarifies existing provisions of the EAR regarding commodity classification determinations and advisory opinions, with respect to commodity jurisdiction decisions; such decisions, in turn, are governed by existing statute. Because this rule does not implement substantive changes, but merely clarifies the agency’s long-held interpretation, it is unnecessary to provide prior notice and opportunity for public comment. The 30-day delay in effectiveness required

by 5 U.S.C. 553(d) is not applicable because this rule is not a substantive rule. In addition, because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule by 5 U.S.C. 553, or by any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 et. seq.) are not applicable. However, to obtain the benefit of a variety of viewpoints, BIS is issuing this rule as an interim final rule with a request for comments.

The period for submission of comments will close [INSERT 60 DAYS AFTER DATE OF PUBLICATION]. The Department will consider all comments received before the close of the comment period in developing final regulations. Comments received after the end of the comment period will be considered if possible, but their consideration cannot be assured. The Department will not accept public comments accompanied by a request that a part or all of the material be treated confidentially because of its business proprietary nature or for any other reason. The Department will return such comments and materials to the persons submitting the comments and will not consider them in the development of final regulations. All public comments on these regulations will be a matter of public record and will be available for public inspection and copying. In the interest of accuracy and completeness, the Department requires comments in written form (including fax or e-mail).

Oral comments must be followed by written memoranda, which will also be a matter of public record and will be available for public review and copying. Communications from agencies of the United States Government or foreign governments

will not be available for public inspection.

The Office of Administration, Bureau of Industry and Security, U.S. Department of Commerce, displays these public comments on the Federal e-Rulemaking portal at www.Regulations.gov and on BIS's Freedom of Information Act (FOIA) web site at <http://www.bis.doc.gov/foia>. This office does not maintain a separate public inspection facility. If you have technical difficulties accessing BIS's web site, please call the Office of Administration at (202) 482-0637 for assistance.

List of Subjects

15 CFR Part 734

Administrative practice and procedure, Exports, Inventions and patents, Research Science and technology.

15 CFR Part 748

Administrative practice and procedure, Exports, Reporting and recordkeeping requirements.

Accordingly, parts 734 and 748 of the Export Administration Regulations (15 CFR Parts 730 – 774) are amended as follows:

PART 734 – [AMENDED]

1. The authority citation for 15 CFR Part 734 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13020, 61 FR 54079, 3 CFR, 1996 Comp., p. 219; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 13, 2009, 74 FR 41325 (August 14, 2009); Notice of November 6, 2009, 74 FR 58187 (November 10, 2009).

2. Section 734.3 is amended by adding paragraph (d) to read as follows:

§ 734.3 Items subject to EAR.

* * * *

(d) Commodity classification determinations and advisory opinions issued by BIS are not, and may not be relied upon as, determinations that the items in question are “subject to the EAR,” as described in § 748.3 of the EAR.

PART 748 – [AMENDED]

3. The authority citation for 15 CFR Part 748 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 13, 2009, 74 FR 41325 (August 14, 2009).

4. Section 748.3 is amended:

a. By revising the second and third sentences in paragraph (a) introductory text;

b. By adding a new sentence after the third sentence in paragraph (a) introductory text;

b. By adding paragraph (b)(3); and

c. By adding paragraph (c)(4), to read as follows:

§748.3 Classification requests, advisory opinions, and encryption registrations.

(a) Introduction. You may ask BIS to provide you with the correct Export Control Classification Number (ECCN) down to the paragraph (or subparagraph) level, if appropriate. BIS will issue you a determination that each item identified in your classification request is either described by an ECCN in the Commerce Control List (CCL) in Supplement No. 1 to Part 774 of the EAR or not described by an ECCN and, therefore, an “EAR99” item. These classification determinations issued by BIS are not U.S. Government determinations that the items described therein are “subject to the EAR,” as this term is defined in §734.3 of the EAR. Those who request commodity classifications and advisory opinions should have determined that the items at issue are not subject to the exclusive export control jurisdiction of one of the other U.S. Government agencies listed in §734.3(b) of the EAR. * * *

(b) * * *

(3) BIS assigns each of its commodity classifications a Commodity Classification Automated Tracking System (CCATS) number. Neither the BIS classification nor the CCATS number may be relied upon or cited as evidence that the U.S. Government has determined that the items described in the commodity classification determination are subject to the EAR (See 15 CFR 734.3).

(c) * * *

(4) Advisory opinions are limited in scope to BIS's interpretation of EAR provisions. Advisory opinions differ from commodity classifications in that advisory opinions are not limited to the interpretation of provisions contained in the Commerce Control List. Advisory opinions may not be relied upon or cited as evidence that the U.S. Government has determined that the items described in the advisory opinion are not subject to the export control jurisdiction of another agency of the U.S. Government (See 15 CFR 734.3).

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DATED: July 23, 2010

Kevin J. Wolf
Assistant Secretary for
Export Administration

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