Originally published on August 2, 2010 in *International Trade Law News* (www.tradelawnews.com)

Interim Final Rule Intended to Clarify Purpose of BIS Commodity Classifications and Advisory Opinions Has Been Misinterpreted

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On August 2, 2010, the Bureau of Industry and Security published an interim final rule in the *Federal Register* intended to clarify the purpose of the commodity classifications (commonly known as "CCATS") and advisory opinions that it issues. Unfortunately, the purpose of the interim rule, which was to help educate exporters with export compliance, has been widely misinterpreted.

The interim final rule amended sections 734.3 and 748.3 of the Export Administration Regulations (EAR) by adding language noting that:

- Commodity classifications and advisory opinions may not be relied upon as determinations that the items in question are "subject to the EAR" as described in section 748.3 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 export control agencies, such as the Directorate of Defense Trade Controls, OFAC, and Nuclear Regulatory Commission.

- Advisory opinions are limited to BIS's interpretation of EAR provisions and may not be relied upon or cited as evidence that the items in question are not subject to the to the export control jurisdiction of another U.S. Government agency.

The interim final rule also indicates that BIS will begin inserting the following reminder language on all future commodity classifications (CCATS) that 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 CFR 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 CFR Parts 120– 130), which are administered by the U.S. Department of State.

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BIS's interim final rule was intended to remind exporters that the purpose of a commodity classification, which is to provide the Export Control Classification Number (ECCN) of products, technology or software as described on the Commerce Control List (CCL), is only one part of the export analysis. Prior to seeking a commodity classification from BIS, an exporter should first determined the proper government agency that has jurisdiction over their item, technology or software. For example, products that are included on the U.S. Munitions List or are considered to be "defense articles" under the International Traffic in Arms Regulations (ITAR) are subject to the export licensing jurisdiction of the State Department's Directorate of Defense Trade Controls (DDTC).

Under the current U.S. export control regime, DDTC is the only agency that can issue commodity jurisdictions, commonly known as CJs, to advise an exporter whether an item or service is subject to the ITAR or not. Because of the intended purpose of CJs and commodity classifications, the information submitted to BIS to obtain a commodity classification (product specifications, etc.) is very different than the information submitted to DDTC to obtain a CJ (design intent, application, military versus commercial sales, etc.).

The modifications made to the EAR, as well as the new language to be included on commodity classifications, was also intended to eliminate, to the extent possible, those cases where a person or company exporting a defense article can avoid criminal prosecution under the Arms Export Control Act by claiming that they had obtained a CCATS from BIS for an item when the item was actually subject to the jurisdiction of the ITAR.

The interim final rule also sought to educate those in law enforcement who prosecute export control violations by attempting to distinguish commodity classifications from commodity jurisdictions.

Despite the clear purpose of this rule, there have been headlines in various publications indicating that this interim final rule is confusing as it seems to indicate that BIS will not accept responsibility for its decisions, that such classification are not dependable or that exporters cannot rely on commodity classifications or advisory opinions issued by BIS.

These interpretations are incorrect. BIS classifications and advisory opinions can certainly be relied upon for issues relating to the EAR. However, under the current export control regime, which provides that different agencies have jurisdiction over dual-use and defense articles, exporters must be certain that their item is "subject to the EAR" before relying on a commodity classification or advisory opinion issued by BIS. While this confusion may be eventually eliminated by the creation of a single export control list and single licensing agency, the clarification in this interim final rule is useful and is long overdue.

The period for submission of public comments on the interim final rule runs until October 1, 2010.