

## BPE Global Hot Topic – November 2022

### Classification is Key



When Shakespeare wrote “a rose by any other name would smell as sweet,” he forgot to mention whether the rose would smell sweeter if, after it had been appropriately classified, it was determined that no license was required for its export and no duties would be charged for its import. This is why classification matters! In fact, no year has brought the importance of accuracy in classification into focus like 2022. This year, trade compliance professionals scrambled to keep up with constant regulatory changes surrounding ECCN or HTS codes. Following are some of the key events that led to numerous hours of classification exercises this year, and some ideas about what can be done now to help mitigate classification frenzy in the future.

We kicked off 2022 with the 5-year HTS update based on the World Customs Organization’s 2022 Harmonized System Tariff nomenclature. As we reported in January, the changes included over 1,500 new headings and subheadings across the 97 chapters of the HTS. While these were significant changes, at least we were prepared, since the changes had been announced in advance (feel free to call the BIS to share this Best Practice)! A review of the Change Record of the HTS shows that it was a relatively quiet year for any country-specific updates. To date, only 11 revisions have been made, the majority of which were updates to Chapter 99 U.S. notes.

On the export front, one of the biggest classification surprises of the year came in early March, when, in addition to the usual ECCN-based export controls, U.S. and European export agencies also rolled out Harmonized Schedule-based restrictions for exports to Russia and Belarus. In the U.S., the Bureau of Industry and Security (BIS) added two new HTS-based lists against which companies must now screen. The first of these, Supplement 4 to Part 746 of the Export Administration Regulations (EAR), imposed license requirements for products typically for use in certain industry sectors. The second list, Supplement 5 to Part 746 of the EAR, imposed HTS-based controls on items designated as Luxury Goods. Yes, this means that even EAR99 items can still be controlled based on their HTS to Russia and Belarus. Global Trade Management (GTM) Systems, ordinarily programmed ECCN-based controls were not designed with this type of export control in mind and companies had to come up with creative solutions to ensure their products listed, including those that are EAR99, were not inadvertently exported.

Other complications emerged in that the codes are harmonized globally only to the 6<sup>th</sup> digit, with country-specific variations thereafter to the 10<sup>th</sup> digit, meaning that some products might be authorized for export in one country, but not in another. Making this even more complicated, let’s not forget that the days U.S. Federal Register Notices were published were the same days these new supplements went into effect. Multinationals exporting from different geographic locations had no time to study each country’s regulations and lists to implement proper holds and ensure compliant exports. Because of this new way of implementing sanctions, many companies learned the painful lesson that rule implementation dates were not the time to stop and wonder, “are our products correctly classified under the Harmonized Tariff Schedule?”

Additions and revisions to Export Control Classification Numbers (ECCNs) were also popular in 2022. For example, in August BIS revised five ECCNs and added one ECCN to the CCL for products that support the production of advanced semiconductors and gas turbine engines. These were designated as “Section 1758 Technologies,” which encompasses both the “emerging and foundational technologies” the

Department of Commerce has been tasked with identifying and controlling under the Export Control Reform Act. Be aware. Exporters have been put on notice that Section 1758 Technologies can be added to the Commerce Control List at any time, and manufacturers of Section 1758 technologies have additional hurdles to overcome when it comes to foreign investors.

Some would argue that the most impactful changes with respect to ECCNs came just last month when BIS added two new ECCNs for semiconductor and supercomputing products requiring stricter export controls to China. Reading through the rules, we soon learned that decoder rings would need to be distributed to help us wrap our heads around the new twist: in accordance with EAR Part 740.2 (a)(9), products elsewhere specified on the Commerce Control List that meet or exceed the technical parameters of the new ECCNs 3A090 or 4A090 no longer qualify for certain license exceptions. For example, a 5A002 product that exceeds the technical parameters of 3A090 no longer qualifies for license exception ENC when for export to China. Additional restrictions were imposed similarly on mass market products classified as 5A992.c that meet or exceed the technical parameters of ECCNs 3A090 or 4A090. Those now carry the RS controls of the new ECCNs and would require a license for export to China, which in most cases would be reviewed with a presumption of denial. Once again, we were back to the classification drawing board, reviewing existing products, validating them against the new ECCNs, and determining how to stop them from being exported without proper authorization. This brought up another GTM system question. How can you program them to allow the export of a 5A992.c product that *does not* meet 3A090/4A090 parameters to China while stopping those that *do*?

Although these few examples cover only some of the nuances of the rules issued this year, they're still a lot to absorb. But there is good news! While we may have no control over what the government will do in the future, there are things that every company can do now to minimize the stress of last-minute regulations that impact product classifications.

Classify, classify, classify.

If you were fortunate enough not to have been forced into classification frenzy this year, that doesn't mean you're off the hook. As an importer or exporter, you still have an obligation to classify your products. Begin now. If you haven't already done so, establish a product matrix that will include both your ECCNs, related Schedule B/HTS numbers, and applicable license exceptions. Add extra columns to identify non-CCL related controls. It's no longer enough to classify a product as EAR99 and assume there are no other export-related controls.

Don't just file away your CCATS validations and assume you can rely on them forever. If it's been a while since you reviewed them, schedule some time to dust them off to determine whether the ECCNs are still valid or that your products haven't been improved upon in such a way or moved to a lower control such that they might require a reclassification.

Try to avoid the temptation of downloading your most cherished category of the CCL, or that favorite HTS Chapter you spend your days in, without checking regularly for updates. While it may make it easier to find the document when you need it, if the regulations change and you don't know it, you could easily misclassify a product.

Collaborate.

Who are the key players involved with classification, both internally and externally? Make it a point to get to know them now, so that you aren't having to figure it out when you're pressed for time and need answers to questions right away. Create a list of key engineers and product managers you can reach out to with questions about your products' technology. Ask to be advised on a regular basis regarding what the engineering teams are designing or developing. Remind them that critical technologies (foreign investment-would need to pre-set up above)

Schedule time with your GTM systems providers to find out what they learned this year, and whether they have made, or are planning to make any significant changes to the systems that will help you more easily classify and maintain your classification data in the future. If you have ideas on how to make improvements, don't forget to share them. They're always willing to listen.

Make friends with your IT team. If you're at a smaller company and don't have a GTM system to rely on, take your IT contacts out to lunch regularly. Explain your needs to them (read "train") so that they can pick from their best resources to help you move away from manual classification processes and develop better tools such as automated questionnaires and product classification databases. Don't forget to budget accordingly.

#### Comment.

In some cases, industry is given the opportunity to submit comments to the issuing agency on proposed rules. While it's tempting to assume that someone else will do it, the number of comments received can make a difference. If you know your company will be significantly impacted by a proposed rule that will change your products' classifications or imposes restrictions on your products' exports based on how they're classified, then it may benefit you to take the time to submit a comment, whether as an individual company or collectively through any of the trade associations to which your company may belong.

Let BPE Global know if we can help you with any of your trade compliance needs. BPE Global is a global trade consulting and training firm. Evelyn Bernal is a Director of BPE Global. You can reach Evelyn by email at [EBernal@BPEGlobal.com](mailto:EBernal@BPEGlobal.com) or by phone at 408-718-0265.