

FDP Rules Alert

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On February 3, 2022, the Department of Commerce, Bureau of Industry and Security (“BIS”) published a final rule (the “Final Rule”) revising the organization and substance of the foreign-direct product (“FDP”) rules.^[1] BIS has consolidated the FDP rules in the previously reserved § 734.9 of the Export Administration Regulations^[2] (“EAR”), whereas, before, one was required to reference multiple sections to apply the FDP rules. Based on a surface-level review of the rule and corresponding comments from BIS in the Federal Register, the Final Rule may seem to have merely reorganized the rules in one place in the EAR for ease of use; however, the Final Rule may have a material impact on Huawei and its suppliers.

The Final Rule divides the FDP rules into four paragraphs—the National Security FDP rule, the 9x515 FDP rule, the “600 series” FDP rule, and the Entity List FDP rule—to delineate their respective scopes more clearly.^[3] Under the Final Rule, BIS added the term “U.S.-origin” before “technology or software subject to the EAR” to the text of each FDP rule, except the Entity List FDP rule, where BIS removed “U.S.-origin” from the rule’s production equipment provision.^[4] While the comments accompanying the Final Rule in the Federal Register explain that the addition of “U.S.-origin” in the first three FDP rules simply clarified, rather than changed, their scope, those comments are silent as to the removal of “U.S.-origin” from the Entity List FDP rule.^[5]

BIS appears to have caused more items to be subject to the EAR. Consequently, many more items may now require a license for export, reexport, or transfer in country to listed Huawei entities. Specifically, by removing “U.S.-origin” from the Entity List FDP rule relating to production equipment, BIS has expanded the scope of production equipment that is subject to that rule. Under the May 19, 2020 rule, the Entity List FDP rule only applied to items produced by a plant or major component of a plant (located outside the United States) that was itself a direct product of certain enumerated U.S.-origin technology or software subject to the EAR.^[6] By removing “U.S.-origin” from the text of the Entity List FDP rule, the EAR now controls the output of a plant or major component of a plant that is the direct product of U.S.- or non-U.S.-origin technology or software subject to the EAR and specified in the enumerated Export Control Classification Numbers (“ECCNs”).^[7]

This rule is enforceable because technology or software of a third country can be subject to the EAR, even though it is not U.S.-origin, such as when the technology or software contains more than a de minimis amount of U.S.-controlled content or is the direct product of U.S.-origin technology or software under the National Security FDP rule.^[8]

For example, the new rule would prohibit a company from possessing in its “clean room” German- or Japanese-made production equipment that is the direct product of technology or software subject to the EAR, developed by the German or Japanese equipment manufacturer, and classified under one of the enumerated ECCNs.

The Final Rule reflects the U.S. government’s continued effort across administrations to limit Huawei’s access to technology and software, regardless of origin, that support 5G infrastructure. The removal of “U.S.-origin” from the Entity List FDP rule expands that rule’s already broad scope to include items resulting not only from certain enumerated technology or software subject to the EAR, but also from the production of a plant or major component of a plant that is the direct product of certain enumerated technology or software subject to the EAR, regardless of origin.

^[1] 87 Fed. Reg. 6022 (Feb. 3, 2022). *E.g., id.* at 6024–25 (explaining that the 600 series FDP rule applies to “military commodities” located and produced outside the United States, described in Export Control Classification Number (“ECCN”) 0A919, that are the direct product of U.S.-origin technology or software); *id.* at 6023 (clarifying, in § 736.2(b)(3), that BIS generally determines license requirements for foreign-direct products subject to the EAR on a case-by-case basis by considering each item’s classification, destination, end-user, and end-use).

^[2] 15 C.F.R. parts 730–80 (2022).

^[3] 87 Fed. Reg. at 6022.

^[4] 15 C.F.R. § 734.9(e)(1)(ii) (2022). Under the FDP rules, a major component “is ‘equipment’ that is ‘essential’ to the ‘production’ of an item, including testing ‘equipment,’” and equipment is essential if it “is involved in any of the production stages.” *Id.* § 734.9(a); 87 Fed. Reg. at 6023. BIS moved the definition of “major component” from footnote 1 to Supplement no. 4 to part 744 of the EAR to § 734.9(a) of the EAR to demonstrate that the definition applies to all FDP rules. 87 Fed. Reg. at 6023.

^[5] 87 Fed. Reg. at 6023.

^[6] 85 Fed. Reg. 29,849, 29,850 (May 19, 2020).

^[7] § 734.9(e)(1)(ii).

^[8] § 734.3(a).

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