

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 Regulations² (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 companies on the Entity List and designated with footnote 1, such as Huawei and its suppliers.

2022年2月3日，美国商务部工业与安全局（“BIS”）发布了一项最终规则（“最终规则”），对外国直接产品（“FDP”）规则的内容进行了重组和修改。¹ BIS已将FDP规则归入到先前保留的《出口管理条例²》（“EAR”）第734.9条中，而在此之前，人们需要参考多个章节以适用FDP规则。根据对该规则简要分析和BIS在联邦公报上的有关评论，《最终规则》似乎只对EAR的一处进行了重组，以方便适用；然而，即便如此，《最终规则》还是可能对特别指定的实体清单上的企业，例如华为及其供应商产生重大影响。

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 “US-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 “US-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 “US-origin” in the first three FDP rules simply clarified, rather than changed, their scope, those comments are silent as to the removal of “US-origin” from the Entity List FDP rule.⁵

《最终规则》FDP规则分为四个段落--国家安全FDP规则、9x515 FDP规则、“600系列”FDP规则和实体清单FDP规则，以更清楚地划分各自的范围。³ 《最终规则》中，BIS在每条FDP规则的文本中，在“受EAR管制的技术或软件”之前增加了“美国原产”一词，但实体清单FDP规则除外，BIS在该规则的生产设备条款中删除了“美国原产”。⁴ 虽然《联邦公报》对《最终规则》的评论解释说，在前三条FDP规则中增加“美国原产”仅是澄清而非改变其范围，但未提及从实体清单FDP规则中删除“美国原产”。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 designated companies on the Entity List. Specifically, by removing “US-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 US) that was itself a direct product of certain enumerated US-origin technology or software subject to the EAR.⁶ By removing “US-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 US- or non-US-origin technology or software subject to the EAR and specified in the enumerated Export Control Classification Numbers (ECCNs).⁷

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 US, described in Export Control Classification Number (ECCN) 0A919, that are the direct product of US-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 87 Fed. Reg. 6022 (2022年2月3日)。例如，同上，第6024-25页（解释了600系列FDP规则适用于美国以外生产的“军事商品”，出口管制分类号（ECCN）为0A919，是美国技术或软件是直接产品。同上，第6023页（在第736.2(b)(3)条中澄清，BIS通常在考虑每个项目的分类、目的地、最终用户和最终用途的基础上，逐一确定受EAR管制的外国直接产品的许可证要求）。

3 15 C.F.R. parts 730–80 (2022).

4 87 Fed. Reg. at 6022.

5 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.

6 15 C.F.R. §734.9(e)(1)(ii) (2022)。根据FDP规则，主要组件“是指对项目的‘生产’至关重要”的设备，包括测试设备，如果设备“参与任何生产阶段”，则是必不可少的。同上。§734.9(a); 87 Fed. Reg. at 6023。BIS将“主要组件”的定义从EAR第744部分第4号补充文件的脚注1移至EAR第734.9(a)条，以证明该定义适用于所有FDP规则。

7 87 Fed. Reg. at 6023.

8 85 Fed. Reg. 29,849, 29,850 (May 19, 2020).

9 §734.9(e)(1)(ii).

BIS似乎已经使越来越多的物项受到EAR的管制。导致更多的出口、再出口或（国内）转让给特定实体清单企业的物项现在可能需要申请许可证。具体而言，通过删除与生产设备有关的实体清单FDP规则中的“美国原产”，BIS已经扩大了受该规则管制的生产设备的范围。根据2020年5月19日的规则，实体清单FDP规则只适用于EAR所管制的属于美国原产的软件或技术直接产品的工厂或主要设备组件（位于美国境外）生产的产品。⁶ 通过从实体清单FDP规则的文本中删除“美国原产”，EAR控制了作为某些出口管制分类编号（“ECCNs”）的美国或非美国原产的技术或软件的直接产品的工厂或主要设备组件生产的产品。⁷

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

这一规则是有效的，因为第三国的技术或软件即使不是源自美国，也可以受到EAR的管制，例如，根据国家安全FDP规则，该技术或软件含有超过“最低比例”的美国管控内容，或者是源自美国的技术或软件的直接产品。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.

⁸ § 734.3(a).

例如，新规则将可以禁止一家公司在其“clean room”中加工德国或日本制造的生产设备，而该设备是EAR所管制的技术或软件的直接产品，由德国或日本设备制造商开发，并属于某些列明的ECCN物项。

The Final Rule reflects the US government’s continued effort across administrations to limit certain companies, such as Huawei, access to technology and software, regardless of origin, that support 5G infrastructure. The removal of “US-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.

《最终规则》反映了美国政府各层持续竭力地限制某些特定的企业（例如华为）从任何来源获得5G基础设施的技术和软件。从实体清单FDP规则中删除“美国原产”，进一步扩大和延伸了该规则本来就很宽泛的范围，不仅包括受EAR管制的某些的技术或软件的产品，还包括某些工厂或主要设备组件生产的产品，只要这些工厂或主要设备组件是EAR所管制的技术或软件的直接产品，不论原产地。

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