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**BIS2022** UPDATE CONFERENCE ON  
EXPORT CONTROLS & POLICY



# The Foreign Direct Product Rules and *De minimis* Rules

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## Topics

- *De Minimis Rules*
- Direct Product Rules
- Compliance



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*De minimis*

- Incorporation, U.S. controlled content and the EAR
- *De minimis* rules
  - Ineligible for *de minimis*
  - “600 series”/9x515/see-through carve out items
  - Non-“600 series”/9x515/see-through carve out
  - Calculations of *de minimis*
- Second Incorporation Rule
  - Discrete Product

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## Incorporation



- U.S. items are “incorporated” when they are:
  - Essential to the functioning of the foreign equipment;
  - Customarily included in the sale of foreign-produced items; and
  - Reexported with the foreign-produced items.

Supplement No. 2 to part 734, Note to paragraph (a)(1)

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## “Controlled content” for *De minimis* Purposes



- **Controlled content** = incorporated U.S.-origin items that require a license to the ultimate destination of the foreign-produced item
  - EAR99 items may be controlled content to certain destinations;
  - Do not count:
    - Incorporated commodities eligible for License Exception GBS
    - Incorporated items eligible for NLR (no license required)
    - Incorporated commodities controlled for Short Supply reasons
    - **NEW: Items that meet the criteria in § 746.8(a)(5)**
      - To Russia or Belarus
      - From Supp no 3 to part 746 country
      - AT only and 9A991

Supplement No. 2 to part 734, paragraph (a)(1)

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## Not Considered Controlled Content

- Any items in “600 series” or 9x515, unless destined to
  - Crimea and covered regions of Ukraine (§746.6),
  - Russia & Belarus (except for § 746.8(a)(5) exclusion), or
  - Venezuela (§ 742.6(a)(7));
  - **Note:** Any not eligible for *de minimis* to Country Group E:1, E:2, or China.
- EAR99 items, unless destined to
  - Country Group E:1, E:2,
  - Crimea and covered regions of Ukraine (except EAR99 food and medicine, or certain software) (§746.6),
  - Russia for industry sector related (see §746.5(a)(1)(ii))
  - Russia & Belarus (see § 746.10 luxury goods).
- Items controlled for (AT) reasons only, unless destined to
  - Country Group E:1 or E:2;
  - Crimea and covered regions of Ukraine (except certain software) (§746.6); or
  - Russia & Belarus (except for § 746.8(a)(5) exclusion).

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## De minimis Rules

- 0%: § 734.4(a)
  - Often applies to specific U.S. content destined for certain destinations
  - Some restrictions apply to all destinations
- 10%: § 734.4(c)
- 25%: § 734.4(d)
- Additional steps for certain encryption items described in § 734.4(b)
- Calculation guidance: Supp. No. 2 to part 734

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## Ineligible for *De minimis* or 0%: § 734.4(a)

- Certain 9E003 technology
- Certain foreign high-performance computers when destined to certain countries (Computer Tier 3 or Cuba, Iran, North Korea and Syria)
- Certain foreign-produced encryption technology
- Non-ITAR foreign-produced military commodities that incorporate one or more of the commodities described in ECCN 0A919.a.1 when destined for a country listed in Country Group D:5
- “600 series” & 9x515, .a through .x, destined to Country Group D:5
- .y items in “600 series” & 9x515, destined to Country Groups E:1, E:2 or China

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## *De minimis* for “600 series,” 9x515 and see-through carve out items

The “600 series” and 9x515 *de minimis* rule – items identified in .a through .x paragraphs of the ECCN, as well as *see-through carve-out items*

Item with U.S. content reexported to all countries, except D:5 (see also ITAR §126.1), E:1 and E:2

25% *de minimis* rule

D:5 (U.S. arms embargoed), E:1 and E:2

0% *de minimis* rule

*Note 1: See Supplement No. 2 to Part 734 – Guidelines for De minimis Rules*

*Note 2: If exceeds de minimis, the foreign made item is subject to the EAR.*

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The "600 series" *de minimis* rule – items identified in any paragraph of "600 series" ECCN

Item with U.S. <u>any</u> content only reexported to all countries, <u>except</u> below countries.	Not subject to the EAR
E:1, E:2 plus China	0% <i>de minimis</i> rule
<ul style="list-style-type: none"> <li>• Crimea and covered regions of Ukraine (§746.6),</li> <li>• Russia &amp; Belarus (except for § 746.8(a)(5) exclusion), or</li> <li>• Venezuela (§742.6(a)(7))</li> </ul>	25% <i>de minimis</i> rule

Note 1: See Supplement No. 2 to Part 734 – Guidelines for De minimis Rules  
Note 2: If exceeds *de minimis*, the foreign made item is subject to the EAR.

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## De minimis in General

The general <i>de minimis</i> rules under 734.4(c) and (d)	
U.S.-origin controlled content reexported to all countries, <u>except</u> Country Group E:1 and E:2	25% <i>de minimis</i> rule
Country Group E:1 and E:2	10% <i>de minimis</i> rule


Note 1: See Supplement No. 2 to Part 734 – Guidelines for De minimis Rules  
Note 2: If exceeds *de minimis*, the foreign-made item is subject to the EAR.

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**De minimis Calculation**



- Performing *de minimis* calculation:  

$$\frac{\text{(Fair Market Value of U.S.-origin controlled content)}}{\text{(Total Fair Market value of non-US-made product)}} \times 100$$
- Compare commodity/commodity, software/software, technology/technology
  - For commodities, can also include “bundled” software
- Consult Supp. No. 2 to part 734 for additional guidance

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**Bundling Software with Commodities**

- U.S.-origin software may be “bundled” with non-U.S.-made commodities
  - Eligible software is configured for a specific commodity, but is not necessarily physically integrated into the commodity
  - Eligible software is controlled for AT reasons only or is EAR99
- Notes to paragraphs (c)(1) and (d)(1)

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## Calculation Example

- U.S.-origin field programmable gate array (FPGA) integrated circuit 3A001.a.7 \$600.00.



- Used for beam forming in processing equipment specially designed for German Trout acoustic towed hydrophone array \$6,000.00



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## Calculation Example

U.S.-origin FPGA \$600

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German hydrophone \$6000

*De minimis* Percentage =  $.1 \times 100 = 10 \%$



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## Second Incorporation Rule

- Policy determination of BIS
- Cannot be applied to “600 series” U.S.-origin content or U.S.-origin see-through carve-out items.
- Can only be applied if the first incorporation results in a non-U.S.- made **discrete product**



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## Discrete Product

- The first incorporation must be complete and result in a discrete product.
- The U.S.-origin content in the **first** discrete product must be counted in a *de minimis* calculation until that product’s **second** incorporation is complete.

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## Discrete Product

- Evidence of a discrete product
  - The foreign-produced item is regularly sold as stand-alone product or as an identifiable replacement component or assembly.
- Evidence that the foreign-produced item is not a discrete product
  - Purchaser is involved in the design of the foreign-produced item

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## Second Incorporation Rule Example

- U.S.-origin microprocessor chip (3A001.a.3)
- Chip is incorporated into a foreign-produced Central Processing Unit (CPU) card (4A003.c) and is subject to the EAR because of the *de minimis* rule.
- The CPU is sold from stock outside the U.S.
- The foreign-produced CPU is incorporated into a foreign-produced computer (4A003), which is not subject to the EAR because of the 2<sup>nd</sup> incorporation rule.



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One-Time Report

- Only required for technology commingling
- Include:
  - ECCN of technology
  - Fair Market Value in U.S. dollars
  - If using man-hours, how you tracked man-hours
  - De minimis calculation and percentage
- Method – any reasonable method will be considered

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*Saturday, May 16, 1959* - FEDERAL REGISTER 3989

shall endorse it, return one copy to the owner or operator prior to the departure of the aircraft, and retain a copy for his records. Upon return of the aircraft to the United States, the endorsed copy of the certification shall be surrendered to the Collector of Customs at the port of entry. If the port of entry is not the same as that from which the aircraft departed, the Collector of Customs at the

and one copy to the Collector of Customs at the original port of departure.

§ 385.2 [Amendment]

6. Section 385.2 *General Licenses GTDP, GTDU, and GTDS*, paragraph (b) *General License GTDU, unclassified technical data either unpublished or not generally available in published form is* amended to read as follows:

technical data from the United States, the exporter knows or has reason to believe that the product\* to be manufactured abroad by use of the technical data is intended to be exported or reexported directly or indirectly to a Subgroup A destination or Poland (including Danzig).

(1) Technical data and services listed in (a) of this subdivision for the plants,

Foreign-Direct Product Rules

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Foreign-Direct Product Rules

- You may **not** without a License or License Exception:  
\*\*\*
- **No. 3: Export from abroad, Reexport, or Transfer (in-country) foreign- “direct products” subject to the EAR pursuant to §734.9 if such items are subject to a license requirement in part 736, 742, 744, 746, or 764 of the EAR.**

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Foreign-“Direct Product” rules

- § 734.9(b) National Security FDP rule
- § 734.9(c) 9x515 FDP rule
- § 734.9(d) “600 series” FDP rule
- § 734.9(e) Entity List FDP rule
- § 734.9(f) Russia/Belarus FDP rule
- § 734.9(g) Russia/Belarus-MEU FDP rule

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## Direct Products of U.S. Technology or Software

- Pursuant to ITAR**  
 §§123.9(a) and 124.8(a)(5), defense articles produced or manufactured abroad pursuant to a TAA or MLA require the approval of DDTC before being transferred to any end-user, end-use, or destination other than as stated on the export.
- Under the EAR**, certain non-U.S.-made items, located outside the U.S., that are the direct product of certain U.S. controlled technology or software are subject to the EAR when exported from abroad or reexported to *certain* countries.

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## Definitions

- “Direct product”**: The immediate product (including processes and services) produced directly using technology or software.
- ‘Major Component’**: A major component of a plant located outside the United States means “equipment” that is essential to the “production” of an item, including testing “equipment.”
  - Equipment**. This is a combination of parts, components, accessories, attachments, firmware, or software that operate together to perform a function of, as, or for an end item or system. Equipment may be a subset of “end items” based on the characteristics of the equipment. ...
- U.S. Origin (unofficial)**: An item produced, refurbished, assembled, or upgraded in the United States.

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The National Security FDP rule - § 734.9(b)

Is the foreign-produced item a “direct product” of:	
(i) U.S.-origin “technology” or “software” that requires a written assurance as a supporting document for a license, see Supp No. 2 to 748 (o)(3)(i), or as a precondition for the use of LE TSR § 740.6 <u>or</u>	Yes/No?
(ii) A complete plant or ‘major component’ of a plant that is a direct product of U.S.-origin “technology” that meets the criterion in (i)?	
Is the FDP subject to national security controls as designated in the applicable ECCN of the Commerce Control List in part 774 of the EAR?	Yes/No?
Is the FDP being reexported or exported from abroad to a destination listed in <b>Country Group D:1, E:1 or E:2</b> ?	Yes/No?

*Note: If “yes” to all three questions, then the Foreign-produced item is subject to the EAR.*

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The 9x515 FDP rule - § 734.9(c)

Is the foreign-produced item a “direct product” of:	
(i) U.S.-origin 9x515 “technology” or “software” <u>or</u>	Yes/No?
(ii) A complete plant or ‘major component’ of a plant that is a “direct product” of U.S.-origin 9x515 “technology”?	
Is the FDP a 9x515 item?	Yes/No?
Is the 9x515 FDP being reexported or exported from abroad to a destination in <b>Country Group D:5, E:1 or E:2</b> ?	Yes/No?

*Note: If “yes” to all three questions, then the foreign-produced item is subject to the EAR.*

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The "600 series" FDP rule - § 734.9(d)

Is the foreign-produced item a "direct product" of:	
(i) U.S.-origin "600 series" "technology" or "software" <u>or</u>	Yes/No?
(ii) A complete plant or 'major component' of a plant that is a "direct product" of U.S.-origin "600 series" "technology"?	
Is the FDP a "600 series" or 0A919 item?	Yes/No?
Is the "600 series" or 0A919 FDP being reexported or exported from abroad to a destination listed in <b>Country Group D:1, D:3, D:4, D:5, E:1 or E:2</b> ?	Yes/No?

*Note: If "yes" to all three questions, then the foreign-produced item is subject to the EAR.*

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## ECCN 0A919

- Non-U.S.-made 'military commodities' located outside the United States that are not subject to the ITAR, AND having one or more of the following:
  - Incorporating more than a *de minimis* amount of U.S.-origin controlled content classified under ECCNs 6A002, 6A003, or 6A993.a (having a maximum frame rate equal to or less than 9 Hz and thus meeting the criterion of Note 3.a to 6A003.b.4);
  - Incorporating more than the *de minimis* amount of "600 series" content (see §734.4 of the EAR);
  - Are direct products of U.S.-origin "600 series" technology or software (see §736.2(b)(3) of the EAR).

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The Entity List FDP rule - § 734.9(e) – Footnote 1 (Huawei)  
 Question 1 of 2

<p><b>Is the foreign-produced item:</b></p> <p>(i) A “direct product” of “technology” or “software” <b>subject to the EAR</b> and specified in ECCN 3D001, 3D991, 3E001, 3E002, 3E003, 3E991, 4D001, 4D993, 4D994, 4E001, 4E992, 4E993, 5D001, 5D991, 5E001, or 5E991 of the Commerce Control List (CCL) in supplement no. 1 to part 774 of the EAR; <b>or</b></p> <p>(ii) Produced by any plant or ‘major component’ of a plant that is located outside the United States, when the plant or ‘major component’ of a plant, <b>whether made in the U.S. or a foreign country</b>, itself is a “direct product” of “technology” or “software” <b>subject to the EAR</b> that is specified in ECCN 3D001, 3D991, 3E001, 3E002, 3E003, 3E991, 4D001, 4D993, 4D994, 4E001, 4E992, 4E993, 5D001, 5D991, 5E001, or 5E991 of the CCL?</p>	<p>Yes/No?</p>
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The Entity List FDP rule - § 734.9(e) – Footnote 1 (Huawei)  
 Question 2 of 2

<p><b>Do you have “knowledge” that:</b></p> <p>(i) The foreign-produced item will be <b>incorporated into</b>, or will be <b>used in</b> the “production” or “development” of any “part,” “component,” or “equipment” <b>produced, purchased, or ordered by</b> any entity with a footnote 1 designation in the license requirement column of the Entity List in Supplement No. 4 to part 744 of the EAR; <b>or</b></p> <p>(ii) Any entity with a footnote 1 designation in the license requirement column of the Entity List in Supplement No. 4 to part 744 of the EAR is a <b>party to any transaction</b> involving the foreign-produced item, <i>e.g.</i>, as a “purchaser,” “intermediate consignee,” “ultimate consignee,” or “end-user.”</p>	<p>Yes/No?</p>
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*Note: If “yes” to both questions 1 and 2, then the foreign-produced item is subject to the EAR.*

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**The Russia/Belarus FDP rule - § 734.9(f) – Question 1 of 2**

<p>Is the foreign-produced item <u>not</u> designated as EAR99 and:</p> <p>(i) A “direct product” of <b>U.S.-origin</b> “technology” or “software” subject to the EAR and specified in any ECCN in <b>product groups D or E</b> of the CCL; <b><u>or</u></b></p> <p>(ii) Produced by any plant or ‘major component’ of a plant that is located outside the United States, when the plant or ‘major component’ of a plant, whether made in the United States or a foreign country, itself is a “direct product” of <b>U.S.-origin</b> “technology” or “software” subject to the EAR that is specified in any ECCN in <b>product groups D or E</b> of the CCL.</p>	Yes/No?
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**The Russia/Belarus FDP rule - § 734.9(f) – Question 2 of 2**

<p>Do you have “knowledge” that:</p> <p>(i) The foreign-produced item is <b>destined to</b> Russia or Belarus or <b>will be incorporated into or used in</b> the “production” or “development” of any “part,” “component,” or “equipment” <i>not designated as EAR99</i> and produced in or destined to Russia or Belarus;</p>	Yes/No?
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*Note: If “yes” to both questions 1 and 2, then the foreign-produced item is subject to the EAR.*

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**Russia/Belarus-MEU FDP rule - § 734.9(g)**  
**Question 1 of 2**

**Is the foreign-produced item:**

(i) A “direct product” of “technology” or “software” **subject to the EAR** and specified in any ECCN in product groups D or E in **any** category of the CCL; **or**

(ii) Produced by any plant or ‘major component’ of a plant that is located outside the United States, when the plant or ‘major component’ of a plant, whether made in the United States or a foreign country, itself is a “direct product” of **U.S.-origin** “technology” or “software” subject to the EAR that is specified in **any ECCN in product groups D or E** in **any** categories of the CCL.

Yes/No?

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**Russia/Belarus-MEU FDP rule - § 734.9(g)**  
**Question 2 of 2**

**Do you have “knowledge” that:**

(i) The foreign-produced item will be **incorporated into**, or **used in the “production” or “development”** of any “part,” “component,” or “equipment” produced, purchased, or ordered by any entity with a **footnote 3** designation in the license requirement column of the Entity List in Supplement No. 4 to part 744 of the EAR; **or**

(ii) Any entity with a **footnote 3** designation in the license requirement column of the Entity List in Supplement No. 4 to part 744 of the EAR is a **party to any transaction** involving the foreign-produced item, *e.g.*, as a “purchaser,” “intermediate consignee,” “ultimate consignee,” or “end-user.”

Yes/No?

*Note: If “yes” to both questions 1 and 2, then the foreign-produced item is subject to the EAR.*

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Determining Classification of FDPs  
Subject to the EAR

- When exporting from abroad FDPs that are **subject to the EAR** under *de minimis* or the direct product rules
- ...

**Determine the license requirements for the FDPs**

➤ **Note:** When a FDP contains an ITAR item, only the ITAR item is subject to ITAR controls.

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Licensing the Supply Chain

- Q5: If a distributor has a license to provide products to a footnote 1 designated entity, does the supplier need to get a separate license to cover the reexport or transfer of our products to the distributor?
- A5: Because the distributor has a license to provide the final product to the footnote 1 designated entity, the license requirement of the Entity List FDP rule is fulfilled and does not apply to the supplier. The distributor should communicate the existence of a license to the suppliers of the product and the suppliers should ensure they receive written confirmation of the license and any conditions.

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## Compliance

- **Examine** all transactions to determine
  - if any items exported/reexported to Russia, Belarus, China (or other affected countries) are produced with U.S.-controlled software or technology; or
  - if an Entity List footnote 1 or 3 entity is a party to the transaction.
  - Red Flags
- **Audit** supply chains to the extent possible to identify any U.S.-origin inputs in the production of items
- **Obtain** confirmation from suppliers regarding the origin of parts and components
- **Keep** good records

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## Contact Information

- **Email:** If contacting the Office of Exporter Services via e-mail, please include a telephone number to facilitate BIS's response to your request. Specific questions can be emailed to:
  - [ECDOEXS@bis.doc.gov](mailto:ECDOEXS@bis.doc.gov)
  - [OEXSubmissions@bis.doc.gov](mailto:OEXSubmissions@bis.doc.gov)
- **Telephone:** If you have any questions about export licensing requirements or submitting a license application, you may contact BIS's Office of Exporter Services at:
  - (202) 482-4811 - Outreach and Educational Services Division  
(located in Washington, DC – open Monday-Friday, 8:30am-5:00pm ET)
  - (949) 660-0144 - Western Regional Office  
(located in Irvine, CA – open Monday-Friday, 8:00am-5:00pm PT)
  - (408) 998-8806 - Northern California branch  
(located in San Jose, CA – open Monday-Friday, 8:00am-5:00pm PT)
- **Formal Advisory Opinions:**
  - Request an Advisory Opinion: <https://bis.doc.gov/index.php/component/rsform/form/22-advisory-opinion-request?task=forms.edit>

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**Questions/Comments?**  
**THANK YOU!**

