

China makes key changes to Draft Export Control Law and seeks comments

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Two years after the release of the first draft of the Chinese Export Control Law (the Law) in 2017 (the 2017 Draft), on 28 December 2019, a revised draft was published on the website of the National People's Congress for round-two public comments until 26 January 2020¹ (the Current Draft Law).

The structure of the Current Draft Law remains largely the same as the 2017 Draft, and is organized by six sections: general regime and definition, control policy and lists, control measures, specific rules for dual-use items and military items, enforcement and punishment, and miscellaneous. With that said, by deleting 13 provisions and consolidating some others, the current draft law is significantly shorter than the 2017 draft with only 48 provisions, while the latter had 70.

While many of the substantive rules remained largely the same as in the 2017 draft, the current draft law also makes certain key changes in the scope of the Chinese export control regime, including; deletion of provisions on reciprocity and special control measures at the time of war and other emergencies, the addition of a separate provision for an internal compliance program, important changes around end-use and end-users including compulsory obligation for exporters to submit the relevant certification to the Chinese government, and significant increases in fines.

Below is a brief summary of the key changes in the current draft law as well as the important rules that remain the same as the 2017 draft.

General regime and definition

There are no significant changes to the general regime and definition section. Both drafts contain the same broad scope of four categories of items that are subject to the Law, being dual-use items (civil use and military use), military items, nuclear items and other goods, technologies, and services pertaining to fulfilling international obligations and defending national security. The competent export control authority are still defined as the departments to be designated by the State Council (for dual-use items, the Ministry of Commerce is currently in charge of overseeing enforcement of export related regulations), and the Central Military Commission (for military items) to perform the functions of export control (the Authority).

¹ Please see [here](#).

It is worth noting that in both drafts, exports are defined to include (i) a transfer of controlled items from the territory of the People's Republic of China to overseas, and (ii) Chinese citizens, legal persons, and organizations providing controlled items to foreign citizens, legal persons, and other organizations. The second leg of the definition seems to indicate that the transfer of controlled technology to a foreign person in China is also regulated, which would appear to be similar to the "deemed export" concept under the U.S. Department of Commerce's Export Administration Regulations (EAR). If ultimately adopted, this provision may significantly impact not only multinational companies with a presence in China, but also non-Chinese companies that merely have access to Chinese items and technology outside China to the extent such items are controlled under the Current Draft Law.

Control policy and lists

Article 9 of the 2017 Draft stated a principle of reciprocity that permits China to take similar measures as a response against any jurisdictions with export control measures that are discriminatory against China. However, this Article was deleted in the Current Draft Law. The removal of this "retaliation" provision if a country (region) has taken discriminatory export control measures against China appears to be an effort to play down tensions with the United States, in particular given the recent announcements of the Chinese and U.S. governments that a "Phase One" trade deal has been reached. *Article 12*, which authorizes any necessary control measures in war or urgent international relations related situations, was also deleted.

The Current Draft Law continues to require the publication of separate lists for dual-use controlled items and military controlled items by the Authority. For items not expressly included in such lists, temporary control can also be imposed for up to two years.

Control measures

The 2017 Draft contained a limited number of provisions on licensing and the Current Draft Law further deleted certain provisions related to licensing. For example, the Current Draft Law only requires the Authority to adopt a licensing mechanism for items on control lists and items subject to temporary control. The Current Draft Law deleted provisions in the 2017 Draft that provided for different licenses including individual license and general license which allows exporters to export to multiple end users or to the same end user for multiple times. The 2017 Draft also contained general language that permitted the Authority to grant a license exception as a "special measure," which has now been deleted. It is unclear whether new implementing regulations will be issued for the licensing mechanism or whether the Authority will rely on several existing regulations currently in force but unified and published over a decade ago². It remains to be seen whether after finalization of the Current Draft Law, all such regulations will be consolidated. When considering whether to issue license for exporting controlled items, the factors the authority will take into consideration remain largely the same, including (a) national security, (b) international obligations and commitment, (c) type of export, (d) sensitivity of the items, (e) destination, (f) end use and end user, (g) credit record of the exporter, and (h) other factors provided under the law and regulations. Certain factors, including the supply and demand of certain items in the market and the internal compliance program of the exporter, have been removed. In contrast, destination of the export is a newly added factor.

Compliance program

While internal compliance regime of a company is no longer listed in the Current Draft Law as one of the factors listed for when a license is required, a separate provision, *Article 14* of the

² For instance, for dual-use items, the *Administrative Measures for the General License for the Export of Dual-purpose Items and Technologies* which provide specific guidance.

Current Draft Law, states that exporters should establish an internal export control compliance program. For those who have such effective program and there have been no major violations on the record, the authority can consider granting certain facilitation measures to expedite the licensing process.

End use and end user

One important revision is that exporters will be required to submit a certification of end user and end use when submitting a license application. Under the 2017 Draft the authority may accept exporter's certification to be issued by the importer or the government or military of the importing country (region), depending on the items and sensitivity of the end users. Under the Current Draft Law such a certificate shall be issued by the end user or the government agencies where the end users are located, rather than the importers as provided under the 2017 Draft. It seems the intent of this change is to give Chinese authorities more insight into the end users of the controlled items, not only the importers. There is still no standard form of the end use certification attached to the Current Draft Law.

In addition, there is no longer an explicit obligation for the exporter to conduct a review of the end use and end user at the time of signing an export contract. With that said, after the issuance of an approved export license, exporters still need to report any change of end user and end use, upon discovery of such change. End users, instead of importers as in the 2017 Draft, must commit not to change the end use or transfer the items to third parties.

Blacklist

The rules on addition of importers and end users to the "blacklist," which is similar to the Entity List under the EAR, remain mostly the same. The bases for such designation by the Authority continue to be the following: (a) violation of end use and end user commitment, (b) endanger national security (the only minor change is that "development interests of the country" is deleted here), or (c) use the controlled items for terrorism purpose.

Enforcement and punishment

One of the most significant changes between the two drafts is reflected in benchmark for deciding the fines and the range of fines for different violations of the Current Draft Law.

For instance, the range of fines for export without license has been raised from RMB 50,000 to RMB 500,000, to RMB 500,000 to RMB five million, if the illegal business revenue is below RMB 500,000. Another example is that, for transacting with blacklisted entities, the fine can now be as high as 10 to 20 times of the illegal business revenue, instead of five to 10 times under Article 56 of the 2017 Draft.

For aiding, conspiring, or facilitating the commission of an illegal act (including agency, freight, customs declaration, third-party electronic trading platform, and financial services), the range of the fine has also been increased from RMB 50,000 to RMB 500,000, to RMB 100,000 to 500,000, when the illegal business revenue is less than RMB 100,000. This is particularly risky for companies that do not directly engage in exporting business but provide service to exporters and importers.

While the fines on individuals who are responsible for the violations are absent in the Current Draft Law, such individuals now face enhanced penalties, including prohibition on carrying out export business activities for five years, or for life if they are convicted on criminal charges.

The Current Draft Law also added two more potential penalties for transacting with the blacklisted entities (discussed above), including suspension of exporting relevant controlled items

and restriction over transactions of the exporters, in addition to prohibition of transactions of the exporters and cancellation of licensing related convenience granted before, such as simplified application process, etc.

Re-export and de minimis provisions

Article 64 in the 2017 Draft provided that re-export of controlled items or foreign made products that contain a certain amount of Chinese controlled items from abroad to other jurisdictions (which is similar to the de minimis rules under the EAR) are controlled transactions. The Current Draft Law removed such de minimis provision, and instead only lists re-export together with transit, trans-shipment and export via special customs supervision areas as other activities to which the Current Draft Law shall also apply.

What to expect

While there is still no specific implementation timeline for the Law, this very recent development approaching year end shows that export control is high on China's priorities list. The Current Draft Law makes one step forward approaching the finishing line with certain key changes to the 2017 Draft.

China's current export control framework is made up of a patchwork of various laws, administrative rules, regulations, and catalogues, most of which were last amended more than a decade ago. The legal framework in China is also relatively young compared to the United States and European Union. The Current Draft Law will bring the Chinese export control system closer in terms of structure and scope to the regimes in the United States and European Union. With that said, the law is significantly shorter than the export control regimes of the United States and European Union, and lacks details regarding terms and concepts. It remains to be seen how the law's implementation rules and guidance will supplement and unify the regime.

The companies doing business in China and even outside China are well advised to closely monitor the developments and prepare for the uncertainties. One vitally important effort at this stage is to have an effective compliance program in place, to be ready for the as-yet-unknown compliance obligations.

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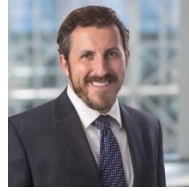
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