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## China Adopts Export Control Law

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The final version of the long-awaited *Export Control Law of the People's Republic of China* (the “**ECL**”) was passed and enacted on October 17, 2020 after submission for review and discussion at the 22nd session of the Standing Committee of the 13th National People's Congress (“**NPC**”) of the People's Republic of China (“**PRC**”). The ECL will become effective on December 1, 2020.

Before the ECL, there was no centralized export control law and China's export control rules were littered through the *Foreign Trade Law* (NPC, Nov. 7, 2016), the *Customs Law* (NPC, Nov. 5, 2017), the *Criminal Law* (NPC, Nov. 4, 2017) and a few administrative regulations<sup>1</sup>. Given that the ECL consists of only 49 articles and the implementation regulations thereunder are still to be promulgated, we expect that these aforementioned laws and regulations will serve as reference in the interim.

### The key points of the ECL

The ECL primarily aims to protect China's national security by regulating the export of sensitive materials and technologies that appear on a control list. The ECL will be the first comprehensive and consolidated export control legislation in China. On December 28, 2019, NPC published the draft ECL, a revised version of an earlier draft first published by the Chinese Ministry of Commerce (“**MOFCOM**”) on June 16, 2017. On July 3, 2020, the NPC further published a revised draft ECL (“**2020 Draft**”). The final promulgated ECL added an article for granting “long-arm jurisdiction” outside of China (Art. 48 of the ECL) but adopted the 2020 Draft version in its entirety.

#### 1. Scope

##### (1) *Controlled Items*

The ECL regulates “Controlled Items,” defined as “dual-use items, military items, nuclear items and other goods, technologies, services and items relating to the maintenance of national security and interests and performance of anti-proliferation and other international obligations.” Controlled Items will also include technical data related to the above-described items. Controlled Items is a broad concept. The currently available control item lists are the *List of Dual-use Biological Products and Related Facilities and Technologies Subject to Export Control* (MOFCOM, Sep. 1, 2006), the *List of Dual-use Nuclear and Related Technologies Subject to Export Control* (China Atomic Energy Authority, MOFCOM, Jan. 1, 2018), and the *List of Nuclear Export Control* (China Atomic Energy Authority, MOFCOM, Oct. 1, 2018). We expect that other control item lists will be generated as implementation regulations for the ECL are promulgated.

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<sup>1</sup> e.g., (i) *Regulations of the People's Republic of China on the Import and Export of Goods* (State Council, Jan. 1, 2002), (ii) *Regulations of the People's Republic of China on the Administration of the Import and Export of Technology* (State Council, Mar. 2, 2019), (iii) *Regulations of the People's Republic of China on the Control of Nuclear Export* (State Council, Nov. 9, 2006), (iv) *Measures for the Administration on Import and Export License for Dual-use Items and Technologies* (Ministry of Commerce, General Administration of Customs, Jan. 1, 2006).

## *(2) Controlled Export*

The ECL will prohibit or restrict (i) the transfer of any Controlled Items from within the territory of the PRC to outside of the PRC, and (ii) the provision of any Controlled Items by any citizens, legal persons or non-legal person organizations of the PRC to any foreign organizations and individuals. Item (ii) is similar to the concept of “deemed export” under the U.S. export control regime. This could affect information exchanges between Chinese employees and employees of foreign nationalities within the same entity. Further, it may cover any transfer of Controlled Items outside the territory of the PRC from a PRC citizen or entity to a foreign organization or individual.

## **2. Export Control System**

### *(1) Controlled Item List*

Article 9 of the ECL provides that the State Council and the Central Military Commission (collectively, the “**Regulators**”) shall work with the relevant departments pursuant to required procedures to establish and adjust export control list(s) for Controlled Items (“**Controlled Item List**”) and promptly publish such list(s).

The Controlled Items List will cover the Controlled Items that are already regulated under the ECL. In addition, the ECL empowers the Regulators to designate goods, technologies and services outside the Controlled Item List as a “**Temporarily Controlled Item**” for a period of up to two years. An assessment shall be conducted before the expiration of the temporary control period to determine whether the temporary control shall be cancelled or extended, or if the Temporarily Controlled Item shall be added to the Controlled Item List.

### *(2) Control Measures*

The key control measures established under the ECL are generally implemented via the export licensing system. Exporters of the Controlled Items or Temporarily Controlled Items on the Controlled Item List are required to apply to the Regulators for a license (“**Export License**”). For the export of goods, technologies and services that are not Controlled Items or Temporarily Controlled Items, an exporter must still apply for an Export License if it knows, should have known, or is notified by the Regulators that the export of such goods, technologies and services may pose the following risks:

- endangerment of national security and interests;
- potential use in the design, development, production or use of weapons of mass destruction and their delivery vehicles; or
- potential use for terrorist purposes.

The Regulators are required under the ECL to review the Export License application filed by an exporter for export of Controlled Items or Temporarily Controlled Items, taking into consideration the following factors:

- (i) national security and interests;
- (ii) international obligations and commitments to foreign countries;
- (iii) the type of export;
- (iv) the sensitivity of the controlled items;
- (v) the country or region of destination;
- (vi) end-users and end-uses;
- (vii) relevant credit record of the exporter; and
- (viii) other factors prescribed in any law or administrative regulation.

### *(3) End-Users and End-Uses Risk Management*

As mentioned above, the end-users and end-uses will be considered for the Export License application. Article 17 of the ECL provides that the Regulators shall establish a risk management system for end-users and end-uses of Controlled Items and evaluate and review end-users and end-uses of Controlled Items to implement strict management protocols.

An exporter is required to submit documents certifying end-users and end-uses as part of its Export License application package, and the relevant certifying documents shall be issued by the end-users or a national or regional government agency where such end-users are located. The end-users of Controlled Items are required to undertake not to change the ultimate uses of the relevant Controlled Items or transfer such items to any third party without the consent of the Regulators. If an exporter or importer becomes aware of any possible change to the reported end-users or end-uses, they are required to immediately report such development to the Regulators.

### *(4) Controlled Party List*

Under the ECL, the Regulators are required to establish a “**Controlled Party List**” to include importers and end-users that (i) violate the requirements regarding the management of end-users and end-uses, (ii) may endanger national security and interests; or (iii) use Controlled Items for terrorist purposes.

If importers or end-users are placed on the Controlled Party List, the Regulators are allowed under the ECL to take necessary measures, such as prohibiting or restricting the transaction of relevant Controlled Items and ordering the importers or end-users to suspend the export of relevant Controlled Items.

## Conclusion

Although the detailed implementation regulations of the ECL are yet to be promulgated, the ECL establishes China's first comprehensive framework for restricting exports of military and dual-use products and technology for national security and public policy reasons.

Given the tightening regulation in this area, the ECL will pose new risks and challenges for Chinese exporters and their customers. It is important for any company that exports materials or technologies from China to conduct a comprehensive review of the items to be exported and consider whether the items are Controlled Items or are at risk of being considered Controlled Items. Furthermore, companies should consider establishing or improving their internal export control compliance policies and programs to better analyze their own products, services and technologies, review and filter business partners and end users, and establish internal export control reviews, reporting mechanisms, risk analyses and risk control systems.

*For more information, please see the following resources:*

- [China Updates page](#)
- [China Releases New QFII/RQFII Rules](#), October 27, 2020
- [China Releases Provisions on Strengthening the Supervision of Private Equity Investment Funds \(Draft\)](#), October 15, 2020
- [China Releases Provisions on the Unreliable Entity List](#), October 5, 2020
- [China Releases Revised Measures on Handling Complaints of Foreign-Invested Enterprises](#), September 23, 2020
- [China Releases Administrative Measures for Strategic Investment by Foreign Investors in Listed Companies](#), September 10, 2020
- [China Releases Draft Data Security Law](#), September 8, 2020
- [China Releases Circular on Further Stabilizing Foreign Trade and Foreign Investment](#), August 24, 2020
- [China Releases Draft Measures for the Administration of Imported and Exported Food Safety](#), August 18, 2020
- [U.S. Listed Chinese Companies: Regulatory Scrutiny and Strategic Options](#), July 30, 2020
- [China Passes Controversial Hong Kong National Security Law](#), July 9, 2020
- [China's Relaxed Financial Sector May Aid Foreign Investors](#), June 18, 2020
- [Is There a Law in China Similar to the US Defense Production Act?](#), May 8, 2020
- [Coronavirus Brings Force Majeure Claims to LNG Contracts](#), March 4, 2020
- [The Rise of China](#), March 4, 2020
- [Coronavirus Fears Cast Cloud Over Dealmaking](#), February 27, 2020
- [Is Your China Chemical Plant in Danger of Being Shut Down](#), December 2019

**Additional questions? Please contact Haynes and Boone lawyers, [Liza L.S. Mark](#) and [Jasmine Yang](#)**