

Client Alert

January 2020

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2019 updates to China's Draft Export Control Law – What you need to know

On 28 December 2019, the National People's Congress (NPC) of the People's Republic of China (PRC) released a new draft of the Export Control Law (ECL) ("**2019 Draft**"), an update from the 2017 version circulated by the Ministry of Commerce. Click [HERE](#) to refer to our client alert on the 2017 Draft.

The 2019 Draft is now open for public comment until 26 January 2020. If enacted, the ECL will be China's first comprehensive and consolidated export control legislation, aimed at upgrading the country's existing regime consisting of multiple regulations.

Key Changes

The 2019 Draft features many key changes from the 2017 Draft:

Retaliatory measures

One of the most controversial points arising from the 2017 Draft was the power for the Chinese authorities to implement retaliatory measures against discriminatory measures taken by other countries against the PRC. This provision has been removed from the 2019 Draft. At this stage, there is no clear indication as to whether the "Unreliable Entity List"¹ announced by MOFCOM May last year, if implemented, would be integrated into the export control legislation or would be enacted independently.

Re-export

The definition of "re-export" (i.e. the export of items containing above a *de minimis* amount of PRC controlled content from one foreign country to another foreign country) has been removed from the 2019 Draft, but reference to "re-export" is still included in respect of transshipment and transit activities.

Catch-all

The catch-all provision previously provided for controls in relation to unlisted items which may endanger national security, present risk of circulation or be used for terrorism purposes. This provision is now clarified to cover items which may be used in the design, development, production or use of WMD and their means of delivery, or used for nuclear, biological, or chemical terrorist purposes.

Determination by the Authorities

An exporter may make an inquiry to determine whether an item is subject to control under the ECL. The 2019 Draft clarified that the scope of the determination includes technologies and services, and it now requires the authorities to respond to such inquiry in a timely manner. Unfortunately, the

¹ To understand more about the "Unreliable Entity List" click [HERE](#) to see our client alert on this topic.





draft does not further clarify what constitutes "timely manner" and whether the determination is binding on the authorities (similar to customs rulings under customs law generally).

End-Use/End User Statement (EUS)

The submission of EUS as supporting document for an export permit application is now mandatory (previously where required).

Approval and Notification when Changing End-User or End-Use

Under the 2017 Draft, where there is a change of end-user or end-use for an item, the importer is required to obtain approval from the authorities. In practice, this may not be feasible as the importer may not necessarily have knowledge of such change upon delivery of the item to the end-user. Under the revised draft, the end-user is required to obtain such approval.

Additionally, where the exporter or importer finds out that the end-user or end-use for the item may change, the exporter or importer is required to immediately report such change to the authorities. Previously, this requirement only applied to the exporter.

Permit Application Timeline

Under the previous draft, the application timeline for dual-use items is limited to 45 days subject to possible extension due to special circumstances. The 2019 Draft clarified that such extension is for an additional 15-day period.

Increased Penalties

Under the 2019 Draft, the prescribed penalties for a number of offences have increased significantly and new categories of offences are introduced. More interestingly, the provision relating to penalty mitigation in the case of voluntary disclosure has been removed. It remains to be seen whether provisions relating to penalty mitigation and power to compound offences and issue administrative penalties would be introduced in the implementing regulations and guidelines.

Conclusion

While there is no set timeframe for the ECL's enactment, drafts introduced into the NPC usually undergo three rounds of deliberation, with the 2019 Draft having undergone the first one. Two more rounds are expected within the next few months. Following passage of the law, we also expect the issuance over time of further implementing regulations on, amongst others, control lists, licence facilitation measures, recordkeeping requirements, and internal compliance programs.

If you would like to submit feedback on the 2019 Draft, kindly note that the public consultation period ends on 26 January 2020. Feel free to reach out to us for an unofficial English translation of the draft law or for assistance with the submission of feedback.

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