

China's Export Control Law Draft under Second Review by the NPC

9 July 2020

Overview

On June 28, 2020, the Standing Committee of China's National People's Congress (NPC) reviewed the second draft of China's Export Control Law (the "Law"). Six months had passed since the Law was first reviewed by the NPC in December 2019 ("2019 Draft") and it has been two years since the Ministry of Commerce released the first draft of the Law in 2017 ("2017 Draft"). The new draft Law has been made public on the website of the NPC soliciting public comments until August 16, 2020.

Compared to the 2019 Draft (please see our [article](#) which discussed the previous drafts), which consolidated and deleted nearly 20 provisions in the 2017 Draft, the new draft did not make drastic changes to the structure or fundamentals of the regime, but is more focused on clarifying previously existing rules. We highlight the key changes below.

In summary, the new draft now explicitly provides for the extraterritorial application of the Law, makes it possible to extend the temporary control period beyond two years, strengthens supervision over end-users and end-uses, adds a separate provision prohibiting service providers from facilitating illegal export activities, clarifies Customs' role in export control enforcement, and further stresses the importance of having a compliance program.

Key changes

1. Extraterritorial reach expanded

The most important change in the new draft is the newly added Article 44 which provides for the extraterritorial application of the Law. Article 44 explicitly provides that organizations and individuals outside China will be held liable if they violate export control rules, impede China's fulfilment of its international obligations, or otherwise endanger China's national security.

This echoes the Government Work Report 2020 published by the State Council which stressed the plan to accelerate the construction of a legal system with extraterritorial reach in particular areas, including export controls.

2. Temporary control can now last longer than two years

Article 10 of the 2019 Draft designed a temporary control regime for up to two years, on goods, technologies and services outside the list of controlled items. The temporary control regime must be justified by the need to fulfil China's international obligations and to safeguard national security. Article 9 of the new draft now allows the competent authorities to review, in a timely manner, when the two-year term is ending, and then decide whether the temporary control should be cancelled or extended, or whether the items subject to temporary control will be included in the controlled items list. The new draft also requires any controls temporarily imposed to be made public, which will to some extent add transparency to this regime.

3. Strengthening supervision over end-users and end-uses

The new draft also further tightened the administration over end-uses and end-users. For instance, in the 2017 Draft, Article 28 stated that the competent export control authorities may conduct onsite inspection of end-users and end-uses. This was removed in the 2019 Draft but now added back to the new draft. Although it simply stated that the authorities may "inspect" end-users and end-uses, without specifying whether it will be onsite or remote, it indicates the intention of Chinese authorities to expand its reach to monitor the end-users and end-uses overseas.

4. Service providers in export activities must be more cautious

The new draft added a separate provision, Article 20, which prohibits any service providers involved in the export of controlled items, including agency, freight, customs declaration, third-party electronic trading platform and financial services, from facilitating the commission of illegal acts violating the Law. In fact, Article 37 of the 2019 Draft already contained similar language in the enforcement section, which imposed penalties for providing such a service. In the new draft Law, there is now a separate provision that addresses this issue, which shows the importance for all stakeholders in the supply chain, not only the exporters and their customers or end-users. Therefore, service providers should exercise even greater caution when conducting any business that might have any links to export activities.

5. Clearer role of Customs

Under the current export control regime in China, the enforcement authorities for export controls are divided among several government authorities 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 is in charge for military items. In addition, the General Administration of Customs and its local counterparts ("Customs") will have the power to verify, investigate, and punish under Article 21 and Article 41 of the 2019 Draft.

In previous drafts, when Customs has evidence to prove that an exporter is attempting to export goods without the required export license, it was not entirely clear whether Customs should defer to the export control authorities to review this issue, or raise doubts to the exporter and make its own judgment. Article 19 of the new draft now provides that under such circumstances, Customs should raise doubts to the exporter, and **may** (previously the wording was "should") bring this before the export control authorities. Subject to further interpretation of such changes, Article 19 seems to indicate that Customs can now on its own decide whether to clear custom for goods that it has doubts on whether they are subject to control.

6. Having an export compliance program is critical

Every draft of the Law has stressed the importance for business operators to have an export control compliance program. Article 16 of the 2019 Draft made it clear that for those who have such effective compliance program **and** when there have been no major violations on the record, the authority can consider granting certain facilitation measures to expedite the licensing process.

The new draft has taken a step further, removing the criteria of absence of major violation on the record. It has indicated that, as long as the companies have an effective compliance program, the authority will take it into consideration while deciding whether to grant facilitation measures such as general export licenses. The new draft also provides that export control authorities will issue detailed and specific measures to provide guidance on how to create an effective compliance program.

Implications of the new draft Law

Although the timeline for further review, deliberation, and final adoption of the Law remains unclear, considering that the structure of export control regime remained largely the same in this new draft, it appears that the Law is on the track for promulgation in early 2021.

We expect the Law, once promulgated, to be leveraged into a larger role in the midst of international relations dynamics, particularly given the extraterritorial reach emphasized in the new draft. For all stakeholders on the supply chain, the importance of paying close attention to the legislation progress and having a compliance program in place can never be overstated.

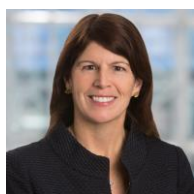
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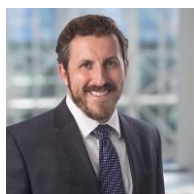
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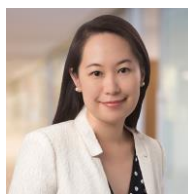
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