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China's evolving export control regime: what you need to know now

On 29 December 2021, the PRC State Council's Information Office published a white paper on export controls ("The White Paper").¹ The document provides an overarching perspective on the development of China's export control regime and PRC policy. It comes approximately one year after the implementation of the PRC Export Control Law ("ECL") in December 2020.

Chinese export controls: a brief history

China began regulating the export of controlled chemicals, munitions, and nuclear materials in the 1990s through the introduction of various ministry-level regulations. As suggested by the nature of the items, China's early focus was on nonproliferation and meeting its obligations under international export control agreements.

In 2020, the ECL was enacted to combat proliferation, uphold China's

international obligations, and to safeguard China's national security and interests. In recent years, it is China's national security that has taken centerstage, particularly following the

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A good example of this is the August 2020 revision to the Catalogue of Technologies Prohibited or Restricted from Export ("Technology Catalogue"), which took place as the Trump administration was attempting to force the sale of the TikTok app. Though China's Ministry of Commerce ("MOFCOM") did not mention TikTok

by name, this revision would likely have given MOFCOM the final say over any such sale by adding controls over information processing technology. These controls covered artificial intelligence used for voice recognition, technology for interactive understanding, and personalized information push service technology based on data analysis.

Basic concepts

The White Paper reiterates China's basic policy position that export controls serve to (i) protect national security; (ii) honor international obligations and commitments related to non-proliferation of weapons, nuclear materials, and other dual-use items; and (iii) promote international cooperation and coordination in areas of shared concern.

Export operator and other regulated parties

The ECL puts primary responsibility on "export operators". While the term is widely used in the ECL, it is not defined. Generally, it would be the exporter, or the consignor (shipper) when the exporter acts as an agent.

Foreign importers and end-users only have a non-diversion obligation under the ECL. The end-users of the controlled items must promise not to change the ultimate uses of the items or transfer them to any third party without the consent of the relevant PRC regulator. Foreign importers and end-users may be blacklisted if they violate these agreements.

Notably, the ECL also imposes responsibilities on third party service providers, including agents, transport providers, mailing or express couriers, customs declaration brokers, and third party e-commerce trading platforms, as well as banking service providers. These service providers are prohibited from providing services to export operators who engage in unlawful exports.

Controlled items

There is no single, unified export control list under current PRC export control laws and regulations. Instead, controlled items (i.e., goods, technologies, and services) are identified under different lists based on the reasons for control, including:

- military items (including police equipment);
- dual-use items (chemicals, biological items, missiles, and nuclear materials);
- other controlled items (precursor chemicals, nuclear materials, civil aviation items, encryption items); and
- other technologies prohibited or restricted for export from China.

The ECL defines "dual-use items" as

¹ http://www.gov.cn/zhengce/2021-12/29/content_5665104.htm

² http://www.gov.cn/zhengce/2021-12/29/content_5665105.htm

³ <http://www.mofcom.gov.cn/article/b/c/202104/20210403056267.shtml>

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goods, technology, and services that can be used for both civil and military purposes. Service is newly added, though undefined. MOFCOM is reportedly looking to accelerate the formulation of a unified export control list.²

Key regulators

MOFCOM has primary authority over most controlled items, except military items. Within MOFCOM, the Bureau of Industry, Security, Import and Export Control is charged with implementing Chinese export controls.

According to the White Paper, following the 2020 promulgation of the ECL, PRC government agencies have attempted to improve their coordination of export control rules through the introduction, revision, and termination of various administrative regulations and departmental rules.

Other relevant authorities include the General Customs of China, the Ministry of Foreign Affairs, the China Nuclear Safety Administration, the Ministry of Transport, the Ministry of Public Security, the Ministry of Industry and Information Technology, the China Atomic Energy Authority, the Central Military Commission, and the State

Administration of Science, Technology and Industry for National Defense.

The Central Military Commission and its subordinate agency, the State Munition Trade Bureau, have primary responsibility for export controls over military items.

Licenses

Licensing requirements depend on the nature of the item to be exported and the reasons for control. The available licenses include (i) MOFCOM export licenses for dual-use items, including single-use licenses and general licenses covering exports for a defined period; (ii) MOFCOM export licenses for restricted technologies; and (iii) State Munition Trade Bureau export licenses for military items.

Looking ahead

The White Paper discusses several strategies for modernizing China's export control system in the coming years.

Among the strategies is increasing China's overall compliance with international regimes related to the nonproliferation of weapons, nuclear materials, and other dual-use goods, technologies, and services.

Chinese regulators are also looking to enhance license management and strengthening enforcement capability. MOFCOM, in particular, is strengthening enforcement collaboration with the Ministry of Public Security, the Ministry of Industry and Information Technology, and the General Administration of Customs, among other departments.

The PRC government is also nudging companies to develop export control compliance programs. In 2021, MOFCOM revised and issued the Guiding Opinions on Establishing the Internal Compliance Program for Export Control by Exporters of Dual-use Items.³ Companies exporting controlled items from China are encouraged (but not required) to implement internal export control compliance programs. However, a compliance program may be a precondition for certain licensing and other activities under the ECL. ■

About the authors:

Wilson Zhao is an Associate, Wendy Wysong is a Partner and Nick Turner is Of Counsel in the Hong Kong office of Steptoe.

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