

WEBINAR

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# China's New Export Control Law: Implications for the Increasingly Challenging U.S.-China Trade Relations

PRESENTERS

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## AGENDA

Background on China's Export Control Regime

Overview of China's new Export Control Law (ECL)

Critical Implications of ECL

Comparison to U.S. Export Control Regime

Key Takeaways

Questions

# Background on China's Export Control Regime

# History of China's Export Control Regime

- Legislation
  - Foreign Trade Law (rev. 2016)
  - Customs Law (2017)
- Regulations
  - Regulations on Arms Export (2002)
  - Regulations on Control of Nuclear Export (2006)
  - Regulations on Control of Nuclear Dual-Use Items and Related Technologies (2007)
  - Administrative Measures for the General Licensing for Export of Dual-Use Items and Technologies (2009)

# History of China's Export Control Regime Continued...

- Control lists
  - Catalogue of Goods Under Export License Administration
  - Administrative List of Export of Military Products
  - Index of Management of Import and Export Permits of Dual-Use Items and Technologies
- Administrative Authorities
  - Chinese Customs Bureau
  - Central Military Commission
  - Ministry of Commerce of the People's Republic of China
  - Ministry of Science and Technology
  - State Administration of Science
  - Technology and Industry for National Defense

# China's Export Control Law (2020)

# Brief Overview

- Purpose
  - Formalizes China's export control regime,
  - Provides comprehensive framework for restricting exports of products and technology for national security purposes
- Scope
  - “Export controls”: (1) transfer of controlled items from the territory of the People's Republic of China to overseas, and (2) the provision of controlled items by any citizen or incorporated or non-incorporated organization of the People's Republic of China to any foreign organization or individual
  - “Re-exports”: the transit, transshipment, through transportation, or re-export of controlled items, or the export of controlled items from any bonded areas, export processing zones or other special customs supervision zones or export supervised warehouses, bonded logistics centers or other bonded supervision premises to overseas”
  - “Technology exports”: the transfer of technology from China abroad, through trade, investment, or economic and technical cooperation, including patent assignment, transfer of patent application rights, patent licensing, transfer of trade secrets, technical services, and “other forms of technology transfer

# Administration

- State Export Control Authorities
  - The collective departments under the State Council and departments under the Central Military Commission that undertake the functions of export control
- Local enforcement
  - Relevant departments of the people's governments of provinces, autonomous regions, and municipalities directly under the central government
- Establishment of export control coordination mechanism



# Controlled Items

- License required:
  - Dual-use items (with both civilian and military applications)
  - Military products
  - Nuclear materials
  - Other goods, technologies, services, etc., that are related to the maintenance of national security and interests and the implementation of international obligations such as non-proliferation
  - Further includes data such as technical documentation relating to the items
  - For items that don't fall within these categories, ECL provides authority to (1) impose an comprehensive embargo or ban; (2) prohibit exports to certain destinations or entities/individuals; or (3) apply temporary controls for up to two-years

# Restricted-Prohibited Parties

- Controlled Party List
  - Includes importers and end-users that:
    - Violate the requirements regarding the management of end-users and end uses
    - May endanger national security and interests; or
    - Use Controlled Items for terrorist purposes
- Restrictions imposed
  - Prohibiting or restricting the relevant transactions relating to Controlled Items
  - Ordering suspension of export of the relevant Controlled Items
  - Other necessary measures

# Restricted-Prohibited Parties Continued...

- Unreliable Entity List
  - Foreign entity that engages in either of the following actions:
    - Endangering national sovereignty, security or development interests of China; or
    - Suspending normal transactions with a Chinese enterprise, other organization, or individual of China or applying discriminatory measures against an enterprise, other organization, or individual of China, which violates normal market transaction principles and causes serious damage to the legitimate rights and interests of the enterprise, other organization, or individual of China
  - Restrictions: one or more of the following measures
    - Restricting or prohibiting the Foreign Entity from engaging in China-related import or export activities;
    - Restricting or prohibiting the Foreign Entity from investing in China;
    - Restricting or prohibiting the Foreign Entity's relevant personnel or transportation vehicles from entering into China;
    - Restricting or revoking the relevant personnel's work permit, status of stay or residence in China;
    - Imposing a fine, according to the severity of the circumstances; and
    - Other necessary measures.
  - China potentially to add three US companies (Boeing, Lockheed Martin, Raytheon)

# Licensing

- License required to export any item listed on a control list or subject to temporary controls
- Criteria for license approval
  - National security and interests,
  - International obligations and external commitments,
  - Type of exports,
  - Sensitivity of controlled items,
  - Countries or regions they are bound for,
  - End users and end uses,
  - Relevant credit records of exporting companies, and
  - Other factors stipulated by laws and administrative regulations.
- Appears to require a compliance policy

# Penalties

- Depending on violation, may include one or more of the following:
  - Warning;
  - Order to stop illegal activities;
  - Confiscation of illegal gain;
  - Monetary fine (up to RMB 5 million or ten times the gains made from the illegal activities);
  - Suspension of business;
  - Revocation of export business qualification; and/or
  - Revocation of export license
- Potential criminal penalties for prohibited exports
  - e.g., Criminal Law of the People's Republic of China provides criminal liability for actions endangering national security
  - Any person who receives a criminal penalty for any export control violation will be prohibited from engaging in relevant export operation activities during the person's lifetime

# Critical Implications

# Extraterritoriality

- Broad scope to include the following:
  - Any organization or individual outside the territory of the PRC that endangers the national security and interests of the PRC, or
  - Obstructs the fulfillment of non-proliferation or other international obligations

# “Know or Should Know” Standard

- For any items that are not Controlled Items and Temporarily Controlled Items, exporter must apply for license if it knows or should know, or is notified, that the export may pose following risks:
  - Endangering national security and interests;
  - Potentially used in the design, development, production or use of weapons of mass destruction and their delivery vehicles;
  - Potentially used for terrorist purposes



# Broad “National Security” Scope

- Language provides for broad scope
- 11 areas of concern:
  - Politics, land, the military, the economy, culture, society, science and technology, information, ecology, resources, and nuclear
- Guidance from other PRC Laws
  - Scope of “national security”: State Security Law in PRC
    - “State security refers to the condition in which the state power, sovereignty, unity and territorial integrity, people's welfare, sustainable economic and social development and other vital interests of the State shall relatively face no danger or encounter no internal and external threats, as well as the capability to safeguard sustainable safety condition”
  - National security reviews:
    - Trial Measures on National Security Review for Foreign Investments in Pilot Free Trade Zones
    - Measures on Work Relating to Transfer of Intellectual Property to Overseas Parties

# Export Compliance Program

- Exporters are encouraged to establish an internal audit system for export control compliance, though not a requirement
- Regulators may grant licensing facilitation measures for existence of compliance program
  - e.g., general license for the export of the relevant Controlled Items by the exporter

# Comparison to U.S. Export Control Regime

# U.S. – China Export Control Regime

## Export Agreements – U.S.

- The Australia Group
- The Zangger Committee
- The Missile Technology Control Regime
- The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Technologies

## Export Agreements – ECL

- Nuclear Suppliers Group

# U.S. – China Export Control Regime

## New Technologies – U.S.

- Emerging and Foundational Technologies
  - Pending regulations that will further restrict the export of emerging and foundational technologies due to national security concerns
    - e.g., Biotech, Artificial Intelligence and machine learning, 3D printing, imaging software, etc.

## New Technologies – ECL

- Catalogue of Technologies Prohibited or Restricted from Export
  - Restricts or bans the export of certain cutting-edge technologies that may implicate national security concerns, public interest, or environmental protection
    - e.g., AI technologies (including speech synthesis, voice recognition, print scanning and identification, etc.)

# U.S. – China Export Control Regime

## Controlled items – U.S.

- Commerce Control List – dual use (commercial items)
- U.S. Munitions List – defense articles

## Controlled items – ECL

- Four categories
  - Dual-use items (with both civilian and military applications)
  - Military products
  - Nuclear materials
  - Other goods, technologies, services, etc., that are related to the maintenance of national security and interests and the implementation of international obligations such as non-proliferation

# U.S. – China Export Control Regime

## Compliance Program – U.S.

- U.S. companies encouraged to establish an export control compliance program
- Regulators may provide enforcement mitigation credit if there is a potential violation

## Compliance Program - ECL

- Exporters encouraged to establish an internal audit system for export control compliance
- Regulators may grant licensing facilitation measures such as a general license for the export of the relevant Controlled Items by the exporter

# Key Takeaways



# Key Takeaways

- More explicit and comprehensive mechanisms for export control in China
- Extraterritorial reach
- New tools to retaliate against countries or regions that endanger Chinese national security or interests by abusing its own export control measures
- Broad “national security” scope
- Licensing responsibility even for non-controlled items (know or should know standard)

**Questions?**

## SPEAKERS

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## SPEAKERS

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