



To Which Points of the Export Control Law Should We Pay Attention?

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On October 17, 2020, the Export Control Law of the People's Republic of China (hereinafter referred to as the "Export Control Law" or "the law") was adopted at the 22nd Session of the Standing Committee of the 13th National People's Congress ("NPC"); it took effect on December 1, 2020. The law was listed into the annual legislative work plan of the State Council in 2016. The Ministry of Commerce issued the draft for comments on June 16, 2017. After three deliberation sessions by the Standing Committee of the NPC on December 28, 2019; June 28, 2020; and October 13, 2020, the law was finally approved by vote. The approval of the law is particularly significant in light of the Sino-U.S. trade war. Despite the trade war, the legislation still adopts a more prudent attitude and many adjustments have been made to the provisions through several reviews. The law appears to parallel similar U.S. export control laws and regulations including the Export Administration Regulations and the International Trafficking in Arms Regulations. Concepts within the law will be familiar to U.S. businesses and to Chinese enterprises who import U.S. origin components. Corresponding infrastructure such as automated licensing portals, enforcement notifications, and hotlines will be announced subsequently.

The promulgation of the Export Control Law has made up for the lack of higher-level law in the area of export control. The export control system, covering nuclear, chemical, biological, missile, and military products, has been developed, with the export control law as its core, together with "Regulations of the People's Republic of China on Export Control of Dual-purpose Nuclear Products and Related Technologies" and other export control regulations and relevant normative documents. The new legal system of export control will play an important role in safeguarding China's national security and interests and actively fulfilling international obligations such as non-proliferation.

The promulgation of the Export Control Law is very relevant to many enterprises, especially those involved in foreign trading. Other specific types of enterprises affected by the adoption of the law and how those enterprises can respond to the changes are both important questions deserving of additional attention. These questions are addressed below.

1. Which kind of exports are regulated by the Export Control Law?

"Export" as stipulated in the Export Control Law includes exports, deemed exports, and special exports.

(1) Exports: Defined as the transfer of controlled items from China to overseas.

(2) Deemed exports: Defined as the provision of controlled items by Chinese citizens, legal entities, and unincorporated organizations to foreign organizations and individuals.

As to the deemed exports, please note that the law does not limit the location where export occurs; that is, if both Chinese and foreign subjects are located in China or abroad, the export between the two subjects will still be deemed an export and subject to the Export Control Law. U.S. businesses are familiar with the concept, as it also is present in U.S. export controls. For example, passing a USB flash drive containing restricted technology from a Chinese company to a foreign individual in China is likely to be deemed an export. The inclusion of deemed exports within the scope of control breaks through the restrictions on the place where the controlled act occurs, and to a great extent, extends the scope of application of the Export Control Law.

(3) Special exports, etc.: Specifically including transit, transshipment, through transportation and re-exports of controlled items, or export from special customs supervision areas such as bonded areas and export processing zones, export supervised warehouses, bonded logistics centers, and other bonded supervision places.

Here, it is important to pay attention to the concept of re-exports, which is juxtaposed with other special exports, and should be implemented in accordance with relevant provisions of the Export Control Law.

In the previous deliberation process, there was great controversy surrounding “deemed exports” and “re-exports.” Some individuals think that the inclusion of these acts into the scope of export control will affect Chinese enterprises that play important roles in the international supply chain; however, these acts are still included in the Export Control Law. The connotation and denotation of these two types of acts is dependent on further supporting regulations.

2. How to judge whether the export items are controlled items?

The legislative purpose of the Export Control Law is to safeguard national security and interests and fulfill international obligations such as non-proliferation. Therefore, the State controls the export of dual-use items, military products, nuclear and other goods, technologies and services related to the maintenance of national security and interests, and the performance of international obligations such as non-proliferation (hereinafter collectively referred to as “controlled items”). The above-mentioned controlled items include relevant technical data and other data.

Specifically, the Export Control Law adopts the current system of an export control list, supplemented by temporary control and supplementary control to determine the controlled items.

(1) Export control list: The State export control department will formulate, adjust, and publish the export control list in accordance with the Export Control Law and other laws and regulations, the export control policies, and the prescribed procedures, together with the relevant departments.

(2) Temporary control: The State export control department may implement temporary control over goods, technologies, and services beyond the export control list upon approval, and make an announcement. The implementation period of temporary control shall not exceed two years. The assessment will be conducted before the expiration of the implementation period of the temporary control. Based on the assessment results, the temporary control will be cancelled, extended, or included in the export control list.

(3) Supplementary control: In addition to the controlled items specified in the export control list and temporary control, the exporter knows or should know, or has been informed by the State Administration of export control, of the items involved in export that may: (a) endanger national security and interests; (b) be used in the design, development, production, or use of weapons of mass destruction and their means of delivery; or (c) be used for the purpose of terrorism and other risks, belong to the scope of export control.

Therefore, in actual operation, enterprises should first compare the items they are considering for export with the export control list and the temporary control list. Even if the items do not fall into one of these two categories, enterprises should still assess whether the items fall within the three categories listed in the supplementary control list. This provision increases the duty of enterprises. For many export items with broad uses, the possibility of being considered “controlled items” within the meaning of the law also increases. Therefore, the Export Control Law also

specifically stipulates that if an exporter is unable to determine whether the goods, technologies, and services to be exported fall within the definition of “controlled items” as specified by the law, the administrative department of export control shall timely reply upon the inquiry of the exporter. If the item to be exported is a controlled item, then the enterprise shall apply to the State export control department for permission.

3. What is the impact of the export control list on the exports?

The Export Control Law establishes an export control list for importers and end-users that may be considering importing an item that satisfies one or more of the following criteria:

- (1) violates the requirements of end-user or end-use management;
- (2) endangers national security and interests; or
- (3) would be used for terrorist purposes.

For the importers and end-users listed in the export control list, the State export control department may take necessary measures such as prohibiting or restricting the trading of controlled items and ordering the suspension of the export of controlled items. An exporter shall not violate the regulations to deal with the importers and end-users listed in the export control list. If it is necessary to trade with the importers and end-users listed in the export control list under special circumstances, it may apply to the State export control department. If the importers and end-users listed in the export control list no longer have the above situation after taking measures, they can apply to the State Administration of export control to remove them from the control list; the State Administration of export control may, according to the actual situation, decide to remove the importers and end-users from the control list.

This requires exporters to submit the end-user and end-use certifying documents of the controlled items to the State export control department when exporting, and the relevant certifying documents should be issued by the end-user or the government agencies where the end-user is located. End-use and end-user certificates also are a concept used under the parallel U.S. export controls regulations. The end-users of controlled items shall also undertake that they shall not change the end-use of the controlled items or transfer them to any third party without the permission of the State export control department. This concept of in-country re-transfers will be familiar to U.S. businesses. Moreover, the Export Control Law also requires exporters and importers to report to the State Administration of export control immediately if they find that the end-user or end-use is likely to change.

This regulation actually puts forward higher requirements for exporters. Exporters need to stipulate the limit to the end-user and end-use in the contract into which it enters with importers or end-users, pay attention to whether the end-user and end-use are likely to change in the performance of the contract and even after the performance, and report to the State export control department in a timely manner. This requires enterprises to establish internal compliance systems and operate more effectively. Particularly, the Export Control Law clearly stipulates that the State export control department can issue general licensing and some other convenient measures to some controlled items for those enterprises that have established internal compliance systems for export control and perform well. This regulation puts forward higher requirements for enterprises in the establishment of compliance systems, and requires enterprises to increase investment in the establishment and operation of internal compliance systems to meet the challenges brought by these changes.

4. What are the legal liabilities for violation of export control obligations?

Under the Export Control Law, those who violate export control obligations are subject to administrative and even potential criminal responsibility according to, and corresponding with, the facts and circumstances of the violation.

(1) Administrative liability

Articles 33 to 39 of the Export Control Law make clear the legal responsibilities of the exporters and others that are subject to its provisions. Among them, as the primary parties subject to the law, the exporters will be given a warning, ordered to stop the illegal acts, face confiscation of their illegal gains and/or fines, ordered to suspend their business for rectification, and even be disqualified from engaging in the export of relevant controlled items. According to the illegal acts and circumstances, the maximum amount of fine can reach 10 times to 20 times the

illegal turnover (Article 37: the transaction with the subject listed in the export control list). As for the calculation of fines, it should be noted that the base number is determined by the amount of illegal turnover, which has been significantly improved compared to most of the other penalties that are calculated with the base of illegal income listed in “Regulations on the administration of technology import and export” and other relevant laws and regulations.

In addition, Article 39 of the Export Control Law provides on the basis of the above penalties, where an exporter is punished for violating the provisions of the law, the State export control department may refuse to accept its application for export license within five years from the date that the punishment decision takes effect, and may prohibit the person directly in charge, and other persons directly liable, from engaging in the relevant export business activities for five years. Anyone who has been criminally punished due to irregularities in export control shall be banned from engaging in the relevant export operation activities for life, and the violation of the law by an exporter will be included in its credit record. Therefore, it is clear that the person directly in charge of, and other persons directly liable for engaging in, the relevant export business activities may be severely punished, and the impact may even affect production and operation activities other than the export of controlled items once they are found to have violated the law.

(2) Criminal liability

Whoever, in violation of the Export Control Law, exports controlled items, the export of which is prohibited by the State, or exports controlled items without permission, will be investigated for criminal liability. According to the relevant provisions of the criminal law, the relevant illegal acts may constitute the crime of smuggling, the crime of illegal business operations, the crime of divulging state secrets, and/or the crime of forging, altering, buying, and selling official documents, certificates, and seals of State departments. The person directly in charge of, and other persons directly liable for, engaging in the relevant export business activities may also be investigated for corresponding criminal liabilities according to the law.

The implementation of the law is dependent on further supporting rules. We will monitor the relevant laws and regulations and share our interpretation of them in a timely manner.

9 Min Read

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