

# China Releases Draft Export Control Law for Public Comment

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China Trade Controls

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On June 16, 2017, China's Ministry of Commerce (MOFCOM) released for public comment a draft of the [Export Control Law](#) ("the Draft Law"). While China has a number of regulations relating to export controls and has signed numerous nonproliferation agreements, the Draft Law would be China's first law specifically addressing export controls and would implement an export controls system that protects China's national security and consolidates its nonproliferation efforts. This new law, if enacted as drafted, would bring China's system somewhat closer to other export control regimes and has the potential to affect both domestic and international players that are exporting certain items and technologies out of China. The Draft Law also introduces new restrictions on the provision of "export control-related information" outside of China, highlighting the government's desire to tighten the control of cross-border transfers of technical data related to controlled items. The Draft Law is expected to be introduced to the National People's Congress for a first reading in 2018.

## Background of the Draft Law

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The Draft Law represents a continuation of the Chinese government's efforts to strengthen national security during President Xi Jinping's administration, focusing specifically on the export of nuclear, biological, chemical, military, or other dual-use goods and services.

China began to formulate export control regulations in the 1990s. In its drafting notes, MOFCOM highlighted three reasons to enact a stand-alone Export Control Law now: (i) the existing regulations have weaker legal authority as departmental regulations; (ii) the most recent export control regulation was promulgated a decade ago in 2007 and has not been updated regularly; and (iii) the current system is unable to support enforcement actions in practice.

## Key Points of the Draft Law

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- **Definition of "dual-use" and "military items."** The Draft Law provides basic definitions of key terms:
  - "Dual-use" is defined as "goods, technologies, services, or other items that have civil uses, and also have military use or enhance military potential, particularly the design, development, production, or use of weapons of mass destruction."
  - "Military items" are defined as "equipment, special production equipment and other materials, technology, and related services used for military purposes."

- “Nuclear” is defined as “nuclear materials, nuclear equipment, non-nuclear materials used in reactors, and related technologies and services.”
- The draft does not define “export” or “regarded as an export” (视同出口)
- **Re-Exports.** Re-exports—the transfer of an item from a country outside of China to a third country—were not previously addressed by regulations. The Draft Law would apply to items produced outside of China if “the value of the Chinese-controlled goods reaches a certain percentage of foreign products.” The Draft Law does not specify those percentages, which we anticipate would be addressed in subsequent implementing regulations.
- **Deemed Exports.** The Draft Law defines providing regulated goods or technologies to non-Chinese citizens (or to residents of Taiwan, Hong Kong, or Macao) as “exports”, even if the goods or technologies have not been transferred outside of mainland China. This newly expanded definition of “export” appears to regulate activities such as non-citizens who work in China viewing controlled equipment or technical data.
- **Export Control System.** The Draft Law aims to establish a unified export control system that has two elements: a controlled item list and a license system for exporters. The Draft Law does not contain the list, although presumably it will build from existing lists scattered across different laws and regulations. Some commentators suggest that two separate lists may be developed—one for dual-use items and one for military items. It is unclear whether China will continue to use its current system based on HS codes. In addition to the controlled item list, Article 14 allows certain agencies to designate a particular product or technology that is not on the list as a “temporarily controlled item” for up to two years.

In formulating the list, the agencies are also to look at, among other things, “technological development” and “competitiveness.”

The license application would include a technical description of the item, an end-user and end-use statement, and a copy of the contract or agreement between the parties.

Seven factors are to be considered when the licensing agency makes licensing decisions:

1. national security and development interests
  2. international obligations and external commitments
  3. degree of sensitivity of the item
  4. market availability
  5. end-user and end-use
  6. internal compliance systems of the exporter
  7. other circumstances prescribed by laws and regulations
- **Agencies and Their Responsibilities.** The Draft Law does not clearly identify departments under the State Council and the Central Military Commission that will perform the functions of export control, although it states that different agencies will regulate and license different controlled items under the Draft Law. For example, China Atomic Energy Authority, the Commission of Science, Technology and the

Industry for National Defense and MOFCOM will jointly manage nuclear exports. Export control agencies in general will enjoy significant authority such as conducting site inspections of end-users. Article 31 also provides that where China has entered into international agreements that already provide export control licensing guidelines (e.g., sanctions and embargoes), those provisions will take precedence. Military aid is specifically exempted from the scope of the Draft Law.

The Draft Law does not describe how the agencies will work together, or outline a procedure whereby a company can seek a ruling to determine which agency has jurisdiction over regulating and licensing exports.

- **National Security Assessment for the Provision of “Export control-related” Information.** The Draft Law specifically requires the national security assessment for the provision of “export control-related” information “abroad.” However, Article 10 does not define how procedures for such a national security assessment for the export of controlled information will be conducted. It is uncertain whether and how this requirement will be consolidated with the cross-border data transfer requirements imposed by the Cybersecurity Law. (See our recent alert [here](#).)
- **Penalties for Noncompliance.**
  - Potential penalties for exporters: Exporting without a license, obtaining a license through bribery or other fraudulent behavior, circumventing export control measures, or conducting transactions with parties on the blacklist each could result in a fine that amounts to five to ten times the value of the illegal gain. In addition to the penalties on the company, the responsible person may be fined between RMB 100,000 to 300,000 (about USD 15,000 to 45,000).
  - Potential penalties for parties facilitating illegal conduct: Third parties providing freight services, customs declarations, electronic trading platforms, and financial services to exporters that violate the Draft Law will be fined five to ten times of the illegal gain. The responsible person may also be fined between RMB 100,000 to 300,000 (about USD 15,000 to 45,000).
  - Investigation and procedural rules:
    - If an exporter applies for a license using fraudulent information, the application shall be denied and a fine between RMB 30,000 to 150,000 (about USD 4,500 to 22,000) will be imposed.
    - Obstruction of investigations (including non-cooperation with a site inspection) may result in penalties of between RMB 100,000 and 300,000 (about USD 15,000 to 45,000). In addition, the responsible person may also be fined between RMB 100,000 and 300,000 (about USD 15,000 to 45,000).
    - For exporters and individuals who violate this Draft Law, their information may be added to the national credit system database and made public. Export control agencies may deny applications for export licenses filed by these companies or individuals for three years after the penalty decisions.

## Potential Implications

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Companies active in China should continue to track the legislative developments and be aware of how the Export Control Law, if enacted as drafted, might affect their operations, sales, or other relevant actions. Based on the wording of the draft, exporters and their customers may face additional burdens, such as on-site inspections of end-users, as well as strict licensing review processes.

If you have any questions concerning the material discussed in this client alert, please contact the following China-based members of our International Trade practice:

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