



Convergence in China's New Export Compliance Guidelines

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On 28 April 2021, China's Ministry of Commerce (MOFCOM) issued the *Guiding Opinions on Establishing the Internal Compliance Mechanism for Export Control by Exporters of Dual-use Items* (2021 Guiding Opinions), replacing the 2007 *Guiding Opinions of MOFCOM on Establishing Internal Export Control Mechanism by Dual-Use Substance & Technology Enterprises* (2007 Guiding Opinions).¹ Attached to the 2021 Guiding Opinions are new *Dual-Use Item Export Control Internal Compliance Guidelines* (ECC Guidelines), including thirty-seven pages of detailed recommendations for internal policies and procedures to prevent, detect, and remediate violations of China's Export Control Law (ECL).² The 2021 Guiding Opinions and ECC Guidelines provide a roadmap for upgrading existing compliance practices and adapting global programs to China's evolving export control regime.

Polymaking Context

China's new Export Control Law (ECL) took effect on 1 December 2020, creating a comprehensive framework for restricting exports of military and dual-use products and technology for national security and public policy reasons.³ Under the ECL, exports, transfers and provisions of products, technology, and services may be prohibited or subject to licensing requirements based on factors including product features, end-users or end-uses, destinations, and exporters' credit records. The ECL eclipsed a patchwork of older export control measures, integrating elements of foreign export control schemes with provisions keyed to specific objectives of the Chinese government.

The ECL directs MOFCOM to issue export control compliance guidelines, and further admonishes exporters to establish and enhance their internal compliance mechanisms for export control.⁴ Although the 2021 Guiding Opinions and ECC Guidelines are not compulsory measures, they reflect MOFCOM's expectations for effective compliance programs.

Key Provisions

Purpose & Scope of Applicability

The stated purpose of the ECC Guidelines is to "provide guidance to export operators to establish and improve internal export control compliance systems, standardize the export behavior concerning dual-use items, and improve the awareness and level of export control compliance in the whole society."⁵

According to the ECL, "dual use items" refer to any "goods, technologies, and services that are for both civil and military purposes or contribute to an increase in military potential, especially those that may be applied to design, develop, produce, or use weapons of mass destruction and their means of delivery."⁶ The ECC Guidelines apply both to exporters of dual-use items and to third party agents and platforms that provide services concerning the export of dual-use items. The ECC Guidelines also apply to enterprises and scientific research institutes engaged in the research, development

and production of dual-use items.⁷ Their inclusion reinforces the application of the ECL beyond export shipments to domestic disclosures of sensitive technology to foreign customers, vendors, and other parties.

Basic Elements of An Effective Export Control Compliance System

The 2021 Guiding Opinions and ECC Guidelines list nine essential elements of an export control compliance system: (1) preparing a policy statement; (2) establishing a compliance organization or department; (3) conducting full risk assessment; (4) establishing internal procedures to review and approve exports; (5) establish contingency plans (for example, to address violations); (6) conducting employee education and trainings; (7) improving compliance audit practices; (8) maintaining accurate records; and (9) establishing export compliance manuals.⁸ While the 2007 Guiding Opinions listed many of the same elements, the recommendations for full risk assessments, compliance audits, and contingency plans are new in the 2021 Guiding Opinions. These additions reflect the current focus on risk-based compliance practices prevailing across many jurisdictions and fields of risk.

These elements closely track the *U.S. Export Compliance Guidelines* published by the U.S. Department of Commerce Bureau of Industry and Security (BIS) to facilitate compliance with the U.S. export controls.⁹ The U.S. Export Compliance Guidelines list the following elements as “critical” for an effective export compliance program: (1) “management commitment;” (2) “risk assessment;” (3) “export authorization;” (4) “recordkeeping;” (5) “training;” (6) “audits;” (7) “handling export violations and taking corrective actions;” and (8) “build and maintain” the export compliance program. Similarly, many of the specific recommendations in the ECC Guidelines mirror passages of the U.S. Export Compliance Guidelines.

Policy Statement

The ECC Guidelines recommend exporters to adopt a general policy statement including the following contents:

- explaining the basic purpose and significance of export control compliance;
- committing to abide by the relevant laws and regulations of export control;
- committing to not engage in commercial activities that violate export controls under any circumstances;
- expressing clear support for export control compliance;
- committing to assess and review export control risks of commercial activities in advance;
- emphasizing the importance of employees being familiar with and earnestly complying with export controls, requiring employees to abide by the relevant laws and regulations of export control, and prohibiting engaging in illegal export activities under any circumstances;
- listing the risks and possible penalties for export control violations; and
- providing corporate export control compliance contacts and contact information.¹⁰

To assist companies in formulating an internal policy statement, the ECC Guidelines include templates for a sample “Export Control Compliance Policy Statement” and a sample “Employee Export Control Compliance Guarantee Statement” for employees to confirm their compliance with export controls.

Export Control Compliance Organization

The ECC Guidelines recommend that exporters “establish a comprehensive and multi-level internal compliance system that is to be supported by the decision-making management leaders, led by the export control compliance department, and the specific implementation of compliance work to be undertaken by each business unit.”¹¹ Exporters should customize the structure and scope of their compliance organization to match their operations (such as setting up a cross-functional export control compliance committee, or a specific export control compliance department).

Full Risk Assessment

The ECC Guidelines emphasize that “a comprehensive risk assessment is the foundation of the internal compliance system for export control.” They should “regularly conduct a comprehensive assessment of their own possible export control risks, and, based on the assessment results, establish or improve the internal export control compliance system and compliance management organization structure, and identify the feasible prevention measures.”¹² Sample checklists listing typical “red flags” indicating heightened risks of export control violations and corresponding measures to prevent and remediate violations are also included.

Internal Review and Approval Procedures

Similarly, the ECC Guidelines encourage exporters to establish effective internal procedures for reviewing and approving exports and disclosures of controlled items at various stages of a transaction, including procedures for determining whether licenses are required based on the nature of the product, destination, end user, or end use. Sample screening checklists are also provided.¹³

Contingency Plans

The ECC Guidelines outline steps for contingency plans to address possible export control violations and other emergencies.¹⁴

- assessing reported risks to determine whether to initiate an internal investigation;
- determining the scope of the investigation and clarifying the investigation procedure;
- drafting the investigation report;
- determining and taking remedial measures ;
- reporting the investigation results to the original reporter as appropriate;
- reporting to the management;
- considering whether to incorporate the incident in future training content; and
- determining whether to report the incident to the national export control management department.

Education and Training

Exporters are recommended to incorporate export control compliance training materials into the company's general training program. Due to the evolving and complex international trade environment, export control compliance teams should attend regular internal and external trainings to ensure their understanding of regulatory requirements is current.

Compliance Audits

The ECC Guidelines encourage exporters to conduct compliance audits of the company's overall businesses as well as its export related functions and departments (such as sales and production) regularly. Sample checklists demonstrating the recommended scope and suggested questions for the auditors are also provided.¹⁵

Record Keeping

The ECC Guidelines recommend exporters to maintain accurate records, including:¹⁶

- specifications of exported products;
- commercial transaction documents (such as inquiry related records, order forms, contracts, invoices, bills of lading, freight orders, and transfer records);
- communications with relevant government departments;
- customer screening records and transaction records;
- end-user and end-use certification documents;
- license application documents;
- license approval documents;
- project implementation records;
- rules and regulations related to export control, including relevant meeting minutes, meeting resolutions, and management documents;
- records of identified violations and remediation;
- training records and materials;
- audit reports;
- records of visits by foreign persons such as customers and subcontractors (relevant to tracking access to sensitive materials and potential disclosures); and
- other required archive materials.

Compliance Manuals

The ECC Guidelines suggest exporters to develop and maintain comprehensive export control compliance management manuals to guide personnel.¹⁷ Compliance manuals should include:

- the general policy statement signed by the company leader (implying a senior executive such as the CEO, General

Manager, or Country Manager);

- summaries of relevant export control laws and regulations;
- company export control compliance policies and systems;
- export control compliance organization and related responsibilities;
- lists and contact information of full-time (or part-time) personnel responsible for corporate export control compliance;
- procedures for classification of items subject to export controls;
- key contents and results of the company's comprehensive risk assessment;
- export review process and review focus;
- procedures for reporting and responding to violations;
- relevant training materials; and
- contact information for relevant export control authorities.

Voluntary Disclosure & Penalties

The 2021 Guiding Opinions state that “in case the exporters violate the administrative provisions on the export control of dual-use items but voluntarily eliminate or mitigate the harmful consequences of their illegal acts, they shall be given lighter or mitigated administrative penalties in accordance with the law.” This comports with the recently amended Administrative Penalty Law, which allows for mitigation of administrative penalties where parties have voluntarily disclosed a previously undetected violation to authorities, taken the initiative to mitigate the adverse effects of a violation, substantially assisted the authorities' investigation, or where “other circumstances that give rise to a lighter or mitigated administrative penalty in accordance with laws, regulations and rules.”¹⁸

The ECC Guidelines provide that exporters should “report to the national export control administration department if there is a serious violation.”¹⁹ No further guidance on distinguishing serious violations from other infractions is provided. However, this passage reflects MOFCOM's expectation that parties will voluntarily disclose violations raising material risks to Chinese interests.

Neither the 2021 Guiding Opinions, the ECC Guidelines, the ECL, nor the Administrative Penalty Law explicitly explain whether companies may be credited for their compliance efforts in the event of a violation that goes undetected (and thus not voluntarily disclosed). Nevertheless, MOFCOM has substantial discretion in determining whether to initiate formal investigations and in determining appropriate penalties. Evidence of a robust compliance program may favorably impact both judgments in the event of a violation, just as the lack of meaningful compliance efforts may adversely affect the outcome.

Substantive Rules

The ECC Guidelines also reflect MOFCOM's approach to enforcement of the ECL. For example, the ECC Guidelines refer to two scenarios in which a “deemed export” of controlled materials may arise without an actual export shipment: (1) the hiring of foreign nationals to perform work related to controlled technology and (2) disclosure of controlled technology in connection with trade shows and other marketing efforts. Similarly, the ECC Guidelines describe the risks of an unauthorized “transfer” or “provision” of controlled items through the transmission of data via emails, telephones, fax, Chinese and foreign social media applications, and cloud storage.

Implications

The publication of the 2021 Guiding Opinions and ECC Guidelines reflects a growing focus by Chinese authorities on corporate compliance functions to prevent, detect, and remediate infractions in regulatory fields ranging from antitrust to export controls.²⁰ They embrace both general principles of risk-based compliance and specific strategies recommended by the BIS to comply with the US export controls. While this convergence facilitates the adaptation of global compliance frameworks to Chinese operations, Chinese exporters – both domestic and foreign-owned – must also heed the unique requirements, goals, and policymaking context of China's expanding export control regime.

¹ Shang Wu Bu Guan Yu Liang Yong Wu Xiang Chu Kou Jing Ying Zhe Jian Li Chu Kou Guan Zhi Nei Bu He Gui Ji Zhi De Zhi Dao Yi Jian (《商务部关于两用物项出口经营者建立出口管制内部合规机制的指导意见》) [Guiding Opinions of the Ministry of Commerce on Establishing Internal Export Control Compliance Mechanism by Dual-Use Substance Enterprises] (promulgated by the Ministry of Commerce, April 28, 2021)

(Ch.) (ECC Guiding Opinions).

² Zhong Hua Ren Min Gong He Guo Chu Kou Guan Zhi Fa (《中华人民共和国出口管制法》) [Export Control Law of the People's Republic of China] (promulgated by the Standing Committee of the National People's Congress, Oct. 17, 2020, effective Dec. 1, 2020), (Ch.).

³ Please refer to DLA Piper's previous client alerts on [China's New Export Control Law](#) and [China's First Measures Under New Export Control Law Target Encryption Products](#).

⁴ See ECL, Article 5.

⁵ See ECC Guidelines, Preface.

⁶ See ECL, Article 2.

⁷ See ECC Guidelines, Preface.

⁸ Id.

⁹ BIS, Export Compliance Guidelines (Jan. 2017),

¹⁰ See ECC Guidelines, Section 1.

¹¹ See ECC Guidelines, Section 2.

¹² See ECC Guidelines, Section 3.

¹³ See ECC Guidelines, Section 4.

¹⁴ See ECC Guidelines, Section 5.

¹⁵ See ECC Guidelines, Section 7.

¹⁶ See ECC Guidelines, Section 8.

¹⁷ See ECC Guidelines, Section 9.

¹⁸ Zhong Hua Ren Min Gong He Guo Xing Zheng Chu Fa (《中华人民共和国行政处罚法》) [Law of The People's Republic Of China on Administrative Penalty] (promulgated by the Standing Committee of the National People's Congress, September 1, 2017, effective January 1, 2018)

¹⁹ See ECC Guidelines, Section 5.

²⁰ See [Jing Ying Zhe Fan Long Duan He Gui Zhi Nan \(《经营者反垄断合规指南》\)](#) [Antimonopoly Compliance Guidelines for Business Operators] (promulgated by the State Administration for Market Regulation, September 11, 2020).

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