THE US-CHINA BUSINESS COUNCIL
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**US-China Business Council Comments**
**on the Export Control Law (Draft for Comment)**

January 26, 2020

On behalf of the more than 220 members of the US-China Business Council (USCBC), we appreciate the opportunity to submit comments on the draft Export Control Law of the People's Republic of China (hereby referred to as "the Draft") to the National People's Congress (NPC). We appreciate the NPC's efforts in unifying China's export control regime and streamlining relevant regulatory requirements.

We note that the current Draft has taken a few positive steps to reflect previous concerns expressed by our members. We are pleased to see the removal of the reciprocity principle and national security assessment from the draft. We are also pleased to see that the Draft has removed the terms "development interest" and "economic development" in assessing export control licenses, to make sure the scope of export controls does not go beyond what is necessary for national security concerns.

However, beyond commendable progress in the areas mentioned above, USCBC and its member companies would like to encourage the NPC to take note of additional feedback to further improve the Draft. Our recommendations are not limited to revisions to the Draft, but also cover items suggested to be clarified in the law's subsequent implementation rules. In particular, we would like to highlight the following suggestions:

- **Clarify the scope of export controls and national security:** We understand that the Draft has a high priority for safeguarding national security, but the term "national security" has a very broad connotation that has not been well articulated in the law. We suggest to further clarify the scope of activities that constitute a "national security threat" for export control purposes. We also encourage China to utilize internationally accepted best practices and metrics when developing the export control lists, such as the multilateral Wassenaar Arrangement.
- **Define activities considered "deemed exports":** The Draft introduces a "deemed export" concept, but lack of clarity may cause significant challenges for multinational companies operating and conducting R&D activity in China. It may also limit the R&D activity of Chinese companies operating overseas as well. Therefore, we urge clarification of what activities constitute "provision of controlled items by the citizen(s), legal person(s) and other organizations of China to foreign citizen(s), legal person(s) and organizations".
- **Consider relaxing requirements for end user statement and certificate:** We recommend Chinese licensing authorities allow buyers to certify on their own account that they will comply with end use and end user commitments, and only require government-issued end user certificates as supporting documents for specific transactions that are strategic in nature.
- **Include a voluntary self-disclosure (VSD) regime:** We suggest the final law to include a VSD regime, under which penalties should be waived or mitigated, where

the exporter voluntarily discloses a violation of the export control law to the authority or takes remedial actions.

- **Grant a lengthy and orderly transition period:** We recommend the Chinese authorities phase in export restrictions and put the law into effect only after industry and other stakeholders have received adequate notice of all legal changes and requirements. Ideally, this would result in the phased implementation of control regimes for different technologies and items so that controls on all items are not implemented simultaneously. We would also recommend a delay in enforcement by 9-12 months from legislative enactment date or last phase of implementation.

In addition to the key points raised above, we are pleased to raise these and other concerns in greater detail below for your consideration.

**Article 1**

We understand that the Draft gives high priority to safeguarding China's national security. Throughout the draft, "national security threat" is also one of the key grounds for issuing embargoes, defining the scope of controlled items and imposing other export control measures. As the term "national security" has a very broad connotation, we would suggest including a provision in the law that clearly defines the scope of activities that constitute a "national security threat" for export control purposes.

**Article 2**

Article 2 specifies that the law covers export control of goods, technology and services. However, it does not provide further details on its classification method for technology and services. Further details of these will help the export traders to prepare in advance.

This article also implies a "deemed export" concept, which may raise concerns for multinational companies who have a presence in China. Since the term "provision" is not clearly defined, companies are not sure whether the following scenarios will be subject to the Export Control Law: a technical meeting held in China or over conference call with foreign nationals, technical information storage in a data center located outside of China, maintaining technical information in a database that is accessible by colleagues in overseas offices, and filing for patent registration in foreign countries. It is also not specified whether Hong Kong, Macau and Taiwan passport holders who hold no other passport are considered "foreign citizens". Therefore, we urge for a clarification of what activities constitute "provision of controlled items by the citizen(s), legal person(s) and other organizations of China to foreign citizen(s), legal person(s) and organizations".

Since the "deemed export" requirement here may trigger big concerns for the R&D activity of multinational companies in China as well as foreign R&D activity of Chinese companies, we also recommend the final law to establish an exemption arrangement, including automatic general license (自动通用许可) or facilitative license (便利许可).

In addition, the article mentions an inclusion of "dual-use services". We suggest a clear definition of this term, as this is not generally known in the international export control regime. Dual-use items should be limited to physical goods, software, and technology, and should not include dual-use services.

**Article 4**

We recommend the legislation identify who shall be the ultimate authority for determining whether a request for approval to transfer across borders—or export—to be approved or denied. This article should also include a requirement to establish an appeals process that allows escalation by the applicant to higher levels of the government for sensitive cases, i.e., those that could have meaningful national security and/or foreign policy implications, when the decision at the lower level is a denial or contains restrictions.

**Article 5**

We suggest the law to clarify the "respective responsibilities" of the State Council and the Central Military Commission departments. Making these responsibilities transparent will ensure that the law can be enforced efficiently. We also suggest that China unifies the channels where exporters are able to receive transparent and clear instructions for export control regulations, so as to avoid enforcement inconsistency.

The Draft sets up the mechanism to provide expert consultation for authorities' export control work, yet it does not mention whether such consultation will happen at provincial level. We would suggest a clarification on that.

**Article 7**

This article stipulates requirements for chambers of commerce and associations. However, it is still unclear what the roles are for these organizations in export control. Will these organizations take an active role in reviewing the company's internal compliance processes? What services could they provide to members in terms of export control? We suggest a clarification on these questions.

**Article 8**

We would appreciate greater detail about the standards for assessment that China will conduct on destination countries or regions of the export-controlled items. We suggest that the principles of the assessment as well as the potential control measures be clearly communicated either in the final law or in the future implementing rules.

**Article 9**

This article lays out the multiple lists to be developed for the export control regime. Like we mentioned in comments for Article 2, it is unclear whether China will continue to use the current system based on harmonized tariff system (HTS) codes to determine product classification and license requirements or if a new coding system will be introduced. We would suggest the NPC consider following an Export Control Classification Number (ECCN) type classification in the future, since the nature of the HTS means that the number of products that would be considered controlled in an HTS scenario tends to be multiple times higher than following an ECCN type classification.

We urge the establishment of control lists that set forth precise, objective and positive criteria with respect to items subject to control. In certain areas of common concern, such as with respect to terrorism and nuclear proliferation, it would be useful for the Chinese export

control regime to be aligned with existing multilateral regimes, such as the Wassenaar Arrangement. We recommend China to consider establishing designations based on the nature of the item – like those utilized by other major trading partners – which will reduce regulatory burdens and better harmonize China's proposed system with those of its major trading partners.

If possible, we suggest that China develops a single consolidated control list, instead of multiple controlled lists (dual-use, military, and nuclear), to streamline the export control regime. The list of controlled items should also consider categorical exclusions adopted by other export regimes, such as mass market items and open source software. Similarly, we recommend establishing licensing exceptions, for example on published material, fundamental research, patents, etc.

Last but not least, our companies will benefit from details including how often the list(s) will be updated and how the list(s) will be made public. We also suggest any changes to the list(s) be announced two months earlier than the effective date, so as to give exporters a grace period to prepare appropriately.

**Article 10**

Article 10 stipulates an embargo and temporary control mechanism. Regarding "embargo", it is still unclear whether it will be consistent with United Nations Security Council determinations, or if China will have other newly added countries, persons, companies or other organizations. We suggest NPC identify sanctioned parties in line with international best practices. We also recommend China to publish detailed control measures and lists either in the law or in implementation rules, because exporters require transparent and timely notice of those parties to whom shipments are precluded.

We also notice, however, that a provision in the 2017 draft law, which provides that a public notice be issued when an embargo is lifted, has been removed. Lack of transparency in such measures will compromise the ability of companies to screen the listed parties under the embargo regime and comply with these measures. We suggest the final law to require that all the decisions on embargoes, including their imposition, termination and suspension, as well as the specific targets of the measures, be publicly announced. We also recommend including a requirement that the ban be reviewed regularly throughout the two-year period to ensure changes in the environment or in situations which led to the ban can be addressed promptly at the discretion of the relevant authority.

We applaud that the Draft adds a rationale of "the need for performing internal obligation and safeguarding national security" for temporary control to avoid unnecessarily expanded use of the mechanism. We recommend the law to require export control authorities publish specific details related to the potential imposition of temporary controls, including conditions and processes. We also recommend the law to include a certain grace period (e.g. one month) for temporary control. Additionally, we recommend the law to have a "grandfather clause" for transactions that have been granted license/approval prior to announcement of the temporary prohibition measures.

**Article 12**

This article mentions that the export control authorities will manage the export operators via the exclusive sale right system or filing system. However, it is not very clear what an "exclusive sale right system" entails. We are also not sure what items will be applied with an exclusive sale right system. The same term also appears in Article 34, where "qualification for exclusive export" is mentioned. We suggest a further clarification for the term.

**Article 13**

We applaud the removal of "development interest" and "supply on the market", which appeared in the previous 2017 draft, as economic and market factors should not be decision factors for granting an export license.

We realize that "credit record" is a newly added factor. We would appreciate the transparency of the metrics for evaluating an entity's credit record. We also suggest a clarification on if/how this will be related to China's Corporate Social Credit System and Authorized Economic Operator (AEO) Program.

We also noticed that the Draft has removed reference to the types of export licenses (individual and generic licenses). For exporters that regularly exports controlled products, it would be important to have the ability to apply for generic or global licenses that allow multiple exports to multiple destinations/end-users without the need to apply for a license on a transactional basis. Applying for only individual/transactional licenses would have a significant impact on the supply chain of exporters. We suggest obtaining global licenses be part of the "licensing facilitation measures" as referred to in Article 14 for companies having established an ICP.

**Article 14**

It's encouraging to see that the Draft has discussed the establishment of ICPs, and the export control system will differentiate exporters based on ICPs. However, we encourage that the establishment of ICPs be made voluntary, to allow companies the flexibility to develop a compliance system based on their own risk assessment rather than mandating baseline compliance.

Furthermore, the article is unclear regarding what "convenient measures" will be provided. We recommend the law to ask authorities to develop licensing procedures and exceptions for companies with good ICPs. Such practice would align with many countries' export regulation implementation and can allow authorities to better focus on exporters with a higher likelihood for violations. For example, for exporters with strong ICPs, the licensing audit should be conducted after export on a random basis rather than controls on individual transactions.

Similarly, Article 14 does not identify or provide examples of actions that would fall under the category of "major violations." In this regard, we recommend providing guidance under the regulations as to what types of actions would constitute a major violation, so that any benefits--or restrictions--which could be derived from licensing decisions based on the criteria for assessing violations can be determined in a standardized manner.

In addition, we recommend the law or future implementation rules offer clear criteria for setting up and assessing ICPs. Again, we suggest a clarification on how ICPs are related to current AEO criteria, and suggest regulators consider AEO enterprise standards in parallel with ICPs.

**Article 15, 16**

Article 15 is a "catch-all" provision that may place an enormous burden on the exporters. Exporters will find it challenging to identify non-controlled items being subject to export control rules. We suggest the final law to clarify specific rules, especially what constitutes national security.

Similarly, article 15 refers to scenarios in which the exporter knows or "is supposed to know" of a situation that would require the submission of an export license application. It would be challenging to determine when an exporter is supposed to know about an activity without a knowledge standard basis. We recommend identifying a "reason to know" standard that can be similarly applied across all provisions in the Law and its implementing regulations

We also noticed that the Draft has removed the wording indicating that the exporter "may at its own option" seek clarification from the relevant authority. Such wording is essential, as it clearly indicates that seeking clarification from an authority is an option, rather than an obligation placed on the exporter. This is particularly important given that the "threat to national security", which is the main threat that the catch-all provision is intended to cover, is not clearly defined by the law. Since the law has already introduced ICPs, exporters should be allowed to decide an appropriate course of action based on their own ICPs, which ought to abide by the law. We suggest to change back to the wording in the 2017 Draft – it "may at its own option" seek clarification from the government authority.

We also recommend the consulting procedure be available with a reasonable review timeline and a conclusion of written confirmation from the authorities to the exporter. We also suggest the export control authority consider a web portal where information can be accessed, rather than limiting contact procedures to phone calls and emails.

**Article 17**

This article requires end-user and end-user statements/certificates (EUS/EUC) be submitted. However, it is important to note that in many of China's existing supply chain models, the brand owner/overseas customer would like to protect its end user/customer information from its suppliers and contract manufacturers. The EUS/EUC is likely to impose a significant burden on exporters and hinder supply chain efficiencies. In addition, obtaining a government body-issued certificate could be a challenge in many jurisdictions, as there is no

international treaty governing the issuance of such certificates. On the other hand, as the draft law already holds Chinese exporters responsible for reporting identified violations of end us and end user commitments, while also authorizing the Chinese government to blacklist end users who violate such commitments, requiring a government issued certificate for each export may be unnecessary.

Therefore, we recommend that Article 17 be revised to follow the current practice that the buyer certifies on its own account that it will comply with the end use and end user commitments. Article 17 should only allow the Chinese licensing authorities to require end use and end user certificates for specific transactions that are strategic in nature in exceptional situations, and not in every instance so as to manage the burden on exporters involved in global distribution.

**Article 18**

It will be very difficult for exporters to expect third parties outside of China to comply with this requirement, especially for dual-use items. We recommend removing the obligations for importers to report to China export control authorities, as they may not have the visibility of export license details or the language capability.

Additionally, as China is a manufacturing powerhouse, there will be an overwhelming volume of transactions if re-transfer also requires approval from the China export control authorities.

Therefore, we recommend fully removing Article 18. If re-export has to remain in the scope of control, we suggest to impose reporting obligations on export operators (not importers), ONLY IF 1) the end use is likely to be related to WMD/nuclear proliferation purposes or endangers national security or 2) the new end user is a listed restricted party.

**Article 19**

We recommend adding “when submitting an export license application” at the end of the statement.

**Article 20**

We applaud the removal of “development interests”. However, it is still not clear how the control list will be managed. It is also not clear how the control list will be related to the Unreliable Entity List, which the Chinese government intends to develop.

Referring to our comments for Article 18, since end-user commitment is likely not a practical suggestion for the Chinese export market, we suggest the legislators consider not adding importers to control lists.

**Article 21**

The second provision is newly added to authorize Chinese Customs to challenge exporters. Such language is very concerning as the process and timeline are unclear. The identification and questioning may become a new burden for exporters/export operators to supply

essentially logistics companies with copies of the licenses. This may create confidentiality concerns as well. We recommend that clear guidelines and processes designed for such identification and questioning are published, so that it won't become a new burden. If the goods are not subject to the export control requirements, it should be released for export with minimum delay.

**Article 22**

We noticed that the Draft has already removed detailed documentation requirements for the application of dual-use export licenses, and maintains only vague requirements that the exporter shall truthfully provide all the required documents. We recommend the export control authority publish clear requirements of the required documents for the exporters to comply with (either in the final law or in the future implementing rules).

We also recommend to exempt the requirement for a copy of the contract or agreement as one of the export licensing document requirements, or exercising limitations on elements of the contract or agreement that are required for the export license, such as requiring the portion relevant to the export and end user, and not the entire agreement. We recommend all application forms, requirements and supporting materials be accessible and transmittable via the internet.

**Article 23**

We suggest adding language that requires a written statement with specific reasoning be issued to exporters in the event of a rejected application.

We also recommend allowing multiple shipments over a period of time under each license, and for license exemptions/exceptions - including intra-company transfers.

**Article 24**

We suggest a shorter turn-around time for application reviews (e.g. within 30 working days) to ensure competitiveness of Chinese exports to global markets.

**Article 26**

We suggest specifying the definition of "major proposal" and whether it is determined by monetary value, or some other factors.

**Article 30**

We applaud the progress made on confidentiality by adding definition of electronic data. We are also glad to see bank account freezing measures be limited to entities under investigation.

However, Article 30 remains very broad with regards to supervision and inspection, making the export operators concerned that the export control authorities may show up anytime for

any reason. This is not typical of other international export regulations. Additionally, the article addresses both inspections and investigations, with no details provided for inspections and a number of unique actions listed in the language related to investigations. These two subjects could be perceived as quite different, since it is assumed that investigations, which would give the government the extraordinary access powers addressed in this article, would have to take place in compliance with the legal rights of the export operator being investigated. In contrast, inspections are normally a routine aspect of export controls compliance in accordance with administrative procedure.

Therefore, we suggest the following changes:

- We recommend the language define “Export Operators” as they are defined earlier in the regulation, with “citizens, legal persons or other organizations specializing in the export of controlled items” removed from this article.
- We recommend to address inspections and investigations in separate articles and specify the enabling legal and administrative provisions.
- We request further clarity on the protocol of this enforcement process, details regarding the conditions that would justify such enforcement measures, details concerning what potential penalties might include, and whether exporters can refuse unreasonable enforcement requests. The investigative actions should be aligned with other relevant legislation to ensure they are covered under an umbrella legal authority.
- We recommend guarantees of due process and transparency when the state export control administration conducts investigations of companies, especially when it’s not imminent related to a national security issue. For example, a notice can be issued to the export operator in advance to allow the business to prepare for the investigation.

**Article 31**

This Article adds another term, ‘supervision’, to its provisions. We recommend addressing supervision and inspection in the same article, with inspections being a part of the compliance--related supervision of export controls, and as mentioned under Article 30, addressing investigations separately.

The confidentiality requirement related to investigations includes “trade secrets.” While we assume the term would cover information submitted in export license applications and in the licenses themselves, we believe more clarity is necessary to ensure information provided by the export operator would be protected even if it were not to rise to the category of a trade secret, i.e., if it were only proprietary in nature. We also recommend a separate, general confidentiality provision for the protection of information submitted by exporters in their license applications and of government data related to licenses.

**Article 32**

We suggest the final law to list all the administrative measures that can be taken by the export control authorities to ensure transparency.

**Article 33**

We recommend the establishing a process to determine the credibility of third-party reports of potential violations to discourage anti-competitive behavior and false reporting.

**Chapter V**

We noted that the Draft has removed provisions stating that exporters' remedial actions could help waive or mitigate penalties, at the authorities' discretion. We believe violations due to unintentional errors of the applicable regulation should receive a fine commensurate to the gravity of the violation, with more serious punishments reserved for repeated and intentional violations.

Therefore, we suggest the final law to include a voluntary self-disclosure (VSD) regime, under which penalties should be waived or mitigated, where the exporter voluntarily discloses a violation of the export control law to the authority or takes remedial actions. It will also bring ICPs to their best values, which not only help facilitate license applications, but also penalty mitigation.

We also recommend greater distinctions in legal liabilities between administrative penalties and criminal penalties in this chapter.

**Article 37**

We recommend limiting the scope of this provision to parties involved in the export transactions. In other words, a third-party electronic trading platform that does not provide services related to the actual export of the goods should not be within the scope. Additionally, knowledge should be defined as actual knowledge. For example, this should not apply to a financial services provider that generally provides financial services to an exporter, but rather only where the financial services were knowingly provided to facilitate an export violation.

Furthermore, articles 37, 38, and 39 all mention the term "serious circumstance" related to an export violation when determining a penalty. It may be helpful to export operators to connect such a reference to violations which adversely impact national security, proliferation or terrorism-related concerns, and/or foreign policy interests. Violations which demonstrate a total disregard for the Law could also fall under the category of serious violations.

**Article 40**

Article 40 does not specify for what types of violations the State export control authority may suspend or reject license applications for a period of up to 5 years; it therefore confers extraordinary powers to take an action which potentially could impact a company's viability, while affording limited opportunity for an exporter to assess and plan for this risk. We recommend a mandated review every year at a minimum.

**Article 41**

We recommend the final law to clearly articulate the Customs' roles and responsibilities in terms of export control, to make sure it won't potentially create undue burdens or delays for normal export activities.

**Article 43**

We suggest adding "breaching confidentiality obligations" to the list of behaviors by government officials that should be punished.

**Article 45**

For transit and transshipment of dual-use items, our members have questions regarding who is responsible for the license application. Requiring licenses under this scenario is nearly impossible. In addition, the term "re-export" is ambiguous. It is not clear whether it means normal export (import and re-export from China) or re-export to a third country. We recommend including a clear definition of re-exports under Chapter 1 and throughout the law for clear indication of the applicable restrictions and processes.

**Other Suggestions**

We suggest the final law include an article or reference to underlying regulations determining the process/documents required for export license application.

We notice that a license exemption mechanism has been removed in the Draft. We suggest the legislators give clarity on that aspect.