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## New Regulation on DUI Control Measure

### Introduction

To be consistent with the United Nations ("UN") Security Council Resolution 1540 (2004), all UN member states, including Thailand, shall take and enforce effective measures to establish domestic controls to prevent the proliferation of nuclear, chemical, or biological weapons (collectively weapons of mass destruction or "WMD") and their means of delivery, including the establishment of appropriate controls over related materials.

On 30 April 2019, Thailand enacted the Trade Controls of Weapons of Mass Destruction Act B.E. 2562 (2019) ("**TCWMD Act**"), which took effect on 1 January 2020. However, the TCWMD Act has lacked the regulations needed to implement Thailand's trade control rules regarding "WMD", which includes "dual-use items" ("**DUI**"), and the Ministry of Commerce ("**MOC**") as the administering regulator of the TCWMD Act has postponed the enforcement of the DUI export control measure many times.

After several public hearings, the Notification of the Ministry of Commerce *re: measures for the purpose of control of goods related to the proliferation of WMD and measures related to the goods with a reasonable doubt of the end use or the end user related to the proliferation of WMD*, also known as the Catch-all-Control notification ("**CAC Notification**"), was published in the Royal Gazette on 27 October 2021 and will become effective on 26 December 2021. The CAC Notification sets out the general rules regarding the measure imposed for the control of DUI. The Department of Foreign Trade ("**DFT**") (under the MOC) is the main regulator under the CAC Notification.

In this Update, we explain the rationale behind the issuance of the CAC Notification and its intended scope.

### Trade Control Measure

The DFT aims to impose the control measure over DUI only where information reported by government agencies reveals that such DUI carry the relevant risks, which would in turn raise the risk of proliferation of WMD. This essentially aims to "block any shipment of dual-use items (or any items which may be dual-use items, and also include the transfer of technology and software) that will be delivered to a high-risk end-user".

The control measure under the CAC Notification prohibits the export, re-export, transshipment, transit and transfer of technology and software of goods related to the proliferation of WMD and goods where there is reasonable doubt of the end use or the end user being related to the proliferation of WMD. This

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prohibition is a complete prohibition if there exists a risk of proliferation of WMD as specified in the CAC Notification.

The CAC Notification does not require an exporter to obtain a license for export, re-export, transit, transshipment, and transfer of any item or technology of DUI in general cases. However, there are specific circumstances prescribed in the CAC Notification where the control measure is imposed, in which case, no channel to obtain an export license for DUI is provided.

### What are the "Goods" subject to the Trade Control Measure?

The list of the goods subject to the trade control measure is provided in the attachments to the CAC Notification. This list of goods is generally based on the EU dual-use control list.

However, the goods in the list are not prohibited for export in all circumstances. The trade control measure under the CAC Notification will only cover goods regarding which the DFT has or has been notified of information on risk associated with the proliferation of WMD from a government agency.

### How Does the Trade Control Measure Operate?

Consideration of whether there is a risk of proliferation of WMD is based on a number of factors including: (a) whether the subject goods fall under the list of DUI; and (b) whether the related person falls under the United Nations Security Council Consolidated List or is the person related to the WMD proliferation pursuant to the information received under the UN Security Council Resolution 1540.

"Related person" in this update refers to the "person related to export, re-export, transshipment, transit or transfer of technology and software" which is defined under the CAC Notification as a person of whom the DFT has or has been notified of information on risk that he or she is related to any conduct which takes part in export, re-export, transshipment, transit or transfer of technology and software of goods with a reasonable doubt, whether such person is in the position of a buyer, seller, exporter, re-exporter, transshipper of goods, transiter of goods, transferor of technology and software or transporter.

When the DFT has information on risk of proliferation of WMD, an investigation will be triggered. If the related person is not able to provide information and/or evidence based on their due diligence/screening program to the DFT to show that there is no risk of WMD proliferation, the relevant goods (in respect of such related person) may be subject to the control measure.

After the DFT has conducted its investigation and identified that it is a case which poses a risk of proliferation of WMD, the goods will be subject to the trade control measures under the CAC Notification.

The imposition of the trade control measure will then be notified to the person related to export, re-export, transshipment, transit or transfer of technology and software, as well as to the Customs Department.

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If the related person disagrees with the imposition of the trade control measure, he or she may submit an appeal to the Minister of Commerce within 30 days from the receipt of the notification letter informing the imposition of the trade control measure.

### Review of the Trade Control Measure

The Director General of the DFT may review the implementation of the trade control measure at the request of a person related to export, re-export, transshipment, transit or transfer of technology and software subject to the trade control measure who has been notified of the imposition of the trade control measure, with evidence of a change in circumstance of risk of proliferation of WMD.

Upon review and investigation, the Director General of the DFT may cancel the implementation of the control measure in its entirety or in part or may implement a new trade control measure as he or she deems appropriate.

If the person requesting the review disagrees with the review result, they may submit an appeal to the Minister of Commerce within 30 days from the receipt of the notification letter containing the review result.

### Internal Compliance Program

The CAC Notification does not generally require exporters to conduct due diligence/screening on their every shipment. However, when the DFT has information on risk of proliferation of WMD and the investigation is triggered, and the related person is not able to provide information and/or evidence based on their due diligence/screening program to the DFT to show that there is no risk of WMD proliferation, the relevant goods (in respect of such related person) may be subject to the control measure.

As such, it is recommended to have an internal compliance program ("**ICP**") in place for the purpose of investigation as set out under the CAC Notification, which is further elaborated in the DFT Notification *re: criteria for certification of the compliance program of the goods related to the proliferation of WMD*, which became effective on 11 October 2021 ("**ICP Notification**"). The operator can also participate in the ICP certification program arranged by the DFT or authorized third party certifier.

A ICP should include:

- (1) Commitment Management
- (2) Trade Screening
- (3) Training
- (4) Record Keeping
- (5) Auditing

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(6) Penalties and Reporting

**Penalties for non-compliance**

The CAC Notification prescribing control measures is issued under Section 12(3) of the TCWMD Act. and Section 18 of the TCWMD Act requires that no one shall conduct a regulated activity prescribed under Section 12(3) unless the measure has been complied with.

Failure to comply with Section 18 of the TCWMD Act results in both a civil penalty and criminal punishment, i.e. imprisonment not exceeding 2 years and/or a fine not exceeding THB 200,000. A higher punishment shall be imposed where the violation is committed with an intent to cause harm to other persons, or to proceed with such goods to design, develop, manufacture, operate, modify, store, or transport WMD, or to proceed by any means with such Item in order to acquire WMD, in which case, the violator shall be liable to imprisonment not exceeding 10 years and/or a fine not exceeding THB 1 million.

An offender who commits the offence outside of Thailand, as well as any accomplice to the offence, shall also be liable for criminal punishment in Thailand if:

- (1) The offender or accomplice is a Thai national or is domiciled in Thailand;
- (2) The offender is a foreigner who commits an offence(s) intending for the offence to take place in Thailand, or for the injured person to be the Thai government; or
- (3) The offender is a foreigner, and such conduct is an offence under the law of the state in which such conduct has taken place, provided that the offender has a presence in Thailand and is not extradited according to the law on extradition.

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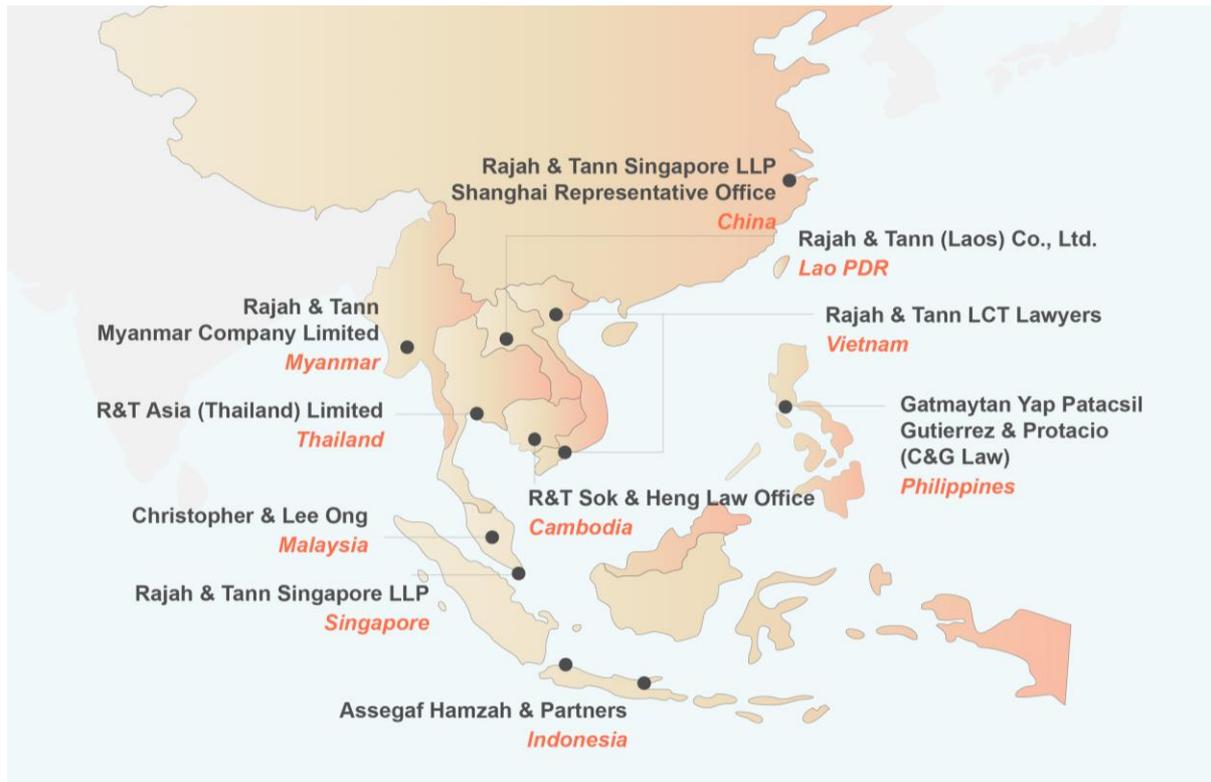
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