

China's Evolving RoHS Legal Regime

By Richard (Tad) Ferris and Dr. Hongjun Zhang

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The new law goes into effect March 1, 2007 (maybe), and could be even broader than Europe's version.

China's Management Methods for Controlling Pollution by Electronic Information Products, often called China RoHS, was promulgated on Feb. 26, and is scheduled to take effect March 1, 2007. This law, developed by China's Ministry of Information Industry (MII) to address growing concerns about electronic waste, is similar to the EU RoHS Directive in terms of currently restricted substances; however, it also includes a significant number of labeling and information disclosure requirements and requires pre-market compliance certification. Furthermore, China's law has the potential to be more broadly applied than EU RoHS.



China RoHS is the primary regulation that, when supplemented by additional implementing measures, forms China's emerging RoHS legal regime. However, most of the legal measures that will form the details of the law are still to be drafted: knowing what the final requirements will be is a challenge.

Here we discuss major aspects and key challenges of the law, focusing on those provisions that depart from EU RoHS, and consider implementation issues as well as future challenges associated with the evolving China RoHS regime.

Major Aspects of the Regulation

Scope. China RoHS essentially applies to the design, manufacture, sale and import of "electronic information products" containing "toxic and hazardous substances or elements."

In Article 3(1), "electronic information products" are defined as "electronic radar products, electronic communications products, radio and television products, computer products, home electronic products, electronic instrument measuring products, specialized electronic products, electronic components and parts, electronic applications, electronic materials, and accessories."¹ This definition presents the potential for a regulatory system that is far more broadly applied than EU RoHS and does not take into account business realities, including the availability of restricted substance alternatives. "Toxic and hazardous substances or elements" are defined in Article 3(4) to include "lead, mercury, cadmium, hexavalent chromium, polybrominated biphenyls, polybrominated diphenyl ethers, and other toxic and hazardous substances or elements as specified by the State."

However, a deeper review of China RoHS reveals that certain requirements are to be focused on listed electronic information products. The list will essentially take the form of a "catalog" of electronic information products that will be issued in batches over an unspecified period of time.² In China RoHS, this catalog is referred to as the "Catalog for Priority Control of Pollution by Electronic Information Products" ("the Catalog"). Further, MII is considering a number of exemptions that may significantly affect the scope of China RoHS application. The challenge at present is that work has not yet been completed and, in some cases, has not yet started, on the implementing measures. Until these measures are completed, the true scope of China RoHS will be unclear. However, the potential scope is as broad as the definition of electronic information products.

Substance restrictions. Electronic information products listed in the Catalog will be subject to restrictions of listed toxic and hazardous substances or elements per China RoHS and associated implementing measures. Work is currently underway on standards to identify maximum concentration values (MCVs) for such substances, as well as exemptions from the substance restrictions. At present, it appears that the MCVs set forth in the draft Chinese standards are similar to those described for EU RoHS. However, the current approach that the Chinese authorities and standards drafters are taking includes notable differences. In particular, the Chinese MCV standards presently address four categories: 1) homogeneous materials comprising electronic information products; 2) metal plating materials comprising electronic information product parts; 3) small elements/parts/materials of electronic information products that, under current conditions, are not readily further disassembled, with a size no bigger than 1.2 mm³ (the size of an 0805 chip); and 4) specialized materials or parts in electronic information products (this category reflects exemptions also reflected in the current EU RoHS Annex).

Pre-market certification. One of the most challenging and potentially disruptive aspects of China RoHS is set forth in Article 19, requiring that electronic information products incorporated into the Catalog undergo compulsory certification. Hence, electronic information products that are listed in the Catalog must undergo conformity assessment testing and certification procedures governed by the Certification and Accreditation Administration (CNCA), an agency under the Administration for Quality Inspection, Supervision and Quarantine (AQSIQ). Discussions are currently underway concerning the possible merger of the China RoHS pre-market certification system with the existing China Compulsory Certification (CCC) mark safety-licensing regime.³

Labeling and information disclosure. The labeling and information disclosure requirements associated with China RoHS constitute some of the most detailed and unique aspects of this regulation. These requirements are not linked to the Catalog but, rather, to the definition of electronic information products. Hence, the application of labeling requirements would not be limited to a particular list of products. The development of exemptions to, and interpretations of, the labeling and information disclosures will be critical issues for the regulated community.

In particular, there are five types of labeling and information disclosure requirements applicable to manufacturers and importers:

Marking of the "environmental protection period" for the electronic information product (defined as "the period during which toxic and harmful substances or elements contained in electronic information products will not leak or mutate") [Article 3(5)].

Marking of the content of toxic and hazardous substances or elements in electronic information products (Article 13).

Marking of the recyclability of electronic information products containing toxic and hazardous substance or elements (Article 13).

Marking of the content of packaging materials used for electronic information products (Article 14).

Marking of the country of origin of the electronic information product. [Proposed in the draft standards on Marking for the Control of Pollution Caused by Electronic Information Products (SJxxx-200x), reflecting the Management Regulations on Marking of Country of Origin, issued by AQSIQ March 5, 2001 and effective April 1, 2001].

Exemptions. Exemptions form a critical part of ensuring that the regulation can be effectively and practically implemented. At present, the China RoHS regulation itself only clearly references one scope exemption. This is in Article 2, which provides that products destined for export from China are exempt from the law. That said, a number of measures under development reflect MII's intention to address the need for certain flexibility, via exemptions, in the China RoHS implementation process. Key exemptions under consideration include:

Substance restriction exemptions. MII and related technical groups have identified a number of potential product exemptions from the substance restriction requirements in China RoHS. Fourteen such exemptions have been proposed, drawn from the exemptions set forth in the Annex to the European RoHS Directive.

Labeling exemptions. MII and related technical groups have proposed a number of exemptions from product labeling requirements, which focus on several factors, including whether the size and functional limitations of the electronic information product make it impractical to mark on the product itself. MII and the related technical groups are still revising the implementing measures governing labeling and related exemption issues, so exemptions will merit close monitoring.

Effective dates. China RoHS as promulgated indicates an effective date of March 1, 2007. Three factors make this date confusing.⁴

First, March 1, 2007, essentially comprises the date for implementation of the labeling or information disclosure measures in China RoHS.⁵ Second, the date or dates for implementation of the substance restriction and pre-market certification requirements in China RoHS will be set forth in the Catalog, which MII will promulgate separately.⁶ Third, gradual implementation of China RoHS will make compliance as of the effective date challenging. Regardless of whether compliance is expected as of a particular date, ability to comply may depend on whether MII finalizes key China RoHS implementing measures in a timely manner, and whether the regulated community is given sufficient time to understand and implement the measures by that date.

Enforcement and compliance surveillance. The pre-market certification requirements constitute only one aspect of the enforcement and compliance surveillance system contemplated for China RoHS. The State Administration of Industry and Commerce will likely have a significant role, joining with AQSIQ, in compliance surveillance.

Penalty provisions applicable to the private sector are set forth in Articles 22 and 23 of China RoHS. Although the types of penalties for violations remain ambiguous, these penalties typically include warnings, fines, product seizures, product repatriation orders (for imports), import or manufacture prohibition orders or facility shutdown orders.

China RoHS Implementation

A considerable amount of work is now underway to develop China RoHS implementing measures. For technical measures, particularly those involving issues such as MCVs, Pb-free solders and labeling specifications, MII established a Standards Working Group in 2004. This group, via subgroups with responsibility for particular subject areas, is charged with developing proposed standards for MII consideration, revision and promulgation. A positive aspect of the group is that MII permits the private sector, including multinational corporations, to join the group as long as the organizations in question are registered in China as legal persons.

A selection of key implementing measures currently being drafted or proposed for drafting follows. A detailed discussion of these measures is beyond the purview of this brief article. Further, the constant changes to the measures currently being drafted limit the usefulness of such a discussion.

Rules or guidelines.

Catalog for Priority Control of Pollution by Electronic Information Products.

Measures governing compulsory certification for electronic information products.

Technical guidelines for environmental protection period marking.

Standards.

Marking for the Control of Pollution Caused by Electronic Information Products (SJxxx-200x).

Lead-free Solders: Chemical Composition and Forms (SJxxx-200x).

Requirements for Concentration Limits for Certain Hazardous Substances in Electronic Information Products (SJxxx-200x).

Test Method for Lead-free Solders (SJxxx-200x).

Patience Needed

Understanding the implications of China RoHS for particular products and industry sectors will require patience, constant monitoring and explanations of the unique aspects of the Chinese legal system. All this activity will no doubt intensify as we approach the initial effective date of March 1. Current projections, subject to change, are that MII and affiliated technical bodies will continue drafting implementing measures for another 12 months or more.

Following typical rulemaking practice, the implementing measures would be issued not in one batch, but in pieces as the drafting, reviewing and approving work is completed. Take, for example, labeling. The labeling standards and environmental protection period technical guidelines both

provide critical compliance details concerning the labeling aspects of China RoHS. However, it is likely that these will be issued successively, rather than together.

Resources

China RoHS can be downloaded in English at aeanet.org/GovernmentAffairs/gabl_ChinaRoHSpage0905.asp and in Chinese at mii.gov.cn/art/2006/03/02/art_521_7344.html.

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Richard (Tad) Ferris is a partner in the China team at Holland & Knight LLP (hklaw.com), focusing on representing multinationals on regulatory and government advocacy issues in China and other developing country jurisdictions; tad.ferris@hklaw.com. **Dr. Hongjun Zhang** is a partner with the China team and former legislative director with China's National People's Congress; hongjun.zhang@hklaw.com.

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