

After several rounds of revisions, China finally adopted its first Export Control Law (ECL), which will take effect on December 1, 2020.

In general, we consider the ECL general, vague and hard to be implemented in practice without further adopting implementation rules. It incorporates many concepts from the US export control laws, but with few details. Given that the controlled item list and the implementation rules are not expected to be published by December 1, 2020, the actual implementation of the law will likely occur next year.

The highlights of the ECL are summarized as follows:

### 1. Scope of Coverage

The ECL regulates military, nuclear, and dual-use items, as well as other products relating to national security. In this sense, the ECL seems to be a combination of the US International Traffic in Arms Regulations (ITAR), the US Export Administration Regulations (EAR) and laws regulating nuclear and other national security-related products. Given the broad coverage and the need to regulate military and dual-use items differently, the ECL has separate chapters and regimes that apply to military items and dual-use items. For example, only licensed exporters may deal with military items, while dual-use items are not subject to the rule. For the purpose of this article, we focus only on dual-use items.

### 2. Controlled Items

The controlled items under the ECL include goods, technologies (including technical materials) and services, which is broader than the EAR, which does not cover services. The controlled items will be specified in a control list yet to be published.

In addition to the items specified on the control list, the ECL authorizes “temporary control” for no more than two years on items that are not listed but the export control administration authority deems necessary to control either generally or to a specific nation or person.

Moreover, the ECL provides that if an exporter knows, or ought to know, that exporting certain items beyond the control lists will endanger national security, or will be used for the purpose of proliferation or terrorism, the exporter should also apply for a license.

在几轮修订之后，中国最终通过了第一部《出口管制法》，该法将在2020年12月1日正式生效。

总体上，我们认为《出口管制法》的用语笼统且模糊的，在进一步的实施条例出台之前难以真正执行。中国的《出口管制法》从美国出口管制法律中借鉴吸收了许多概念，但却缺少具体细节。考虑到管制物项清单以及相应的实施条例将不会在2020年12月1日前公布，该法可能在明年才得以真正施行。

《出口管制法》的重点总结如下：

### 1. 管制范围

《出口管制法》管制军品、核、两用物项以及其它与国家安全相关的产品。从这点上看，《出口管制法》似乎结合了美国《国际武器贸易条例》、美国《出口管制条例》（“EAR”）以及管制核和其它与国家安全有关的产品的法律。鉴于其宽泛的管制范围以及将军品和两用物项区别管制的需求，《出口管制法》设置了分别适用于军品和两用物项的独立章节及制度。例如，只有获得许可的出口经营者才可以出口军品，然而该规则并不适用于两用物项。本文将仅关注两用物项的问题。

### 2. 管制物项

《出口管制法》中的管制物项包括货物、技术（包括技术资料）和服务，这一范围要广于EAR（EAR管制的范围不包含服务）。管制物项将通过管制清单予以列明，该清单目前尚未公布。

除了管制清单中列出的物项之外，《出口管制法》也授权了一种不超过两年的“临时管制”，其针对虽未被列入管制清单，但国家出口管制管理部门认为有必要对其进行全面管制或针对特定国家或个人的管制的物项。

另外，《出口管制法》还规定，如果出口经营者知道或应当知道管制清单所列管制物项以外的其它出口物项将会危害国家安全，或将会被用作核扩散或恐怖主义目的的，出口经营者也应当申请出口许可。

### 3. Administration Authority and Control Lists

The ECL authorizes the State Council and the Central Military Commission to establish “export control administration authorities” to implement the law, which appear to consist of three authorities, each respectively responsible for military, dual-use and nuclear items. In the case of dual-use items, it is believed that the Ministry of Commerce (MOFCOM) will be the administrative authority. Thus, the list of controlled dual-use items will be drafted by MOFCOM. At this moment, it is unclear when the first controlled list will be published and in what form.

It is worth noting that MOFCOM also publishes and oversees the “catalogue of technologies that are prohibited or restricted from exporting” according to the Regulation on Technology Import and Export. It is expected that the dual-use controlled list may be drafted on the basis of the current “catalogue of technologies that are prohibited or restricted from exporting.”

The ECL provides that the authorities shall evaluate the risk levels of different countries to take applicable control measures. This may refer to something similar to the Country Chart under the EAR.

### 4. Export Deemed Export and Re-export

The ECL defines “export” to mean “cross-border transfer of controlled items from the PRC, and provision of controlled items by citizens, legal persons and other organizations of the PRC to foreign natural persons, legal persons or other organizations.” This second part of the definition seems to be parallel to the concept of “deemed export” under the EAR, e.g., the transfer of controlled items to foreign persons even within China.

The ECL further provides that the law also applies to transit transportation, “re-export” or export from a bonded zone in China to overseas. The question is whether the word “re-export” has the similar meaning as that under the EAR, i.e., whether the ECL has extraterritorial jurisdiction and applies to foreign products that contain the controlled items where the *de minimus* rule or the “direct product rule” under the EAR are relevant.

In a draft Export Control Law published in 2017 (2017 Draft), there existed a provision specifically relating to re-export of controlled items after leaving China, foreign products that contain controlled items and a concept similar to the *de minimus* rule. This provision was removed completely from the ECL, which seems to suggest that China is refrained from exercising extraterritorial jurisdiction.

Therefore, it is our view that the “re-export” under the ECL probably refers to a straightforward re-export of the controlled items after leaving China, but not foreign products that contain the controlled items. For example, if a controlled item is exported from China to Country A and then without any processing or change, directly re-exported to Country B, that transfer may still be subject to the ECL. However, if the controlled item is processed in Country A and becomes a different product, the export of the finished product to Country B will not be subject to the ECL.

### 3. 管理部门和管制清单

《出口管制法》授权国务院和中央军事委员会建立一个“出口管制管理部门”来实施该法，该管理部门似乎由三个部门组成，各部门分别负责军品、两用物项和核物项的管制工作。普遍认为，商务部将会成为管理两用物项的部门，因此，两用物项的管制清单将会由商务部起草。当下，首份管制清单将会何时、以什么形式公布犹未可知。

值得注意的是，商务部也负责根据《技术进出口管理条例》公布并执行《中国禁止出口限制出口技术目录》。两用物项管制清单有可能在现有的《中国禁止出口限制出口技术目录》的基础上进行起草。

《出口管制法》规定，管理部门应该对不同国家的风险水平进行评估，以实施适当的管制措施。这可能是一种与EAR中的“国家列表”（Country Chart）相类似的措施。

### 4. 视同出口和再出口

《出口管制法》将“出口”定义为“从中华人民共和国境内向境外转移管制物项，以及中华人民共和国公民、法人和非法组织向外国组织和个人提供管制物项”。定义中的第二部分似乎与EAR中的“视同出口”（deemed export）概念相类似，即在中国境内向外国人转移管制物项。

《出口管制法》还规定了该法同样适用于过境运输、“再出口”或从中国的保税区出口至海外的行为。问题是该“再出口”的含义是否与EAR中的“再出口”含义相似，即《出口管制法》是否有域外管辖权，是否适用于包含管制物项的外国产品，这与EAR中的“最低比例规则”（*de minimus* rule）或“直接产品规则”（direct product rule）相关。

在2017年公布的《出口管制法》草案（“2017草案”）中，曾经存在有关再出口的详细规定，包括管制物项在离开中国后的再出口、包含管制物项的外国产品的再出口，以及与EAR项下的“最低比例规则”相似的原则。这一条款在最终版的《出口管制法》中被完全地删除似乎暗示着中国并不希望扩大该法的域外管辖权。

因此，我们认为《出口管制法》中的“再出口”可能仅指管制物项在离开中国后的直接再出口，而并不适用于包含管制物项的外国产品的再出口。例如，如果一个管制物项从中国出口至A国，再在没有任何加工或改变的前提下直接再出口到B国，则该转移仍可能受到《出口管制法》的管控；但如果该管制物项在A国被加工成了另一种产品，那么向B国再出口该成品的行为将不在《出口管制法》的管控范围内。

## 5. License Requirements

The ECL provides that a license is required for exporting all controlled items. It does not mention concepts like “no license required” or “license exception” as those under the EAR, which was mentioned in the 2017 Draft. When deciding whether to issue a license, the authorities will consider the following factors:

1. International obligations and commitments
2. National security
3. Type of export
4. Sensitivity levels of items
5. Destination countries or regions of export
6. End users and end use
7. Credit record of export operators
8. Other factors specified by laws and administrative regulations

## 6. End User and End Use Control

There is no definition of “end-user” or “end-use” under the ECL, but for the purpose of applying for the export control license, the exporters are required to submit information about the end use and the end user. The end user must commit not to change the end use or transfer the controlled items to a third party. The export control administration authorities will establish a system to access the risk levels of end use and end users.

The ECL seems to establish a blacklist system that is similar to the “entity list” under the EAR. Importers and end users (not exporters) may be added to the list under the following circumstances. Exporters could be ordered to stop all transactions with the blacklisted parties unless a license is obtained in special circumstances.

1. Violating the commitment of end user or end use
2. Potentially endangering national security
3. Using the controlled items for terrorism purposes

Compared to the recently adopted “unreliable entity list” (UEL) that is also monitored by MOFCOM, the blacklist under the ECL seems to be more similar to the Entity List under the EAR in a sense that the applicable restrictions are limited to export. In the case of the UEL, on the other hand, the prohibitions or actions could be much broader, including importing and exporting, as well as restrictions on investment and visas/immigration.

## 7. Third-party Service Provider

The ECL prohibits any person to knowingly provide agency, consignee, delivery, customs clearance, e-commerce, finance or other services to exporters that are engaged in activities against the ECL.

## 8. Internal Compliance Program

The ECL requires export operators to establish an internal compliance program to comply with the ECL. Exporters with good records of compliance will be granted with license facilitation.

## 5. 许可要求

《出口管制法》规定，出口所有管制物项需要获得出口许可。虽然在2017草案中有所涉及，但在最终文本中并未规定诸如EAR中的“无需许可”或“许可例外”这样的概念。管理部门在决定是否要颁发许可时，将考虑以下因素：

1. 国际义务和对外承诺；
2. 国家安全；
3. 出口类型；
4. 管制物项的敏感程度；
5. 出口目的国家或地区；
6. 最终用户和最终用途；
7. 出口经营者的信用记录；
8. 法律、行政法规规定的其它因素。

## 6. 最终用户和最终用途管控

“最终用户”和“最终用途”在《出口管制法》中都没有定义，但在申请出口管制许可时，出口经营者需要提交关于最终用途和最终用户的信息。最终用户应当承诺不改变最终用途或向第三方转让管制物项。出口管制管理部门将建立一个最终用途和最终用户的风险等级评估系统。

《出口管制法》似乎建立了一种类似于EAR“实体清单”（Entity List）的管控名单机制。进口商和最终用户（非出口经营者）在下列情形中将被列入名单。出口经营者除在特殊情况下可获出口许可外，将被命令停止与被列入管控名单对象的所有交易。

1. 违反最终用户或最终用途承诺的；
2. 可能危害国家安全的；
3. 将管制物项用于恐怖主义目的的。

与近期通过的同样受商务部监管的《不可靠实体清单》相比，《出口管制法》中的管控名单似乎更接近于EAR的“实体清单”，因为其管制措施仅限于限制或禁止出口，而在《不可靠实体清单》中，其限制的范围宽泛得多，包括进出口限制、投资限制以及签证/出入境限制。

## 7. 第三方服务提供者

《出口管制法》禁止任何人在明知的情况下，向从事违反《出口管制法》活动的出口经营者提供代理、货运、寄递、清关、电子商务、金融或其它服务。

## 8. 内部合规程序

《出口管制法》要求出口经营者建立一套内部合规程序以符合《出口管制法》的要求。合规记录良好的出口经营者将会被授予许可便利。

## 9. Penalties and No Appeal

The penalties for violating the ECL include a fine, business suspension, and denial of an export license and export privilege for five years. The maximum fine is 10 times the illegal income or RMB5 million, whichever is higher. The decision of punishment made by the export control administration authorities will be final and cannot be appealed to courts.

Please note that the above penalties apply only to “export operators” and third-party service providers as mentioned above, i.e., Chinese persons or companies, not importers and end users who may be subject to the “blacklist” as explained above.

## Contacts

Please contact one of the trade practitioners listed or you can reach our team collectively at [InternationalTradeCompliance@squirepb.com](mailto:InternationalTradeCompliance@squirepb.com).

### The People’s Republic of China

#### **Ju (Lindsay) Zhu 朱桔**

Partner, Shanghai  
T +86 21 6103 6303  
E [lindsay.zhu@squirepb.com](mailto:lindsay.zhu@squirepb.com)

### US

#### **George N. Grammas**

Partner, Washington DC/London  
T +1 202 626 6234  
T +44 20 7655 1301  
E [george.grammas@squirepb.com](mailto:george.grammas@squirepb.com)

#### **Daniel E. Waltz**

Partner, Washington DC  
T +1 202 457 5651  
E [daniel.waltz@squirepb.com](mailto:daniel.waltz@squirepb.com)

#### **Karen R. Harbaugh**

Partner, Washington DC  
T +1 202 457 6485  
E [karen.harbaugh@squirepb.com](mailto:karen.harbaugh@squirepb.com)

### EU

#### **Robert MacLean**

Partner, Brussels  
T +32 2 627 7619  
E [robert.maclean@squirepb.com](mailto:robert.maclean@squirepb.com)

#### **José María Viñals**

Partner, Madrid/Brussels  
T +34 91 426 4840  
T +32 2 627 1111  
E [josemaria.vinals@squirepb.com](mailto:josemaria.vinals@squirepb.com)

#### **Wojciech Maciejewski**

Associate, Brussels  
T +32 2 627 7612  
E [wojciech.maciejewski@squirepb.com](mailto:wojciech.maciejewski@squirepb.com)

### UK

#### **Matthew Kirk**

International Affairs Advisor, London  
T +44 20 7655 1389  
E [matthew.kirk@squirepb.com](mailto:matthew.kirk@squirepb.com)

*International Trade Practice co-leaders: Frank Samolis (partner, Washington DC) and George Grammas*

## 9. 处罚与无上诉

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请注意，上述处罚措施仅适用于前述的“出口经营者”和第三方服务提供者，即中国的自然人或实体；而非境外的进口商和最终用户，对其的规制主要通过前述的“管控名单”制度。

## About Us

Our export controls and sanctions lawyers have the ability to provide advice on the shifting regulatory framework on both sides of the Atlantic. We have extensive experience in advising and representing a wide range of companies and financial institutions in Europe, the US and other jurisdictions on export control and sanctions from a multijurisdictional perspective. Our team is part of our overall International Trade Practice, providing a “one-stop shop” solution to global trade compliance through rapid, professional and tailored advice and compliance tools to fit your business needs and processes.

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## 关于我们

我们出口管制和制裁团队的律师有能力就欧美不断变化的监管框架提供建议。我们从跨辖区和多领域的角度为欧美和其他各国的众多企业和金融机构提供法律意见，并代表他们处理出口管制和制裁问题。该团队是我们全球国际贸易业务组的成员，可通过快速、专业和量身定制的建议与合规工具，为您提供“一站式”解决方案，来达成您的业务需求和流程要求。

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