

China Revises Rules on Commercial Encryption Products

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Data Privacy and Cybersecurity

In the past three weeks, China's State Council and the State Cryptography Administration ("SCA") issued two documents that reveal a major change in the regulatory regime governing commercial encryption products in China, potentially paving the way for the draft Encryption Law to establish a uniformed encryption regime. This development and its practical implications will be important to multinationals that manufacture, distribute, or use commercial encryption products in China.

On September 29, 2017, the State Council released the *Decision on Removing a Batch of Administrative Approval Requirements* (the "State Council Decision") (official Chinese version available [here](#)), which removed some approval requirements for the manufacturing, sale, and use of commercial encryption products. On October 12, 2017, the SCA further released a notice ("Notice") to instruct local Bureaus of Cryptography Administration ("BCA") on the plan to implement the State Council Decision.¹ (Our previous alert describing the draft Encryption Law can be found [here](#).)

The State Council Decision and the Notice reveals a major change in the regulatory regime governing commercial encryption products in China, potentially paving the way for an Encryption Law that would establish a uniformed encryption regime.

With the removal of the approval requirements imposed on entities that are manufacturing, distributing, and using commercial encryption products in China, the regime shifted away from regulating entities in the supply chain towards focusing on regulating the encryption products themselves, which potentially can provide a more level playing field for foreign (i.e., non-Chinese) companies manufacturing such products. This shift is largely aligned with the approach proposed by the draft Encryption Law and will reduce the burden currently imposed on users, including foreign-invested entities and foreign individuals located in China, that have had to apply for permits for their use of foreign-produced commercial encryption products.

This alert provides background on the existing regime and summarizes the practical changes brought by the State Council Decision and the Notice.

¹ The full title of the Notice is the *Notice on Properly Handling Relevant Administrative Issues after the Removal of the Approval Requirement for Commercial Encryption Product Manufacturer and Other Three Administrative Approval Requirements*. See the official Chinese version [here](#).

China's Existing Regime Governing Commercial Encryption Products

Although the term “encryption product” has never been clearly defined, one of the regulations, the *Administrative Rules on the Use of Commercial Encryption Products*, provided a broad definition of “commercial encryption product,” which included “encryption technologies and products used for encryption protection or security certification information, not involving state secrets.” Some of the commonly used encryption products, such as Virtual Private Network (VPN) software, have been viewed as some as “commercial encryption products” and are subject to these regulations.

Key pieces of the existing regime include:

- **Approval of Manufacturers.** Under the existing regulations, only manufacturers that are approved by SCA are allowed to manufacture commercial encryption products in China. Approved manufacturers must not manufacture unapproved encryption products. In practice, no foreign-invested companies have obtained SCA approval to manufacture commercial encryption products in China.
- **Approval of Distributors.** Similar to manufacturers, only distributors that are approved by SCA can distribute commercial encryption products in China. Without such a license, any entity or individual may not sell commercial encryption products in China. Again, no foreign-invested companies have obtained such approval in the past.
- **Approval of Commercial Encryption Products.** The existing regulations also require SCA approval for specific encryption products. Manufacturers must obtain a *Product Model Certificate of Commercial Encryption Products* before they can produce such products.

As a general rule, entities and individuals must use approved encryption products manufactured by approved manufacturers and distributed by approved distributors. The use of pre-approved domestic encryption products by either foreign or domestic entities or individuals does not require additional approval from SCA.

- **Import and Use Permits for Foreign-invested Entities and Individuals.** For foreign entities (including foreign-invested entities) and individuals, the regulations offer an exception: such entities and individuals can apply to SCA to use foreign-produced commercial encryption products if they have a legitimate business need to do so, provided that the use of such products “would not be harmful to information security, the legitimate rights of other individuals and organizations, as well as China’s national security.”

If a foreign entity or individual would like to use a foreign-produced encryption hardware, it must apply for both a use permit and an import permit. If the foreign-produced product is software, no import permit is needed, but a use permit is still required.

Changes Introduced by the State Council Decision

The State Council Decision removed approval requirements for manufacturers and distributors of commercial encryption products, as well as the use permit requirement for foreign entities (including foreign-invested entities, such as Chinese subsidiaries of non-Chinese companies) and foreign individuals located in China.

The remaining approval requirements focus on: (i) the approval for commercial encryption products themselves to ensure the quality of the commercial encryption products; and (ii) the import permit requirement for the limited types of foreign-produced encryption hardware listed in a catalogue issued by the SCA and China's General Administration of Customs (see Annex for the catalogue).

The use of foreign-produced encryption software such as VPN software or off-the-shelf products that are not included in the catalogue will no longer be subject to any approval requirements.

SCA will, however, redirect its efforts, among other enforcement goals, towards:

- promoting national standards for encryption products;
- improving the review process for the *Product Model Certificate of Commercial Encryption Products*;
- controlling end users (and end-uses) for imported encryption hardware that is subject to the approval requirement; and
- establishing a "blacklist" to name entities not in compliance with the encryption rules.

Given the rapidly evolving regulatory regime, multinationals that plan to manufacture, distribute, or use commercial encryption products in China should closely follow the developments.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Data Privacy and Cybersecurity practice:

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Annex: Catalogue of Encryption Products and Equipment Subject to Import Management (First Batch)

Customs Code	Product Name
8443311010	静电感光式多功能一体加密传真机（可与自动数据处理设备或网络连接） Electrostatic photosensitive multifunctional integrated encryption fax machine (which can be connected to automatic data processing equipment or network)
8443319020	其他多功能一体加密传真机（兼有打印、复印中一种及以上功能的机器） Other multifunctional integrated encryption fax machine (machine with at least one of the two functions: printing or copying)
8443329010	其他加密传真机（可与自动数据处理设备或网络连接） Other encryption fax machine (which can be connected to automatic data processing equipment or network)
8517110010	无绳加密电话机 Cordless encryption telephone
8517180010	其他加密电话机 Other encryption telephone
8517622910	光通讯加密路由器 Optical communication encryption router
8517623210	非光通讯加密以太网络交换机 Non optical communication encryption Ethernet switch
8517623610	非光通讯加密路由器 Non optical communication encryption router
8543709950	密码机（包括电话密码机、传真密码机等）、密码卡 Cipher machine (including telephone cipher machine, fax cipher machine, etc.), cipher card