

Casting a wide net: China's encryption restrictions



While many governments are concerned about the exportation of high-level encryption technology and products and their subsequent use overseas, China's focus is on the use of encryption within its borders. Christopher T. Cloutier and Jane Y. Cohen examine the PRC's broad encryption controls.

China's web of encryption regulations has the potential to ensnare unsuspecting foreigners using their laptops or mobile phones in country. Under the Regulations for the Administration of Commercial Encryption ('Encryption Regulations'), adopted in 1999 by China's State Council – the highest organ of the state – the manufacture, use, sale, import, or export of any item containing encryption without prior government approval may lead to administrative fines, the seizure of equipment, confiscation of illegal gains, and even criminal prosecution.

The manufacture, use, sale, import, or export of any item containing encryption without prior government approval may lead to administrative fines, the seizure of equipment, confiscation of illegal gains, and even criminal prosecution.

The Encryption Regulations are written broadly, covering essentially any encryption product or technology used outside of official government channels. Starting shortly after these regulations were issued, there have been a series of statements by Chinese officials explaining that they are not intended to capture mass-market products that have only ancillary encryption functions, as opposed to dedicated encryption hardware or software. A clarification issued by one government agency in 2000, for example, explained that mobile phones, internet browsers, and Microsoft Windows software were not within the ambit of the Encryption Regulations.

Although thousands of individuals carry laptop computers and smartphones in and out of China every day, it is not without risk. To begin, the

government statements that the Encryption Regulations are not intended to address standard, mass-market products have all been issued by entities subordinate to the State Council. Thus, these statements did not amend the Encryption Regulations but rather indicated how the government intends to enforce them. Such intentions can change quickly. In addition, most of the statements are now more than a decade old and do not necessarily reflect current conditions. The statements were, for example, issued well before the first smartphones hit the market, and

before many companies began routinely adding specialized security software to computers issued to employees. Many of the more advanced features available in smart phones and security software installed on modern laptop computers would appear to be the type of technology that the Encryption Regulations seek to control.

China's encryption controls

The State Cryptography Administration ('SCA'), sometimes referred to by its former name, the State Encryption Management Bureau ('SEMB'), serves as the national authority responsible for the regulation of encryption products and technologies in China. The SCA formulates, adjusts, and publishes relevant rules and regulations. Together with the General Administration of Customs, the SCA

also enforces China's restrictions on the importation of encryption products and technologies.

As indicated above, the Encryption Regulations are extremely broad. They restrict the development, production, sale, use, and even repair of commercial encryption products. Moreover, the Encryption Regulations severely limit the sale of foreign-made commercial encryption products in China. Specifically, the Encryption Regulations mandate that only SCA-authorized entities are allowed to sell SCA-approved encryption products in China. Both the importation and exportation of commercial encryption products and equipment containing commercial encryption technologies must be approved by the SCA. Foreign organizations, non-Chinese foreign nationals in China, including short-term visitors, are required to obtain a licence from the SCA before using any encryption product in China. Diplomatic organizations are specifically exempted.

Unlike U.S. export controls on encryption, which are increasingly streamlined to ensure that only sensitive types of high-level encryption items are captured, China casts a much wider net. In fact, article 2 of the Encryption Regulations clarifies that all 'encryption technologies and encryption products used for encrypting protection or security authentication of information' are covered to the extent that they are not used for national security purposes. Thus, the Encryption Regulations are broad enough to cover virtually any cryptographic technology or process, regardless of encryption strength or prevalence of a product in international markets.

The SCA has published a number of rules outlining controls on encryption

products in China. These rules include the following:

- *Rules on the Production of Commercial Encryption Products* (11 December 2005) stipulate that encryption products must only be manufactured by firms authorized by the SCA, and that the types and categories of encryption products to be produced must be approved by the SCA. In addition, manufacturers of encryption product that engage in government procurement activities must submit encryption keys to the SCA.
- *Rules on the Sale of Commercial Encryption Products* (11 December 2005) require a seller to obtain a sales licence for commercial encryption products prior to selling encryption products in China. Thus, encryption products developed or manufactured outside of China must not be sold in China without prior authorization from the SCA.
- *Rules on Scientific Research for Commercial Encryption Products* (11 December 2005) stipulate that R&D activities related to encryption products must only be conducted by entities authorized by the SCA.
- *Rules on the Use of Commercial Encryption Products* (24 March 2007) (the 'Use Rules') govern the use of encryption products by Chinese persons including FIEs ('foreign invested enterprises', *i.e.* Chinese-incorporated branches of foreign companies). The Use Rules provide that Chinese citizens and enterprises may use SCA-approved encryption products made in China without a licence. These SCA-approved encryption products are, however, only available through authorized channels, which allows the Chinese government to control their distribution. The Use Rules also provide that FIEs may apply for a licence to use foreign-made encryption technology or equipment given a demonstration of necessity.
- *Measures on the Use of Commercial Encryption Products in China by Foreign Organizations and Individuals* (24 March 2007) (the 'Foreign Organization Measures')

regulate the use of encryption products in China by foreign persons including natural persons and 'organizations established under foreign laws outside the territories of China'. Thus, these rules apply to employees of companies visiting China who are not Chinese citizens. The Foreign Organization Measures require foreign persons using essentially any encryption products or technologies in China to obtain licences from the SCA.

■ *Trial Measures on the*

Implementation of Commercial Encryption Administrative Punishments (1 August 2007) regulate the actions of administrative authorities such as the SCA and relevant provincial and local encryption administration authorities.

- *The Import Control Catalogue of Encryption Products and Equipments Containing Encryption Technologies* (10 December 2009) lists the following nine controlled encryption products and equipment:

Encryption licence application procedures

For Chinese persons

Chinese persons including Foreign Invested Enterprises ('FIEs') may apply for a licence for virtually all activities involving encryption products, including the sale, use, import, or export of encryption products at the State Cryptography Administration ('SCA') branch office nearest where the applicant is located. The application packet must include a complete Registration Form For The Use Of Foreign-Produced Encryption Products and certain other documents such as business licences and a description of the encryption products to be licensed.

Review by the local SCA office lasts for five business days, at the end of which the application is either forwarded to the SCA in Beijing for further review or returned to the applicant for revisions. Review by the SCA in Beijing may last for up to 20 working days. If the application is approved, the SCA will issue a Certificate For Using Foreign-Produced Encryption Products, which is valid for three years. If requested, the SCA will also issue an Import Licence For Encryption Products, valid for 30 days. If the application is rejected, the SCA will provide the applicant with a statement of the reasons for the rejection.

For non-Chinese persons

The application process for non-Chinese entities is similar to that for Chinese persons. Applications must be filed with a nearest branch office of the SCA. For example, a foreigner wishing to import or use an encryption product in Guangdong Province would file the application with the Guangdong SCA. An application packet must also include a Registration Form For The Use Of Encryption Products By Foreign Organization And Individuals and certain additional documents such as business licences and a description of the encryption products to be licensed. Furthermore, if a non-Chinese entity wishes to use an encryption product that needs to be imported, then the importation of foreign encryption product requires a separate import licence, the application for which appears at the bottom of the Registration Form For The Use Of Encryption Products By Foreign Organization And Individuals. Notably, a frequent business traveller easily could fall foul of these provisions because each visit and importation into China of a particular encryption item (e.g. a laptop or a smartphone with encryption technology) could require a separate licence from the SCA.

Time periods for review of the application are the same as those discussed above for Chinese persons. Also as above, if the application is approved, the SCA will issue a Certificate For Using Encryption Products By Foreign Organizations And Individuals, which is valid for three years. If requested, the SCA will also issue an Import Licence For Encryption Products valid for 30 days. Rejected applications will be returned with a statement of reasons for the rejection.

- 8443311010: Electrostatic-sensitive multifunctional integrated encrypting fax machines (with automatic data processing equipment or network connection);
- 8443319020: Other multifunctional integrated encrypting fax machines (machines with the function of printing, copying or both);
- 8443329010: Fax machines (can be connected to automatic data processing facilities or internet);
- 8517110010: Cordless encrypting telephones;
- 8517180010: Other encrypting telephones;
- 8517622910: Optical communication encrypting routers;
- 8517623210: Non-optical communication encrypted exchangers;
- 8517623610: Non-optical communication encrypting routers; and
- 8543709950: Password machines (including telephone password machines, fax password machines, etc.), password cards.

Importantly, importers must apply for an import licence when importing into China any of the aforementioned products, as well as other products which the importer 'knows or should know' contain 'encryption technologies', including those not

specifically enumerated in the catalogue.

PRC encryption enforcement

The SCA itself does not have enforcement powers and must rely on other Chinese government agencies. Such agencies include the General Administration of Customs, Public Security Bureau, State Security Bureau, Administration for Industry and Commerce, and the Administration for the Protection of State Secrets. Recent

Under some circumstances, leasing of encryption items in China may be more advantageous.

developments indicate that these agencies plan to take a more active role in enforcing China's encryption controls. Thus, persons who engage in activities in China involving encryption products (e.g. the importation and use of encryption products), without complying with the existing rules should focus on taking the necessary steps to bring themselves into compliance with China's encryption controls or face potential enforcement actions and penalties.

To ease the licensing burden and reduce the risk of falling foul of Chinese encryption laws, persons that engage in activities in China should consider

activities that involve unencrypted laptops, smartphones, and other unencrypted electronic devices. However, the obvious disadvantage to this approach is the decreased data security resulting from the lack of encryption.

Under some circumstances, leasing of encryption items in China may be more advantageous. Although this approach would avoid having to obtain, for example an import licence in advance of each trip to China, a three-year 'use' licence would still be required. Obtaining a 'use' licence could be averted altogether if a company that leases encryption products to third parties already has the necessary 'use' licences for its encryption items.

Special thanks to Michelle Yingjie Li, an international legal consultant with King & Spalding's Washington office, for her assistance with this article.

Persons involved in the drafting this article are not licensed to practise law in China.

*Christopher T. Cloutier is a partner and Jane Y. Cohen an associate in the Washington, DC office of King & Spalding LLP.
ccloutier@kslaw.com
jcohen@kslaw.com*