



New Year Brings New Chinese Trade Controls on Cryptography

How China's new import and export controls on commercial cryptography may impact your business



The evolution of China's trade control regulations have been a hot topic in recent years. Widely viewed as a response to escalating trade tensions, China has accelerated the development of an advanced export control regime which creates new risks and challenges for Chinese companies and their trading partners. As part of this process, China implemented the 2020 Export Control Law ("ECL") to consolidate regulations and establish a uniform framework for controlling the export of dual-use items. On December 2, 2020, the day after the ECL became effective, the first product-based control lists addressing the import and export of commercial cryptography were announced. These cryptography control lists entered into force January 1, 2021, bringing with them new licensing requirements for companies with a China nexus that trade in the enumerated items.



Cryptography Law

The genesis of the recent cryptography control lists is the Cryptography Law of the People's Republic of China ("Cryptography Law") that took effect January 1, 2020. China's Cryptography Law is intended to promote the development of cryptography while regulating its application to safeguard cyber and information security. This law includes several references to import and export controls. Most

relevant, Article 28 describes import and export licensing for certain commercial cryptography to be implemented by the Commerce Department of the State Council and the State Cryptography Administration. Article 28 also stipulated that a list of commercial cryptography subject to import and export controls would be issued.

Companies should remain mindful of China's longstanding Catalogue of Technologies Prohibited or Restricted from Export. This catalogue is separate and distinct from the ECL with its own requirements, and was notably amended August 2020 to restrict the export of certain cryptographic security technology. Controls are description-based so products should be carefully assessed to identify the appropriate category and any related requirements.

Export Control Law




China's Export Control Law, which became effective just one day prior to the control lists' publication, is integral to limiting the transfer of dual-use items. The ECL establishes a framework for State export control authorities to identify dual-use items subject to export control, managed through published control lists, while also more broadly controlling goods relevant to Chinese national security and interests. Specifically, the ECL restricts the transfer of controlled items from China's territory, as well as the provision of controlled items by a citizen or corporation of China to a foreign organization or individual.

Cryptography Control Lists

In accordance with the Cryptography Law and the Export Control Law, on December 2, 2020 the Ministry of Commerce in China ("MOFCOM"), the State Cryptography Administration ("SCA"), and the General Administration of Customs ("GAC") jointly released the first product-based control list published pursuant to the ECL and focused on commercial cryptography. The announcement took effect on January 1, 2021.



The following is a summary of commercial cryptography items which pursuant to the announcement require a license from MOFCOM prior to import into and/or export from China:

<p>Just import</p> 	<ul style="list-style-type: none"> — Encrypted telephones and fax machines
<p>Import and export*</p> 	<ul style="list-style-type: none"> — Cipher machines/cards (with realization of cryptography operation as their main functions) — Encrypted VPN devices (devices with IPsec/SSL VPN as their main function)
<p>Just export</p> 	<ul style="list-style-type: none"> — Security chips—Integrated circuit chips with some or all functions such as cryptographic operation, key management, random number generation, etc., containing symmetric cryptography algorithm with over 64 key length, asymmetric cryptography algorithm based on integer factor decomposition of over 768 key length, or asymmetric cryptography algorithm based on elliptic curve of over 128 key length, and either: <ul style="list-style-type: none"> – Dedicated in electric power, taxation, public security, finance, and other fields; or – With over 10 Gbps encryption/decryption rate of symmetric cryptography algorithm or over 50,000 times per second signature rate of asymmetric cryptography algorithm. — Key management products—server-side devices used for such management functions as generation, distribution and storage of symmetric or asymmetric keys when the number of management objects to be supported is over 10,000 — Cryptography devices dedicated to electric power, taxation, public security, finance, and other fields — Quantum cryptography devices—devices based on quantum mechanics and cryptography and utilizing quantum technology to realize cryptography function — Cryptanalytic devices—used to break, weaken or bypass cryptographic technologies, products or systems — Cryptographic test, inspection or production devices—specifically designed for the development, production, measurement, testing, evaluation, and verification of items on the export control list — Software and technology—specifically designed or modified for the development, production, or use of items on the export control list

* These controls are generally limited to devices which:

- Contain a symmetric cryptography algorithm of over 64 key length, asymmetric cryptography algorithm based on integer factor decomposition of over 768 key length, or asymmetric cryptography algorithm based on elliptic curve of over 128 key length; and
- Have an encryption/decryption rate of symmetric cryptography algorithm above 10 Gbps (or equivalent – e.g. the signature rate of asymmetric cryptography algorithm is over 50,000 times per second)

Catalogue of Dual-use Items and Technologies

Following the release of the cryptography control lists, China revised the Catalogue of Dual-use Items and Technologies Subject to the Administration of Import and Export Licenses. Unlike the cryptography lists which bases control determination on product descriptions, the Catalogue of Dual-use Item and Technologies is based on Harmonized System (“HS”) codes. HS codes are an internationally standardized system of names and numbers to classify traded products and have historically been the basis of China’s export and import control measures. Adding the HS codes for the items on the new description-based cryptography control lists to the catalogue facilitates Chinese customs enforcement. This updated catalogue was announced December 31, 2020 and became effective the following day January 1, 2021.

Affected HS codes can be found [here](#) in Mandarin.

Import and export licensing procedures

Many companies are now faced with new licensing requirements if they wish to continue trading the described cryptography items with China. As required, companies must file an application for the import/export of dual-use items and technologies with the Ministry of Commerce through a local provincial-level department. Applications must include sufficient supporting documentation, such as:

- Identification of the applicant;
- Related contract or agreement;
- Technical description of related commercial cryptography; and
- Certification of end-user and end-use

The Ministry of Commerce will review the application materials and will consult with relevant departments, such as the State Cryptography Administration. If approved, a license will be issued to authorize the import or export of the subject commercial cryptography item.

Upon import or export, parties are required to make accurate declarations and submit the requisite licenses to Customs for examination. If the appropriate import or export licensing documents are not provided, the controlled goods will not be made available.

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Consequences of non-compliance

The impact of violating these regulations is not limited to Chinese exporters. Importers and end-users around the world who violate ECL obligations may find themselves on a restricted list, making it difficult to trade with China. Chinese exporters are generally barred from transacting with a restricted party without a license.

Third parties that perform shipping, customs clearance, or financial services are also subject to ECL obligations and can incur penalties for non-compliance.

Important actions to take now

Companies trading commercial cryptography items with China should conduct a product assessment to determine whether any items may be described on the newly published control lists. If affected, import and export licensing requirements must be considered prior to proceeding with future transactions. Simultaneously, HS classifications should be validated on a priority basis since they determine control and an error could create complicated compliance challenges.

Companies should also be aware that the impact of this new law may extend to companies beyond those who traditionally trade commercial cryptography items. Cross-border collaborations and exchange of R&D in the technology and gaming space can sometimes involve sharing and co-mingling of technology and software codes from multiple countries. Companies should be mindful of the impact of China's new trade controls on their technology and software collaborations.

Chinese export controls are an evolving topic that international enterprises should closely monitor. Of particular importance will be future announcements of additional laws and regulations.

How we can help

KPMG's Trade & Customs practice is built upon a broad network of professionals with deep knowledge of global trade control regimes. In China, KPMG has a team of over 60 professionals specializing in Trade & Customs matters. Our professionals include highly experienced former senior customs officials prepared to effectively apply for import and export licenses, as well as represent our clients' concerns to the customs authorities. We maintain a close working relationship and conduct frequent technical consultations with the GAC in Beijing and various local customs authorities.

Our global team can help your company navigate the complex China import and export control landscape, from assessing your current risk to implementing procedures to help confirm compliance with evolving regulations. As your trusted advisors, we will help you carve a compliant path forward.

Contact us

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