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China Releases New Rules to Ease Burden on Cross-Border Transfer of Data

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On March 22, 2024, the Cyberspace Administration of China (the “**CAC**”) released the highly anticipated *Provisions on Facilitating and Regulating Cross-Border Data Flow* (《促进和规范数据跨境流动规定》) (the “**Data Flow Regulation**”), effective immediately. The Data Flow Regulation eliminates obstacles to cross-border personal information (the “**PI**”) transfers in various routine international business dealings and facilitates global unified HR management for multinational companies (the “**MNCs**”) ¹. Specifically, it offers certain exemptions from compliance with required transfer mechanisms under the PIPL (defined below) and raised the various thresholds that would trigger CAC security assessment.

Below we will provide an overview of China’s data export compliance mechanism and discuss key highlights as introduced by the newly-released Data Flow Regulation in detail.

1. **PI Export Compliance Mechanisms**

China established the compliance framework for cross-border data transfer when China’s *Personal Information Protection Law* (《中华人民共和国个人信息保护法》) (the “**PIPL**”) came into effect on Nov. 1, 2021. Based on the sensitivity, importance and volume of personal information (“**PI**”) they process, businesses are expected to conduct at least one of the following before they can lawfully transfer PI out of mainland China: (i) obtain security assessment approval for exporting the PI; (ii) conduct and obtain PI protection certification; or (iii) enter into a standard contract for cross-border transfer of PI (the “**SCC**”) with the overseas recipient (collectively, the “**PI Export Compliance Mechanisms**”).

a. **Security Assessment**

Effective September 1, 2022, the CAC implemented the *Measures for the Security Assessment of Outbound Data Transfers (2022)* (《数据出境安全评估办法 (2022)》). It requires security assessment prior to transfer when one of the following occurs: (i) transfer of important data across borders; (ii) the PI processor is a critical information infrastructure operator (the “**CII/O**”) or processes PI of over 1 million users; (iii) the PI processor has provided a total of 1 million non-sensitive personal information (the “**non-SPI**”) (Data Flow Regulation increases the threshold here from 100,000 to 1 million) or 10,000 sensitive personal information (the “**SPI**”) across borders in the latest calendar year; or (iv) other situation as determined by the CAC.

b. **SCC or PI Protection Certification**

On February 22, 2023, the CAC issued the *Measures for the Standard Contract for Outbound Cross-Border Transfer of Personal Information (2023)* (《个人信息出境标准合同办法 (2023)》), effective June 1, 2023. It offers a form of standard contract (with little room left for change or deviation) (the “**SCC**”) to be used when a PI

¹ The Regulation is a result of a prior draft circulated by the CAC on Sept. 28, 2023, i.e. *Circular of the Cyberspace Administration of China on Seeking Public Comments on the Provisions on Regulating and Facilitating Cross-border Data Flow (Draft for Comment)* (《规范和促进数据跨境流动规定 (征求意见稿)》) (the “**Circular Draft**”).

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processor needs to transfer PI cross-border. The SCC or PI Protection Certification applies to situations where a security assessment is not required.

SCC/certification is required when: (i) exporting non-SPI of more than 100,000 but fewer than 1 million individuals in a calendar year; (ii) SPI of fewer than 10,000 individuals in a calendar year. That is to say, exporting PI of fewer than 100,000 individuals in a calendar year does not require SCC or certification.

Notwithstanding the foregoing, the new Data Flow Regulation provides exemptions to businesses from these PI Export Compliance Mechanisms under certain scenarios. The table below shows China's new data export compliance requirements in a nutshell, incorporating the new exemptions provided by the Data Flow Regulation (terms are defined below):

		Non-SPI	SPI	Important Data
Eligible for the Exemptions of PI Export Compliance Mechanisms	CIIOs and Non-CIIOs	Transit processing of PI collected overseas		N/A, as long as not published or classified as "important data" by local authorities
		Data subject ² as a party of an international contract		
		Data used in Cross-Border HR management		
		Emergency situation for life or property protection		
	Non CIIOs	Cross-border transfer of ≤ 100,000 PI in a calendar year	N/A	N/A
Security Assessment Required	CIIOs	Mandatory if not meeting any of the exemption scenarios		
	Non CIIOs	Cross-border transfer of ≥ 1 million PI in a calendar year	Cross-border transfer of ≥ 10,000 SPI in a calendar year	Cross-border transfer of any published or classified "important data"
	Once the security assessment is passed, the result is valid for 3 years (increased from 2 years), before a new security assessment is required.			

² "Data subject" generally refers to an identified or identifiable individual, via an identifier such as an ID number, location, or via factors specific to his/her physical, physiological, genetic, mental, economic, cultural or social identity.

SCC/Certification Required	CIIOs	N/A, since all CIIOs will need to do the security assessment if not meeting one of the exemptions.		
	Non CIIOs	Cross-border transfer of 100,000 ≤ PI ≤ 1 million in a calendar year	Cross-border transfer of ≤ 10,000 SPI in a calendar year	N/A, since all CIIOs will need to do the security assessment if not meeting one of the exemptions.

Below are key highlights of the new Data Flow Regulation:

2. Exemptions for Cross-Border Transfer of Certain Data

The Data Flow Regulation specifies certain scenarios where outbound transfer of PI is exempted from the PI Export Compliance Mechanisms. In particular:

- a. **Necessary to perform a contract.** Outbound transfer of PI will be exempted if such transfer is genuinely needed for the performance of a contract where a party is an individual. This exemption is generally intended to cover “2C” businesses during routine cross-border businesses, such as cross-border shopping, cross-border delivery, cross-border payment, cross-border account opening, air ticket and hotel reservation, visa application, examination services, etc.
- b. **Necessary for human resource management.** Outbound transfer of employee PI will be exempted if genuinely needed for the purpose of human resource management in accordance with legally established employment regulations and collective contracts. It is important to note that businesses processing human resource PI should still comply with other aspects of the PIPL, including but not limited to: (i) conducting PIA; (ii) obtaining the data subject’s informed consent; (iii) taking necessary measures to safeguard data security; and (iv) taking remedial measures in an event of data breach³. Therefore, it is still necessary for businesses to maintain adequate privacy policies, obtain relevant consents (when applicable) and have appropriate data processing or transfer agreements in place to ensure compliance.
- c. **De minimis threshold of less than 100,000 individuals.** For data processors other than CIIOs, exporting non-SPI of less than 100,000 in total in a calendar year is exempted. The Circular Draft had proposed a threshold of 10,000 individuals triggering an SCC or PI protection certification requirement.
- d. **Negative list by free trade zones.** The Data Flow Regulation also empowers China’s free trade zones⁴ to introduce negative lists exempting data from any of the PI Export Compliance Mechanisms. This may be complete exemptions or modified requirements, such as those recently proposed for businesses registered in nine cities in the Greater Bay Area. The Greater Bay Area

³ Article 10 and 11 of the Data Flow Regulation.

⁴ China has total 22 free trade zones as of the date of this publication.

exemption allows for transfer of PI cross-border under a simplified form of SCC and without an obligation to file a PIA⁵.

- e. **Certain data that do not include PI or “important data”.** The outbound transfer of data collected and generated during international trade, cross-border transportation, academic cooperation, transnational production and manufacturing, and marketing activities that do not include personal information or important data, is exempted.
- f. **Transit PI.** The Data Flow Regulation confirms that PI that was first collected overseas and then imported into China for further processing without any domestic PI data or “important data” will be exempted from any cross-border data transfer requirements for subsequent data export.
- g. **Emergency situations.** The outbound transfer of personal information necessary to protect the life, health and property of an individual in an emergency situation qualifies for an exemption.

It is important to note that the above exemptions apply even if combined volume in a calendar year exceeds the thresholds of 1 million PI (in the case of security assessment), 10,000 SPI (in the case of security assessment) or 100,000 PI (in the case of SCC or PI protection certification) volume exemptions, as long as the data being exported falls under any of the exemption categories.

3. **Export of Important Data**

According to the PIPL, all cross-border transfers of “important data” (as regulated under China’s Data Security Law) shall go through a security assessment. On March 22, 2024 – the same day the Data Flow Regulation was released – China introduced the *Data Classification and Grading Requirements* (《数据安全技术数据分类分级规则》)⁶, where specific guidelines for “important data” are laid out. Regulators and local governments are also in the process of updating important data catalogues.

Note that the Data Flow Regulation confirms that only businesses seeking to export data which are already identified as “important data” shall undergo the security assessment.

4. **Export of Sensitive Personal Information**

China’s protection of SPI is in line with the international trend of increasing protection. The PIPL defines SPI as “personal information that, once leaked or illegally used, may easily lead to infringement of an individual’s personal dignity or endanger safety or the property of an individual”. SPI generally includes biometrics, information on religious beliefs, information on specific identities, medical information, financial accounts, a person’s whereabouts, and any PI of minors under the age of 14. On August 9, 2023, China’s National Information Security Standardization Technical Committee released a circular on *National Standard “Information Security Technology — Security Requirements for Processing of Sensitive Personal Information” (Draft for*

⁵ Please refer to our earlier China Update article at: <https://www.haynesboone.com/news/alerts/china-streamlines-requirements-regarding-data-export-in-the-greater-bay-area>

⁶ The *Data Classification and Grading Requirements* introduces the principle, framework, method and process of data classification, and includes a separate guide for identifying “important data” as appendix G.

Comment) (《信息安全技术敏感个人信息处理安全要求》)⁷ which provides helpful guidance with respect to the identification and processing of SPI.

Under the new Data Flow Regulation, CIIOs are required to pass CAC's security assessment if exporting more than 10,000 SPI or go through the SCC/certification if exporting less than 10,000 SPI.

5. **Other Obligations before Data Export**

To avoid doubt, businesses eligible for the exemptions are nonetheless required to fulfill other obligations as required by the PIPL. Specifically, Article 56 of the PIPL requires PI processors to conduct a Personal Information Impact Assessment (the "**PIA**") before exporting data. The PIA should include the following aspects: (i) whether the purpose, method or any other aspect of the processing of PI is lawful, legitimate and necessary; (ii) the impact on personal rights and interests and level of risk; and (iii) whether any security protection measure taken is lawful, effective and commensurate with the level of risk.⁸

Additionally, before a PI processor can transfer PI to a third party – either within China or overseas – it must first obtain the data subject's informed consent (including name and contact information of the overseas recipient, the purpose and method of the processing, and the type of PI involved, as well as how the individual can exercise his/her rights under the PIPL against the overseas recipient), and then it should make sure that the data recipient's use of the data and data-handling methods abide by the terms of the data subject's consent. PI processors must also ensure that the foreign recipient of the data has data protection requirements in place which are no less stringent than those imposed by the PIPL.

Along with the new Data Flow Regulations, the CAC also released updated guidelines regarding the security assessment and the SCC respectively⁹, which simplified the materials required for declaration and filing for these two compliance mechanisms, as well as provided a data export declaration system (<https://sjcj.cac.gov.cn>) for easier filings. The CAC also published the response to media inquiries¹⁰ which clarified certain questions, including, for example: (i) whether overseas processing of the PI of China-based individuals will be deemed as a form of cross-border transfer; (ii) for any submitted and pending applications of Security Assessment and Standard Contract filing, which are now exempted by the Provisions, the relevant applicants may either continue the application process or withdraw their applications; (iii) non-CIIOs may apply for security assessment and/or SCC filing through the new online portals; (iv) applicants of security assessment are required to explain the purpose and necessity for exporting PI and provide consent samples; and (v)

⁷ The draft standard lays out common types of SPI (including PI relating to biometrics, religion, certain identify, medical records, financial accounts, whereabouts, identify authentication, minors under the age of 14, and others) and examples in each category, and sets out data processing requirements for each type of such SPI. The draft also provides a sample individual consent form.

⁸ Article 56 of the PIPL.

⁹ i.e., the *Guide on Application for Security Assessment of Outbound Data Transfers (Second Edition)* (《数据出境安全评估申报指南(第二版)》) and the *Guidelines for Filing the Standard Contract for Outbound Cross-Border Transfer of Personal Information (Second Edition)* (《个人信息出境标准合同备案指南(第二版)》)

¹⁰ https://www.cac.gov.cn/2024-03/22/c_1712776611649184.htm

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applicants of security assessment and SCC no longer need to provide an assessment of the data protection laws and policies of the recipient's jurisdiction.

6. **Takeaways for Businesses**

The new Data Flow Regulation is intended to ease compliance burdens for cross-border data transfer as part of China's efforts to attract foreign investments and thus stimulate economic growth.

To sum up, businesses are advised to consider the following from a practical standpoint:

- a. Be prepared to reassess their data export situation, including implementing suitable data tracking mechanisms to effectively monitor and assess the annual volume of PI they process, and to adjust their data compliance framework accordingly;
- b. When applicable, promptly take compliance measures for cross-border data transfer, including, but not limited to, preparing for the filings with the CAC (if not yet done), as any failure to do so will result in compliance risks as well as personal liabilities for senior executives;
- c. Review and update existing data policy documents, privacy notices, consents, employee handbooks and contracts to make sure all necessary provisions are included under relevant Chinese data protection and labor laws and regulations; and
- d. Businesses located in the free trade zones should keep an eye on the negative list, or even consider engaging in lobbying efforts relating to policy making in the free trade zones.

For more information, please visit our China Updates page or see the following resources:

[China Increases Filing Thresholds for Antitrust Merger Review](#), May 15, 2024

[China Streamlines Requirements Regarding Data Export in the Greater Bay Area](#), February 29, 2024

[China Releases Regulation on the Protection of Children in Cyberspace](#), December 5, 2023

[China Publishes Interim Measures for the Management of Generative Artificial Intelligence Services](#), August 7, 2023

[Mexico Nearshoring: Opportunity for Manufacturers in China and the U.S.](#), April 5, 2023

[China MIIT Releases Data Security Management Measures for Industrial and Information Technology Sectors](#), February 20, 2023

[A New Guideline Added to China's Data Protection Framework](#), August 17, 2022

[China Revises its Anti-Monopoly Law 14 Years After its Initial Implementation](#), July 26, 2022

[China Releases Judicial Interpretation of Anti-Unfair Competition Law](#), April 28, 2022

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- [Select Proposed Changes to the Company Law of the People's Republic of China](#), March 22, 2022
- [A Snapshot of China's Cyberspace Administration and Data Protection Framework](#), February 9, 2022
- [China Intensifies Regulations on Cryptocurrency Trading and Mining](#), November 2, 2021
- [China's Amended Administrative Penalty Law Took Effect on July 15](#), October 8, 2021
- [China Issues New Rules Regulating Personal Information Collection by Mobile Apps](#), April 28, 2021
- [A New Gateway to China – Recent Policy Developments in the Hainan Free Trade Port](#), April 6, 2021
- [China Issues Measures for the Security Review of Foreign Investments](#), February 9, 2021
- [China Patent Law Fourth Amendment—Impact on Foreign Companies](#), January 26, 2021
- [China Regulators Remove Restrictions on Insurance Fund Investment](#), December 14, 2020
- [China Adopts Interim Provisions on the Review of Concentrations of Business Operators for the Anti Monopoly Law](#), November 30, 2020
- [China Releases Draft Personal Data Protection Law for Comments](#), November 12, 2020
- [China Adopts Export Control Law](#), November 5, 2020
- [China Releases New QFII/RQFII Rules](#), October 27, 2020
- [China Releases Provisions on Strengthening the Supervision of Private Equity Investment Funds \(Draft\)](#), October 15, 2020
- [China Releases Provisions on the Unreliable Entity List](#), October 5, 2020
- [China Releases Revised Measures on Handling Complaints of Foreign-Invested Enterprises](#), September 23, 2020
- [China Releases Administrative Measures for Strategic Investment by Foreign Investors in Listed Companies](#), September 10, 2020
- [China Releases Draft Data Security Law](#), September 8, 2020
- [China Releases Circular on Further Stabilizing Foreign Trade and Foreign Investment](#), August 24, 2020
- [China Releases Draft Measures for the Administration of Imported and Exported Food Safety](#), August 18, 2020
- [U.S. Listed Chinese Companies: Regulatory Scrutiny and Strategic Options](#), July 30, 2020
- [China Passes Controversial Hong Kong National Security Law](#), July 9, 2020

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[Coronavirus Brings Force Majeure Claims to LNG Contracts](#), March 4, 2020

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[Coronavirus Fears Cast Cloud Over Dealmaking](#), February 27, 2020