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China Streamlines Requirements Regarding Data Export in the Greater Bay Area

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China has established the compliance framework for cross-border data transfer since 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 November 1, 2021. Based on the sensitivity/importance and the volume of the 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 recipient¹ (collectively, the "**PI Export Compliance Methods**").

On February 22, 2023, the CAC released the *Measures for the Standard Contract for Outbound Cross-Border Transfer of Personal Information* (《个人信息出境标准合同办法》) (the "**SCC Measures**"). For multinational companies ("**MNCs**") that process PI in low volume with no important data (as determined by relevant authorities), signing the SCC form and having it filed with the Cyberspace Administration of China (the "**CAC**") is the most commonly followed compliance method. Parties to the SCC need to sign the form as is with little deviation in order to satisfy the CAC requirements.

Hong Kong's data protection regime for personal information is governed by the *Personal Data (Privacy) Ordinance (Cap. 486)* (the "**PDPO**")², and its regulator is the Office of the Privacy Commissioner for Personal Data (the "**PCPD**"). The PDPO establishes data subject rights, specific obligations to data controllers, and regulates the collection, processing, possessing, and use of PI through six data protection principles. It requires a data user to take all practicable steps to ensure that any PI held by the data user is protected against unauthorized or accidental access, processing, erasure, loss or use. Hong Kong currently does not require government filings before transferring data cross-border.

On June 29, 2023, the CAC and the Innovation, Technology & Industry Bureau of Hong Kong ("**ITIB**") jointly signed the *Memorandum of Cooperation on Promoting Cross-border Data Flow in the Guangdong-Hong Kong-Macao Greater Bay Area* (《关于促进粤港澳大湾区数据跨境流动的合作备忘录》) (the "**Memo**"), which proposes to streamline data transfer mechanisms in the Greater Bay Area³ within the jurisdictions' existing data protection regime⁴. In that regard, on December 10, 2023, the CAC and the ITIB jointly released the

¹ For the purpose of China's data protection regime, data transfers between mainland China and Hong Kong SAR, Macau SAR, or the Taiwan Province are considered cross-border transfer of data.

² The PDPO came into force on December 20, 1996 and was significantly amended in 2012 and in 2021.

³ "Greater Bay Area" generally refers to the Guangdong–Hong Kong–Macao Greater Bay Area of China, but for the purpose of the GBA Guidelines, it is limited to just include the Hong Kong SAR and certain cities of Guangdong as further described in this article.

⁴ As an ancillary document to the Memo, on November 1, 2023, the National Information Security Standardization Technical Committee (全国信息安全标准化技术委员会) published the *Practical Guide to Cybersecurity Standard – Requirements for Cross-border Personal Information Protection in the Guangdong-*

Implementation Guidelines on the Standard Contract for Cross-boundary Flow of Personal Information Within the Guangdong-Hong Kong-Macao Greater Bay Area (Mainland, Hong Kong) (《粤港澳大湾区(内地、香港)个人信息跨境流动标准合同实施指引》) (the “**GBA Guidelines**”). According to ITIB, an “early and pilot implementation” arrangement for the contract begins as of December 2023, with an open invitation for the banking, credit referencing and healthcare sectors to participate – all of which have strong demand for cross-boundary services – with a view to further extending the facilitation measures to other sectors.

The GBA Guidelines essentially introduce a simplified version of the SCC (the “**GBA SCC**”) to facilitate PI transfers WITHIN the Greater Bay Area. According to the GBA Guidelines and the SCC Measures, applicable businesses should take the following steps to comply with cross-border transfers of PI: (i) obtain informed consent from the individuals whose PI are being transferred; (ii) conduct PI protection impact assessment (the “**PIA**”) with reevaluation when situation demands; (iii) sign the GBA SCC; (iv) file the documents (as described in section 2 below) with the CAC or PCPD as applicable within 10 days after the GBA SCC is executed; and (v) submit to regulatory oversight from their respective local jurisdictions.

Highlights of the GBA Guidelines include:

1. Applicability.

The GBA Guidelines apply to transfer of PI within the following areas: The Hong Kong SAR, and the cities of Guangzhou, Shenzhen, Zhuhai, Foshan, Huizhou, Dongguan, Zhongshan, Jiangmen, Zhaoqing in Guangdong Province (the “**Greater Bay Area**”). The locations of the relevant PI transfer are determined by where the business is registered, rather than where the servers are located. To prevent abuse/circumvention of the PIPL, PI transferred per GBA SCC cannot be subsequently transferred outside of the above areas or to a third party that is not registered in the above areas.

In addition, “important data” is the only type of data that are not eligible to take advantage of the GBA Guidelines. That is to say, businesses that otherwise have to go with the more burdensome CAC security assessment approval may now choose to comply through this less burdensome “SCC route.” For example, businesses that process over one million pieces of PI were not eligible to comply through signing an SCC under the current SCC Measures⁵ (i.e., need to obtain security assessment approval, or conduct and obtain PI protection certification), but they can now comply by signing the GBA SCC.

2. Simplified Filing Requirements.

One of the major accommodations provided by the GBA Guidelines is that enterprises that want to transfer PI within the Greater Bay Area are no longer required to submit the PIA as part of their filings with the CAC, which alleviates businesses’ filing burdens tremendously. Now, applicable businesses in the Greater Bay Area only need to submit the following three documents: (i) photocopy of the legal representative’s I.D., (ii) the signed undertaking letter as provided by the GBA Guidelines, and (iii) a copy of the fully signed GBA SCC. Both the PI

Hong Kong-Macao Greater Bay Area (Draft for Comment) (《网络安全标准实践指南—粤港澳大湾区跨境个人信息保护要求(征求意见稿)》), which set out detailed requirements regarding PI processing activities in the Greater Bay Areas including the legal basis, cross-border transfer, data security, etc.

⁵ See Article 4 of the SCC Measures.

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processor and the PI recipient should file the documents with the local CAC or PCPD as applicable, within 10 days after the SCC takes effect.

Although PIA is no longer required as part of the CAC (or PCPD) filings as discussed above, businesses should nonetheless conduct PIA for their own record per Article 5 of the GBA Guidelines. Note that the PIA is always required. However, the GBA Guidelines don't require a copy of it to be part of the CAC submission filing, and it requires less items in the PIA shown in the right column of the table below. The table below summarizes the key differences as set forth in the SCC Measures and the GBA Guidelines respectively, showing PIA to be conducted per GBA Guidelines shall contain much less items as opposed to the SCC Measures:

Key Assessment Items under the <u>SCC Measures</u>	Key Assessment Items under the <u>GBA Guidelines</u>
The legality, legitimacy, and necessity of the purpose, <u>scope</u> , and method of the PI processing by the PI processor and the overseas recipient	The legality, legitimacy, and necessity of the purpose and method of the PI processing by the PI processor and the overseas recipient
The <u>quantity, scope, type, and sensitivity of PI to be transferred overseas</u> , and the risk that the outbound cross-border transfer may pose to PI rights and interests	The risk that the outbound cross-border transfer may pose to PI rights and interests
The responsibilities and obligations that the overseas recipient undertakes to assume, and whether the management and technical measures and capabilities of the overseas recipient to perform such responsibilities and obligations are sufficient to ensure the security of PI to be transferred	Same
The risk of the PI being tampered with, sabotaged, disclosed, lost, or illegally used after it is transferred overseas, and whether there is a smooth channel for protecting the rights and interests in the PI	Not required
The impact of PI protection policies and regulations in the country or region where the overseas recipient is located on the performance of the SCC	Not required
Other matters that may affect the security of PI to be transferred overseas	Not required

3. Fewer Obligations and Burdens for the PI Recipient.

The SCC signed between the PI processor and recipient contains provisions establishing obligations that the overseas PI recipient needs to follow, including obtaining consent when applicable, providing a copy of the SCC to the PI subject, data retention and security, recordkeeping, etc. One of the concerns many MNCs have regarding signing an SCC is that it requires additional commitment by the overseas PI recipient with respect to data access and document requests from China. In addition, if the parties choose not to resolve disputes through arbitration, then the SCC dictates that the governing law, jurisdictions and venue shall all be PRC law and Chinese courts.

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The GBA SCC form amends the SCC form in the following major aspects:

- a. The GBA SCC form eliminates two obligations in the SCC form which reduces compliance burden for the PI recipient: (i) PI processor is no longer allowed to review necessary data files from the PI recipient (Article 3.11 of the SCC), and (ii) PI recipient no longer needs to produce records to regulatory authorities through PI processor according to relevant laws and regulations (Article 3.12 of the SCC);
- b. with respect to regulatory oversight, businesses that are registered in the above-mentioned Greater Bay Areas are subject to personal jurisdictions from their respective regulatory agencies (i.e., PCPD or local CAC) under the GBA SCC. This means the PI recipient in Hong Kong (that signed the GBA SCC) is no longer subject to CAC's jurisdiction as currently required per Article 3.13 of the SCC;
- c. governing law of the GBA SCC is determined by the jurisdiction where the PI processor is registered (i.e., PRC law or Hong Kong law, as applicable); and
- d. any dispute arising out of the GBA SCC can be submitted to a court in mainland China or Hong Kong with competent jurisdiction.

The GBA Guidelines lighten the data compliance burden for companies doing businesses across Hong Kong SAR and mainland China. While the GBA Guidelines only apply to Hong Kong and 9 Guangdong cities, it is yet another signal from China in encouraging cross-border data transfer within its current data protection regime in general. MNCs should pay special attention to the draft regulation released by the CAC earlier this year on September 28, 2023, i.e., the circular draft 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）》), which if passed, will offer filing exemptions to businesses under certain circumstances. For example, businesses that anticipate transferring less than 10,000 pieces of PI cross-border will be exempted from fulfilling the PI Export Compliance Methods that are otherwise required under the PIPL. MNCs should closely monitor the legislative developments in this space so as to better structure their compliance efforts.

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