DISCUSSIONS ON

FILING STANDARD CONTRACTS FOR CROSS-BORDER TRANSFER OF PERSONAL INFORMATION

hdh

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Chinese Standard Contract for the Export of Personal Information ("SC") was set to become effective on 1 June 2023

On May 30, 2023, the Cyberspace Administration of China ("CAC") issued the Guidelines for Filing Standard Contracts for Cross-border Transfer of Personal Information ("Guidelines").

The Guidelines, that released just two days before the Standard Contract Measures for the Export of Personal Information ("SC Measures") came into force on 1 June 2023, echo the filing requirements set out in the SC Measures that personal information processors are required to undertake. The key elements of the Guidelines are summarized below.

What China is doing

The SC Measures were initially released by the CAC on February 22, 2023 clarifying how companies can transfer personal information ("PI") outside of China by signing a "Standard Contract" with the overseas recipient of the data – a much simpler procedure than the other options as it does not require an external audit.

Under China's Personal Information Protection Law (PIPL), which came into effect on November 1, 2021, companies are required to undergo certain procedures in order to transfer certain types of data and certain volumes of PI outside of China. The Standard Contract is one of a few different PIPL-compliant mechanisms for cross-border data transfer ("CBDT").

The SC Measures and the Guidelines are the final pieces in the puzzle. Under the SC Measures, data controllers are required to file the executed SC and a Personal Information Protection Impact Assessment (PIPIA) with the local CAC office within ten working days from the effective date of the executed SC. However, beyond those high level requirements, the SC Measures lacked further details as to the process and other documentary requirements. These gaps were now addressed in the Guidelines, for instance, which companies are eligible for this mechanism, the requirements for additional procedures – such as self-assessments, and the requisite contents of the contract itself.

What are the CBDT requirements in Article 38 of the PIPL?

Specifically, companies must meet one of the following criteria in order to transfer PI over a certain scale overseas:

- Undergo a security review organized by the CAC, except where exempted by relevant laws and regulations.
- Undergo PI protection certification by a professional institution in accordance with the regulations of the CAC.
- Sign a contract with a foreign party stipulating the rights and obligations of each party in accordance with standards set by the CAC.
- Meet other conditions set by the CAC or relevant laws and regulations.

Article 38 also states that companies must adopt necessary measures to guarantee that the overseas recipient of the PI also complies with the requirements and regulations for processing and protecting PI stipulated in the PIPL.

PI is defined very broadly in the PIPL and is described as “various kinds of information related to identified or identifiable natural persons recorded by electronic or other means, excluding the information processed anonymously”, such as names, phone numbers, and IP addresses. Separately, the PIPL also defines “sensitive” PI, which is subject to stricter protection requirements. Sensitive PI includes but is not limited to:

- Biometric data (such as fingerprints, iris and facial recognition information, and DNA)
- Data pertaining to religious beliefs or “specific identities”
- Medical history
- Financial accounts
- Location and whereabouts
- Any PI of minors under the age of 14

The definition of sensitive PI is further expounded upon in the Personal information security specification [GB/T 35273-2020].

What is considered “PI export activity”? Which data operators are eligible to sign a “Standard Contract”?

PI export activity” is newly-defined in the Guideline as:

- When PI processors transmit and store PI that has been collected and generated during domestic operations overseas;
- When PI collected and generated by PI processors is stored within China, but overseas institutions, organizations, or individuals can inquire, retrieve, download, and export the PI;
- Other acts of exporting PI abroad as specified by the CAC.

This definition confirms the assumption that “PI export” does not only include the direct transfer and storage of PI to overseas locations but also remote access to PI stored in China by a person or entity located outside of China.

Which data operators are eligible to sign a “Standard Contract”?

The SC is arguably the simplest route to receiving approval to conduct CBDT, as it does not require an audit by either the CAC or an accredited third-party agency. However, companies going this route will be required to carry out a PIPIA, as we will see below.

Companies that meet **ALL** of the following criteria are eligible to use the SC:

- They are not a critical information infrastructure operator (CIIO).
- They process the PI of fewer than one million people.
- Since January 1 of the previous year, they have transferred the PI of less than 100,000 people out of China.
- Since January 1 of the previous year, they have transferred the “sensitive” PI of less than 10,000 people out of China.

The final version of the measures has also added a clause stating that PI processors cannot use means such as splitting up the PI that ought to undergo a security review into smaller batches in order to be eligible for the SC procedure.

What must be evaluated in a PIPIA?

Before transferring PI overseas using the Standard Contract method, companies must conduct a PIPIA.

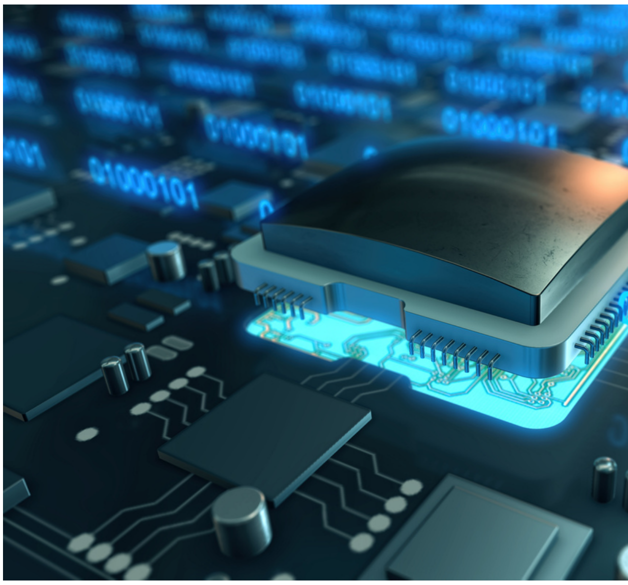
What must be evaluated in a PIPIA?

According to the SC Measures, the PIPIA must assess the following matters:

- The legality, legitimacy, and necessity of the purpose, scope, and processing method of the data processor [in China] and the overseas recipient.
- The scale, scope, type, and sensitivity level of the outbound PI being, and the potential risks that the export of the PI can pose to the rights and interests of the PI subjects.
- The responsibilities and obligations that are undertaken by the overseas recipient, and whether the management and technical measures and capabilities for fulfilling these responsibilities and obligations can ensure the security of outbound PI.
- The risk of the PI being tampered with, destroyed, leaked, lost, or illegally used after being exported, and whether the channels for safeguarding the rights and interests of the PI subjects are unobstructed.
- The impact that the PI protection policies and regulations in the country or region where the overseas recipient is located may have on the fulfillment of the Standard Contract.
- Other matters that may affect the security of the outbound PI.

PIPIA Template

The Guidelines also provide a long anticipated PIPIA template. The requirements under the template are substantially similar to the Privacy Impact Assessment requirements under the Security Assessment and the Certification data export mechanisms. However, we note the newly available PIPIA template also includes additional assessment matters, with a focus on personal information rather than national security; such as the collection and use of personal information in the business involved in the data exports, processing of sensitive personal information, and use of personal information for automated data processing.



In practice, some companies have adopted a proactive strategy by leveraging and adapting existing resources such as Data Protection Impact Assessments or Transfer Impact Assessments conducted pursuant to the GDPR to fulfil the PIPIA requirements.

However, these documents would likely need to be fine-tuned and further adjusted in light of the template provided by the Guidelines.

FILING PROCEDURES FOR THE SC

Things to look out for when procced

What must be stipulated in the SC?

The SC that is signed with the overseas recipient must strictly adhere to the template that has been provided along with the SC Measures. However, the CAC may sometimes adjust this template slightly according to the actual situation. The full template can be found along with the SC Measures on the [CAC website](#).

The PI processors can agree on other terms with overseas recipients, but these cannot conflict with the requirements of the SC template. The export of PI can only be carried out after the SC takes effect.

The information that is required to be included in the SC per the CAC template includes but is not limited to:

- Basic information of the PI processor [in China] and the overseas recipient, including but not limited to the company names, addresses, contact persons' names, and contact information.
- The length of the contract and mutual PI processing activity.
- Information on the technical and management measures that the overseas recipient will employ to fulfill the obligations of the contract to protect PI and minimize security risks, such as encryption, anonymization, de-identification, access control, and other technical and management measures.
- Agreed methods for arbitration and dispute resolution in the event of a dispute.

The SC template contains nine articles in total and includes clauses on matters such as the obligations of the PI processor and the overseas recipient, the impact that PI protection policies and regulations in the country or region where the overseas recipient is located may have on the fulfillment of the contract, and the rights and interests of the PI subjects.

Filing procedures for the SC

Where to File/How to File

The PI processor must file requisite materials with the local CAC office. He/ She can only begin CBDT activities after the contract takes effect. All the materials must be delivered in both physical and electronic form.

SC Formalities

The Guidelines clarify that PI processor should submit an “original” SC. This suggests that copies (or even electronically executed versions) of the SC may not be accepted, though the Guidelines do not provide formatting requirements regarding the execution of the SC and do not expressly address whether the use of electronic signatures will suffice.

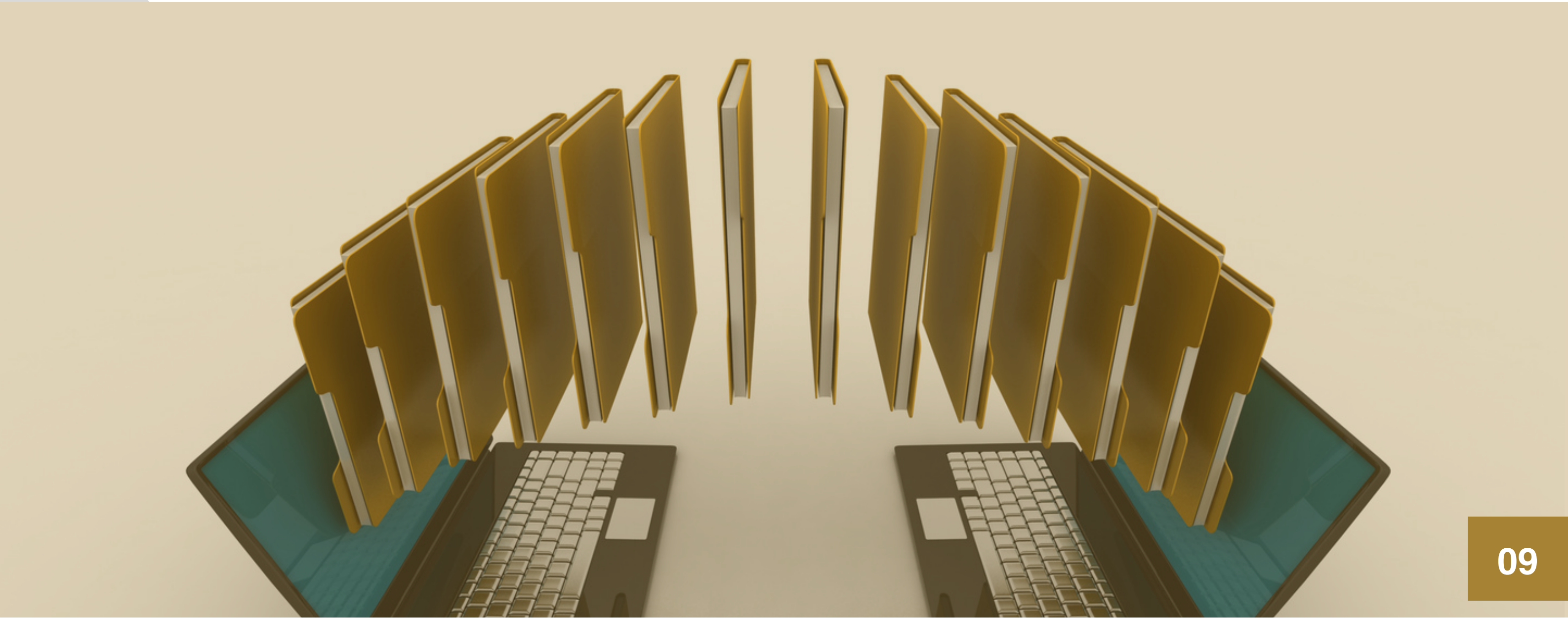
Timeline and Results Feedback

The SC filing process will supposedly take up to 15 working days from submission, provided there are no deficiencies in the materials submitted, or no requirement for the PI processor to supplement such materials.

If the SC filing is accepted, the successful data controller applicant will receive a filing number, while an unsuccessful applicant will be required to address the deficiencies and resubmit the relevant documents within 10 working days upon receipt of the CAC’s notification.

Re-filing Requirement

PI processor is required to re-execute the SC and file anew in the event of any of the changes in certain specified circumstances.



The materials that need to be submitted are listed in the table below.

Documents Required for Filing the Standard Contract		
	Document	**Requirement**
1	Photocopy of the unified social credit code certificate (the certificate of the 18-digit number assigned to all companies in China)	Photocopy with company chop
2	Photocopy of the legal representative’s ID card	Photocopy with company chop
3	Photocopy of the ID card of the person in charge	Photocopy with company chop
4	Power of Attorney	Original copy
5	Letter of commitment	Original copy
6	Standard Contract	Original copy
7	PIPIA	Original copy
Note: Templates for documents 4 to 7 above are provided in the Guidelines, which can be **downloaded here**.		

Potential limitations to the SC Measures

Potential limitations to the SC Measures

The SC Measures provide a much clearer picture for China-based companies on how to handle CBDT activities, which has been one of the major concerns for foreign investors and MNCs. The contract template is also especially helpful as it clears any doubt surrounding the information that each party must provide and the obligations that they are liable to.

Current limitations to the SC Measures mostly stem from the lack of clear definitions of various terms introduced in other legislation and regulations.

For instance, the definition of a CIIO is still somewhat unclear. CIIOs are subject to significantly stricter data and cybersecurity requirements and a higher level of government oversight.

In the Regulations on the Security and Protection of Critical Information Infrastructure released in August 2021, the scope of CIIOs includes industries such as energy, transport, water, and national defense, among others. But the regulations also stipulate that they could include “any other important network facilities or information systems that may seriously harm national security, the national economy and people’s livelihoods, or public interest in the event of incapacitation, damage, or data leaks.”

For companies in some sectors, the definition is clear-cut. For others, less so, as the “any other” category could be interpreted to include major online services companies, such as Tencent’s WeChat or ride-hailing platform Didi. However, in many of these cases, these companies would not be eligible for the SC as their scope of operations likely exceeds the PI quantity limits stipulated in the SC Measures.

Potential limitations to the SC Measures (con'd)

The Guidelines bring a greater degree of clarity to the SC filing process, though there are still outstanding questions, such as whether electronic signatures will be accepted, or how the CAC – which has been ostensibly overwhelmed by the security assessments – will be able to meet their self-imposed 15 working day timeline.

Furthermore, little is known on the exact level of details required by the CAC vis-à-vis the PIPIA for the SC, which on the surface appears to mirror most of the requirements of the privacy impact assessment for the stricter security assessment.

Given that failure to comply with the filing requirements will expose PI processors to potential legal liability and penalties under the PIPL – with financial penalties of up to RMB 50 million or 5% of the PI processor’s annual revenue – companies that engage in data exports should start preparing the PIPIA and the other required documents, and update and finalise the SC as soon as possible to ensure compliance with the SC Measures and the Guidelines.

We expect the local CAC offices from the various provinces to provide more details on the SC in the coming months, so businesses with a presence in China should keep an eye out for developments.

Post-Script

The local Beijing CAC office (not to be confused with the central CAC that sits in Beijing) has since released a guidance on 2 June 2023 in relation to SC filings (Beijing Guidance). The Beijing Guidance echoes many of the same points set out in the SC Measures and Guidelines, with the addition of the following points:

- Only data controllers with a separate legal personality may file an SC with the Beijing CAC i.e. branch offices without separate legal personalities cannot file SCs with the Beijing CAC;
- The SC filing entity should be the same entity as the data exporting data controller, save for where a parent company may make the SC filing on behalf of its subsidiaries;
- The SC and relevant documents should be submitted electronically in PDF to sjcj@bjwxb.beijing.gov.cn first – the hard copies of the filing documents should only be submitted to the Beijing CAC after the electronic submission has been examined and approved;
- The Beijing CAC will review the electronic submissions within ten working days; whereafter data controllers that have passed the examination will be required to send in the hard copy materials to the Beijing CAC, following which they will receive a filing number.

Based on the Beijing Guidance – it appears that the examination of the filing documents will take place after the electronic submission of the documents, and that the filing of the paper documents is merely a procedural formality.

Interestingly, the Beijing Guidance provides for an even shorter examination timeline than the Guidelines (10 working days in the Beijing Guidance versus 15 days in the Guidelines), though it is unclear why the Beijing Guidance has diverged from the Guidelines, and whether the other local CAC offices will follow suit.

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