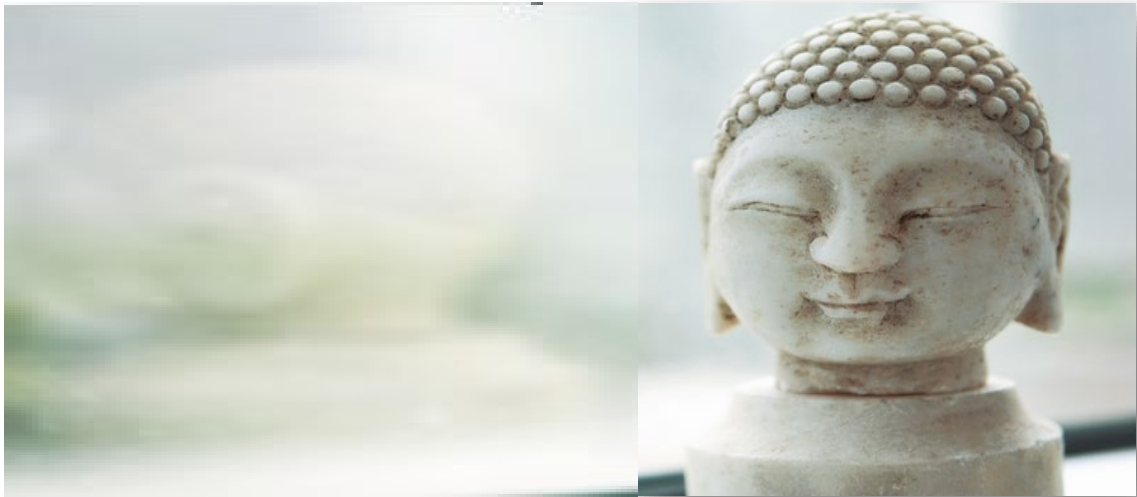


# China Legal Report

## October 2023



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# PIPIA - Personal Information Protection Impact Assessment in China

## I. Introduction

Under China's Personal Information Protection Law ("**PIPL**"), which came into effect on the 1<sup>st</sup> of November 2021, companies must follow certain procedures for the transfer of certain types of data and certain amounts of personal information outside of China (**Cross-Border Data Transfer ("CBDT")**).

On the 1<sup>st</sup> of June 2023, measures came into effect that set out the requirements for the use of a standard agreement ("**Standard Agreement**") procedures for the CBDT of personal information ("**PI**").

Originally released by the Cyberspace Administration of China ("**CAC**") on the 22<sup>nd</sup> of February 2023, the Standard Agreement for the CBDT clarifies how companies can transfer PI outside of China by signing a Standard Agreement with the foreign recipient of the data. This is a far easier process than the other options, since no external audit is required. In addition, the long-anticipated China Standard Agreement Clauses referred to in Article 38 of the Personal Information Protection Law ("**PIPL**") and the Regulations for the China Standard Agreement ("**the Regulations**") were finally approved and released by the CAC on the 22<sup>nd</sup> of February 2023.

At the end of May 2023, the CAC issued the Guidelines for the Submission of Standard Agreements for CBDT, a supplementary document which serves as a comprehensive guide for companies using the Standard Agreement mechanism. These Guidelines provide additional information on the implementation of the Standard Agreement procedure, including more clarity on legal definitions and further information on how to submit materials to local government. However, prior to the transfer of PI abroad using the Standard Agreement, companies are required to carry out a Personal Information Protection Impact Assessment Report ("**PIPIA Report**").

## II. Application of the Standard Agreement

Both the China Standard Agreement Clauses and the Regulations came into force on the 1<sup>st</sup> of June 2023, with a six-month grace period. This means that by the 30<sup>th</sup> of November 2023, unless a mandatory export security assessment is triggered, all companies that have CBDT, such as their head office, subsidiaries or other service providers, will need to have the China Standard Agreement Clauses in place and filed with the People's Republic of China ("**PRC**") regulators.

Because it's a simplified process, the Standard Agreement applies only to relatively small data controllers and to companies that do not handle data considered to be related to national security and interests. Companies that meet all of the following criteria are eligible to use the Standard Agreement:

- They do not process critical information and are not operators of critical information infrastructure;
- They process the PI of less than one million individuals.
- Since 1 January of the previous year, they have transferred the PI of fewer than 100'000 persons out of China;
- They have transferred the sensitive PI of fewer than 10'000 individuals out of China since 1 January of the previous year.

Notably, the following actions are considered exporting PI overseas:

- Transferring or storing PI collected or generated in China outside of China;
- PI collected or generated in China being made available for querying, retrieving, downloading or exporting by an overseas institution, organisation or individual;
- Any other activities involving the outbound cross-border transfer of PI as stipulated by the CAC.

Therefore, for multinational companies, if the PI collected or generated in China is stored on servers located overseas or is accessible to an overseas head office, it will be deemed as CBDT because the PI is deemed to be exported.

The Standard Agreement is arguably the simplest route to obtaining CBDT authorisation, as it does not require an audit by the CAC or an accredited third party. However, companies that choose to use the Standard Agreement will be

required to carry out a Personal Information Protection Impact Assessment ("PIPIA").

### **III. Guidance on the Personal Information Protection Impact Assessment Report ("PIPIA Report")**

Prior to be entitled to transfer of PI abroad using the Standard Agreement method, companies are required to carry out a PIPIA. The PIPIA Report needs to be submitted for filing together with the Standard Contract. In accordance with the Standard Agreement Measures, the PIPIA is required to assess the following issues:

- 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, nature and sensitivity level of the outgoing PI, and the potential risks that the export of the PI may pose to the rights and interests of the PI subjects.
- The responsibilities and obligations assumed by the overseas recipient, and whether the managerial and technical measures and capabilities for fulfilling these responsibilities and obligations can ensure the security of the outgoing PI.
- The risk of the PI being tampered with, destroyed, leaked, lost or misused after export, and whether the channels for safeguarding the rights and interests of the PI subjects are unobstructed.
- The effect that the policies and regulations for the protection of PI in the country or region where the overseas recipient is located may have on the fulfilment of the Standard Agreement.
- Other matters that may affect the security of the outgoing PI.

The template of the PIPIA Notification provides further guidance on the information to be provided under PIPIA, including the corporate structure and investments of the PI processor, and the information assets, cloud services, data centres and network paths that are used in the outbound transmission. Compared to the PIPIA in the case of the mandatory data security audit, the

PIPIA in the case of the use of the Standard Agreement places greater emphasis on the protection of and impact on the rights and interests of individuals with respect to their PI, rather than on national security and public interest. The PIPIA needs to be completed within three months prior to filing, and no material changes are allowed to be made before filing.

#### **IV. Summary**

Having a good understanding of the precise regulatory implications of different data flows in the course of your business, including prioritizing the actions to be taken according to your business case, is a crucial first step to avoid efforts being misdirected.

It is advisable for companies wishing to engage in CBDT of PI to start assessing the volume of PI being handled in order to understand their eligibility to use the Standard Agreement method before the measure comes into force.

Companies should also review their current PI protection and risk assessment mechanisms to ensure that all processes comply with PIPL and the PIPIA Report, Standard Agreement and all applicable legislation.

It is worth noting that despite the above regulation, once a new rule - Regulations on the Administration of Data across Borders is in effect, it is expected that the majority of SMEs are to be freed from their obligation to have a transfer agreement of CBDT of personal information (if the company processing less than 10,000 persons' PI per year). The regulation was released for public comment on September 28th 2023, and the deadline for submitting comments was October 15th 2023. We will keep you updated on how the laws will develop in this regard.

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