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Personal Information Export by PRC Presence of Global Asset Managers: Action Plan under Standard Contract Route

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On 24 February 2023, the Cyberspace Administration of China ("**CAC**") released the *Measures on Standard Contract for Cross-Border Transfer of Personal Information* ("**Standard Contract Measures**") accompanied by the standard contract ("**Standard Contract**"), which will take effect on 1 June 2023. The issuance of the Standard Contract Measures indicates that the three routes for cross-border transfer of personal information as stipulated in Article 38 of the *PRC Personal Information Protection Law* are basically in place, being (1) to undergo the data export security assessment organized by CAC; (2) to undergo the personal information protection certification by a professional institution ("**Certification Route**"); and (3) to enter into the Standard Contract with the offshore recipient ("**Standard Contract Route**")[1].

For the commercial presences set up by global asset managers in China (e.g., WFOE PFM, QDLP/QDIE, WFOE FMC, JV WMC and Research WFOE), the cross-border transfer of personal information of onshore investors, employees and business partners may be involved in the course of their business operation to varying degrees, depending on the respective regulatory requirements. In light of the business development of global asset managers in China, we view that at the current stage most of their PRC subsidiaries would not touch on the scenarios where the data export security assessment organized by CAC is a must. The PRC subsidiaries of global asset managers may choose either the Certification Route or the Standard Contract Route for personal information export. However, considering the application process, time and cost of the Certification Route, in practice, the Standard Contract Route should be a more practical approach for global asset managers.

Under the Standard Contract Route, for any new demand of personal information export by PRC subsidiaries of global asset managers after 1 June 2023, the requirements in the Standard Contract Measures shall be strictly implemented. For the personal information export activities that have already been conducted before 1 June 2023 without entering into the Standard Contract or by entering into a contract not in line with the Standard Contract, the Standard Contract Measures provide a six-month grace period (starting from the effective date of the Standard Contract Measures). In other words, only less than 9 months are left for PRC subsidiaries of global asset managers to rectify their personal information export activities with **the deadline being 30 November 2023**. We summarize the following action plan and key takeaways for carrying out and rectifying personal information export activities under the Standard Contract Route, with an aim to provide reference to global asset managers for better implementation of the upcoming work in this regard:

1. Identify the demands of personal information export and establish the personal information protection mechanism

(1) Sort out the scenarios requiring cross-border transfer of personal information in the course of the company's business and the data transfer routes, including, without limitation, the types and amount

[1] **[Conditions for Application of the Standard Contract Route]** A personal information handler can transfer personal information abroad by entering into the Standard Contract provided that all of the following conditions are met: (1) it is not a critical information infrastructure operator; (2) it handles personal information of less than 1 million individuals; (3) it has transferred personal information abroad of less than 100,000 individuals since 1 January of the previous year; and (4) it has transferred sensitive personal information abroad of less than 10,000 individuals since 1 January of the previous year. Where it is otherwise provided by law, administrative regulations or CAC, such provisions shall prevail.

of personal information to be exported, the purposes and methods of personal information export, the personal information subjects involved, the offshore recipients;

(2) Formulate/update relevant rules and policies governing personal information export activities, including, without limitation:

- Formulate and publicize the personal information handling rules (i.e. privacy policy);
- Formulate/update personal information management policies, such as the policy governing personal information protection impact assessment ("**PIA**");
- For cross-border transfer of employees' personal information, update/optimize employment contract, HR management related policies, employee handbook, as well as notification and consent letters applicable to the handling of personal information of candidates/employees;
- For the permitted cross-border transfer of investors' personal information, update/optimize product documents, subscription forms, as well as consent letters for handling of personal information.

2. Negotiate the terms and conditions of the Standard Contract with the offshore counterparty in advance

The Standard Contract must be concluded on top of the template released by CAC. It is acceptable for the personal information handler and the offshore recipient to agree on additional terms and conditions in the appendix to the Standard Contract, provided that they do not conflict with the main body of the Standard Contract. Given no change to the main body of the Standard Contract is allowed, the PRC subsidiaries of global asset managers need to communicate with the offshore recipients in advance before entering into the Standard Contract, and the key clauses include those related to the personal information subjects' capacity of third-party beneficiary[2], governing law[3], dispute resolution[4].

3. Perform the PIA

The PRC subsidiaries of global asset managers must perform the PIA in advance of cross-border transfer of personal information, including:

[2] The Standard Contract explicitly provides that, the personal information subjects, as the third-party beneficiary of the Standard Contract, have the right to claim against either or both of the personal information handler and the offshore recipient in accordance with the Standard Contract. To put it in another way, it is possible for the personal information subjects to bring a lawsuit against the offshore recipient directly.

[3] The Standard Contract should be governed by Chinese law, while the parties may not negotiate to choose the law of any other jurisdiction.

[4] The parties may choose to settle disputes by way of litigation or arbitration. In case of litigation, the dispute shall be submitted to the competent people's court in China according to law. In case of arbitration, an offshore arbitration agency may be chosen, provided that it is located in a contracting state of the New York Convention.

(1) Establish a PIA working group;

(2) Perform the PIA by themselves, or engage an external agency such as law firm or accounting firm to perform the PIA, focusing on the following aspects:

- Assess the legality, legitimacy and necessity of the purpose, scope and method of personal information export, and confirm whether the statutory procedures necessary for personal information export have been duly performed (e.g., whether the notification obligation has been fully fulfilled, whether the consent of relevant individuals has been obtained);

- Identify the amount, scope, type and sensitivity of the personal information to be exported, and assess the risks to the rights and interests of personal information that may arise from personal information export;

- Conduct due diligence on the offshore recipient, including, without limitation, its data security management capability and technical protection measures in place, and whether it has a smooth channel for the personal information subjects to safeguard their rights and interests;

- Conduct research on the country/ region where the offshore recipient is located in terms of, among others, the legislations, major rules and policies, regulators/authorities, regulation and law enforcement status related to personal information protection, as well as remedies available to the personal information subjects, and assess the impact of the personal information protection related rules and regulations in the country/ region where the offshore recipient is located on the performance of the Standard Contract;

- Assess the risks of other matters that may affect the security of personal information export (if any) on a case-by-case basis;

(3) Produce the PIA report.

4. Sign the Standard Contract and conduct filing procedure

The PRC subsidiaries of global asset managers could transfer personal information abroad after the Standard Contract is duly signed and takes effect. Meanwhile, filing with the local cyberspace administration at the provincial level shall be completed within 10 working days from the effective date of the Standard Contract. For instance, if the PRC presence is incorporated in Shanghai, it should undergo the filing procedure with Shanghai Cyberspace Administration. The documents which are required to be submitted for filing include the signed Standard Contract and the PIA report.

5. Implement ongoing compliance management

In the course of providing personal information to the offshore recipient, the following matters are also worth of attention:

(1) The personal information handling activities should be properly documented with records being maintained, and the handling activities of the offshore recipient shall be supervised and audited on a continuous basis with audit records being kept;

(2) The smooth channel for personal information subjects to safeguard their rights and interests shall be established and maintained, and the requests of the personal information subjects to exercise their rights and obtain the copies of the Standard Contract should be responded in a timely manner;

(3) The PIA reports and records of personal information handling activities should be kept for at least 3 years;

(4) It is required to re-perform the PIA, execute a supplemental agreement to the executed Standard Contract or execute a new Standard Contract, and undergo the corresponding filing procedure, under any of the following circumstances: (i) there is any change to the purpose or method of personal information export, or the scope, types, sensitivity, retention place of the personal information to be exported, or the purpose or method of the offshore recipient to handle the personal information; (ii) the offshore retention period of the personal information is extended; (iii) there is any change to the personal information protection related rules and regulations in the country/region where the offshore recipient is located; or (iv) any other circumstance that may affect the rights and interests of personal information.

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