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Comments on Draft Standard Contract Provisions for the Exit of Personal Information

The undersigned organizations respectfully submit this letter regarding China's *Standard Contract Provisions for the Exit of Personal Information* ("Standard Contract Provisions").[1] It is important that the Cyberspace Administration of China's ("CAC") design the standard contract provisions to be a valid and effective transfer mechanism under the Personal Information Protection Law ("PIPL").[2] As designed, we are concerned that the proposed framework may be unworkable in practice for many Chinese and foreign entities.

The ability to transfer data securely across transnational digital networks is of central importance to the national policy objectives of many countries, including China. Data transfers support COVID-19 recovery, digital connectivity, cybersecurity, fraud prevention, anti-money laundering, and other activities relating to the protection of health, privacy, security, and regulatory compliance.

This ability also supports shared economic prosperity. Cross-border access to marketplaces, purchasers, suppliers, and other commercial partners allow enterprises in all sectors to engage in mutually beneficial international transactions with foreign enterprises. Data transfers, which are critical at every stage of the value chain for companies of all sizes, support global supply chains and promote productivity, safety, and environmental responsibility.

To avoid prejudicing these priorities, we respectfully submit that the draft Standard Contract Provisions should: (1) not impose greater restrictions on data transfers than necessary; (2) afford equal treatment to Chinese and foreign enterprises, services, and technologies; and (3) be administered in a uniform, impartial, and reasonable manner with a view to ensuring non-discriminatory and streamlined approvals. Additionally, we make the following observations:

- Improve alignment with international best practices: China's Standard Contract Provisions should reflect international best practices, and should be revised for greater alignment and interoperability with standard contractual clauses (SCCs) under the EU General Data Protection Regulation (GDPR). For example:
    - Improve Clarity re Contractual Relationships: We recommend that the Standard Contract Provisions be revised to align more closely with GDPR SCCs, which cover a broader range of transfer scenarios and contractual relationships.[3] We would recommend that CAC conform relevant terminology and definitions to "controllers" and "processors," as used in the GDPR. This would eliminate unnecessary confusion about the roles, responsibilities, and meaning of "personal information handlers" and "receiving parties." This would also allow for consistency when an overseas data recipient processes both Chinese and EU data, thus easing administrative burden without compromising the data privacy and security levels.
    - Adopt Document Retention Requirements: Article 3 requires filing of standard contracts with CAC. To align with the international practice, we would propose that CAC instead require data controllers to retain the original agreement and produce a copy to CAC regulators upon request.

- Reevaluate disqualifying conditions: The conditions set out in Article 4 for disqualifying companies from using Standard Contract Provisions[4] significantly undermine their usefulness. We recommend reevaluating conditions that do not align with any known international practice, including those relating to critical information infrastructure, as well as volume limits for personal and sensitive personal data.[5] For example:
    - Revise Thresholds: The thresholds required for CAC security assessments are so low (representing transfers covering 0.07% [seven hundredths of 1 percent] and 0.0007% [seven 10,000ths of 1 percent] of China's population over a 12-24 month period),[6] that most international companies will be unable to rely on standard contracts.
    - Revise Overbroad Exclusions: China's TC260 definition of "critical information infrastructure" appears to sweep in a wide array of computing equipment typically used for ordinary and non-sensitive international business transactions. Disqualifying companies from using standard contracts because they operate such computing and networking equipment could sharply limit the availability of standard contract provisions as a data transfer mechanism.

- Refine transfer impact assessment procedures: Departing from international best practices and the approach reflected in PIPL Article 56,[7] Article 5 of the Standard Contract Provisions contains prescriptive review requirements relating to – among other things – the volumes, scope, sensitivity, and categories of information (categories that have not yet been clearly defined in Chinese law), as well as the laws and practices of the recipient's home country; regional or global organizations to which the country or region is a member; and binding international commitments made. These review requirements create a risk of a lack of consistency in the approaches adopted by different companies and organizations. It would be helpful for CAC to look for ways to streamline and rationalize these requirements, including by citing to neutral and factual legal summaries (*see e.g.*, global legal survey published by Japan's Personal Information Protection Commission); and by developing a list of categories of low-risk data transfers for which no formal, or a less detailed assessments would be required. A one-size-fits-all mandate for such assessments will have unintended and harmful consequences.
- Clarify that parties may tailor the language of contracts to specific circumstances: We urge CAC to avoid a rigid requirement that "standard contract provisions" be adopted verbatim from the template, and permit parties to tailor contract provisions so long as they meet key legal conditions set forth in Article 6.
- Reevaluate thresholds for updating contracts: Article 8 imposes an obligation to update and execute new contacts if there are modifications of law in any recipient country or a modification in the purpose, scope, types, sensitivity, volume, method, storage period and storage location or the use of personal information. We urge CAC to reevalate these low thresholds for requiring such contractual updates, which depart from international best practices and are not calibrated to ensure transactional predictability.

The numerous departures in the Standard Contract Provisions from prevailing international practice would likely prevent many companies from relying on the Provisions, negatively impacting Chinese and foreign enterprises alike without improving the privacy and security of the personal information of Chinese citizens. Given the potential consequences for China's economy and its international relations, we also respectfully request that CAC build in more time for robust consultations with the relevant stakeholders and a meaningful implementation period. This not only helps CAC and industry better understand each other's concerns; it would also allow the industry to put in place adequate processes and procedures to comply with the Standard Contract Provisions.

We are grateful for the opportunity to share these perspectives and we look forward to continued engagement with CAC on these matters.

Sincerely yours,

American Council of Life Insurers

ACT |The App Association

Association of German Chambers of Commerce and Industry (DIHK)

BSA | The Software Alliance

BusinessEurope

Computer and Communications Industry Association

Coalition of Services Industries

Ecommerce Forum Africa

European Services Forum

Global Data Alliance

Information Industry Technology Council

Japan Electronics and Information Technology Industries Association

National Foreign Trade Council

US Council for International Business

US-China Business Council

techUK

World Information Technology and Services Alliance

[1] Cyberspace Administration of China, Draft Standard Contract Provisions (July 2022), at: http://www.cac.gov.cn/2022-06/30/c_1658205969531631.htm
[2] Articles 38 and 40, Personal Information Protection Law
[3] Those relationships are controller-controller, processor-processor, controller-processor, and processor-controller relationships.
[4] We also recommend that CAC seek to clarify how Article 4 conditions are to be applied. Specifically, Article 4 leaves unclear whether the cumulative conditions apply to an entire corporate group or separately to each business or functional unit within a corporate group.
[5] We recommend that the various disqualifying conditions undergo a thorough review of: (a) whether these conditions are in fact necessary to achieve China's relevant public policy objectives; (b) whether other less onerous alternatives (e.g., higher numerical thresholds, less restrictive criteria, or lower frequency reviews, or more exemptions for specific classes of transactions).–could feasibly achieve those policy objectives with fewer data transfer restrictions; (c) the impacts (economic and non-economic) of various alternatives on enterprises and other persons that depend upon the transfer of data; and (d) the grounds for concluding that a particular alternative is preferable to others.
[6] The threshold of 1 million persons is approximately 0.07% of China's population of 1.4 billion. The threshold of 10,000 persons is approximately 0.0007% of China's population.
[7] Article 56 of the PIPL provides that an impact assessment should focus broadly on the purposes and method of handling personal information; relevant risks and impacts; and whether protection is commensurate that risk and impact.