

October 2023

New Draft regulation to facilitate data export from Chinese Mainland



New Draft Regulation

On 28 September 2023, the last working day before the Golden Week, the Cyberspace Administration of China published the draft Provisions on Regulating and Facilitating Cross-Border Data Flow (the "**New Draft Provisions**"). The New Draft Provisions, if being passed, might exempt lots of data exporters from the obligation of passing the data export security assessment ("**DESA**"), executing the standard contract ("**SCCs**"), or obtaining the personal information protection certification ("**PIPC**") (collectively, the "**Three Mechanisms for Data Export**").

Exemptions

The current Measures on the Security Assessment of Data Export and the Measures on the Standard Contract for Export of Personal Information (collectively, the "**Existing Data Export Provisions**") require data exporters to go through at least one of the Three Mechanisms for Data Export, depending on the nature and volume of the data to be exported.

Under the New Draft Provisions, in any of the following scenarios, the data exporter does not need to go through any of Three Mechanisms for Data Export (collectively, the "**Statutory Exemptions**"):

- (a) it is envisaged that within a period of one year, the volume of personal information to be exported will be less than 10,000 individuals;

- (b) the personal information to be exported is not collected within Chinese Mainland;
- (c) the export of personal information is necessary to conclude or perform a contract with the individual;
- (d) the export of employee personal information is necessary to implement human resource management pursuant to the lawfully concluded labour rules or collective employment contract; and
- (e) the export of personal information is necessary to protect individuals' lives, health or properties under emergency conditions.

Narrowing down of DESA application

The threshold triggering DESA also changes under the New Draft Provisions. The thresholds to trigger DESA under the Existing Data Export Provisions include,

- (a) the data to be export is important data;
- (b) the data exporter is an operator of a critical information infrastructure ("**CIIO**");
- (c) the data exporter has handled personal information of more than 1 million individuals;
- (d) the data exporter has exported personal information of more than 100,000 individuals (in aggregate) since 1 January of the preceding year; and
- (e) the data exporter has exported sensitive personal information of more than 10,000 individuals (in aggregate) since 1 January of the preceding year.

Under the New Draft Provisions, where it is envisaged that within a period of one year, the volume of personal information to be exported falls within the range from 10,000 individuals to less than 1 million individuals, and the data exporter has already observed the requirement of SCCs or PIPC, the data exporter may be exempted from DESA; and DESA is only required in the following scenarios,

- (a) where the data exporter exports personal information of more than 1 million individuals;
- (b) where the data being exported is notified by the relevant authority or region or is announced publicly as important data; and
- (c) where the data exporter is a CIIO.

Where the data exported falls within the scope of important data or where the data exporter is a CIIO, DESA is required under both the Existing Data Export Provisions and the New Draft Provisions. Apart from this, in general, the New Draft Provisions tends to reduce the scenarios where DESA could be triggered.

Different approach of calculating volume of personal information

The New Draft Provisions changes the approach of calculating the volume of personal information from "backwards-looking" to "forwards-looking". This will save lots of data exporters (other than those who export personal information of more than 1 million individuals) the trouble in looking into the historical records in order to determine the volume of personal information being exported. Under the forward-looking approach,

data exporters may prioritise efforts in future compliance and have less concerns of being punished for past non-compliance.

In the New Draft Provisions, there is no separate threshold for sensitive personal information.

Other key developments

Where the data generated from international trade, academic cooperation, cross-border manufacturing or marketing and promotion activities does not include any personal information or important data, the data exporter does not need to go through any of the Three Mechanisms for Data Export.

If any data is categorised as important data, it will be notified by the relevant authority or region or announced publicly.

Free trade zones may formulate its own checklist of data to be regulated in data export (the "**Negative Checklist**"). Any data not included in such Negative Checklist could be exported by data exporters without going through the Three Mechanisms for Data Export.

Issues for further clarifications

The New Draft Provisions provides that in case of any discrepancy between the New Draft Provisions and the Existing Data Export Provisions, the New Draft Provisions will prevail.

However, there are issues left to be clarified, for example, whether the threshold for sensitive personal information under the Existing Data Export Provisions will remain, whether the data exported under the Statutory Exemptions will be calculated into the total volume of data being exported, whether the "backwards-looking" threshold will still be considered, and whether the total volume of data being exported will be considered on the basis of an entity or a group.

Contact us



Zoe Zhou

Managing partner – Wei Tu Law Firm*

T: +86 20 83880590 - 6022

E: zoe.zhou@shlegalworld.com



Geting Lin

Associate – Wei Tu Law Firm*

T: +86 20 83880590 - 6043

E: geting.lin@shlegalworld.com

*Stephenson Harwood and Wei Tu Law Firm entered into an association under the name “Stephenson Harwood – Wei Tu (China)” with the approval of Guangdong Department of Justice. The association allows us to offer a ‘one stop service’ for Hong Kong, English and PRC law advice, with Wei Tu providing the PRC law advice and services.

Stephenson Harwood is a law firm of over 1300 people worldwide, including 190 partners. Our people are committed to achieving the goals of our clients – listed and private companies, institutions and individuals.

We assemble teams of bright thinkers to match our clients' needs and give the right advice from the right person at the right time. Dedicating the highest calibre of legal talent to overcome the most complex issues, we deliver pragmatic, expert advice that is set squarely in the real world.

Our headquarters are in London, with eight offices across Asia, Europe and the Middle East. In addition, we have forged close ties with other high quality law firms. This diverse mix of expertise and culture results in a combination of deep local insight and the capability to provide a seamless international service.

© Stephenson Harwood 2023. Any references to Stephenson Harwood in this communication means Stephenson Harwood and/or its affiliated undertakings. Any reference to a partner is used to refer to a partner of Stephenson Harwood or a partner of Wei Tu Law Firm. The association between Stephenson Harwood and Wei Tu Law Firm is not in the form of a partnership or a legal person.

Full details of Stephenson Harwood LLP and its affiliated undertakings can be found at www.shlegal.com/legal-notices.

Information contained in this briefing is current as at the date of first publication and is for general information only. It is not intended to provide legal advice.

Unless you have consented to receiving marketing messages in relation to services of interest to you in your personal capacity, the services marketed in this message are offered only to the business for which you work.