

# Legal Practice | 法律实践

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## Cross-Border Data Transmission: Low-Cost Compliance Suggestions for SMEs

### I. Introduction:

With the successive promulgation of the *Cybersecurity Law*, *Data Security Law*, *Personal Information Protection Law*, and their supporting regulations, compliance requirements for cross-border data transmission have become a task that Chinese enterprises must take seriously. Specifically, enterprises with a need for Cross-Border Data Transmission (for example, overseas companies investing in and establishing production or trade enterprises in China, cross-border e-commerce stores, etc.) should establish their own cross-border data export compliance system in accordance with these legal requirements. However, the issue here is, how can companies with relatively small data outbound volumes, especially for these small and medium-sized enterprises (SMEs), act according to their needs and strive to set up a data outbound compliance system that meets the requirements of regulators at the lowest possible cost?

### II. What is Cross-Border Data Transmission?

In practice, owing to the complexity of business operations, many data processing activities, even if the actual data is not directly transmitted overseas via methods such as email, may still constitute what Chinese regulatory authorities recognize as cross-border data transmission. The examples of the above-mentioned scenario include: data processors transmit and store data collected and generated during domestic operations to overseas locations; or data processors collect and generate domestically stored data while granting overseas institutions, organizations, or individuals' access to retrieve it. Here are some common scenarios:

- Domestic enterprises transmit data to overseas recipients (such as its parent company or business partners) via certain information carriers (e.g., email);
- Overseas enterprises without a physical entity in

China collect and use customer information from within China for cross-border business.

- Domestic enterprises use the unified information management system of their multinational group, and overseas group members access and collect domestically collected and stored data through this system;
- Domestic enterprises use services provided by overseas companies (such as international version of Microsoft 365 and Slack), resulting in cross-border data flow.

### III. Compliance obligations

Pursuant to Chinese laws and regulations, enterprises transmitting data abroad should meet one of the following conditions: (i) pass the **security assessment** organized by the Cyberspace Administration of China; (ii) be **certified** by a specialized agency for protection of personal information in accordance with the provisions of the Cyberspace Administration of China; (iii) enter into a contract with the overseas recipient under the **Standard Contract** formulated by the Cyberspace Administration of China and file the contract with the Cyberspace Administration for record.

The legislator has stipulated the circumstances under which a data security assessment must be conducted with respect to specific subjects: (i) where a data processor provides important data abroad<sup>1</sup>; (ii) where a critical information infrastructure operator or a data processor processing the personal information of more than 1 million people provides personal information abroad; (iii) where a data processor has provided abroad personal information of 100,000 people or sensitive personal information of 10,000 people in total since January 1 of the previous year.

#### IV. Compliance advice for ordinary small/medium-sized enterprises

Many small/medium-sized enterprises do not necessarily face the problem of a large amount of outbound data, which does not even involve critical data or key information infrastructure and is typically within the range of personal information. For these enterprises, it is recommended that they first conduct self-checks in accordance with the following process:

- Does the data provided abroad contain important data?
- Has the enterprise been notified by the competent authority that it is a critical information infrastructure operator?
- Does the processed personal information amount to one million people or more?
- Has the enterprise cumulatively provided abroad more than 100,000 people's personal information or more than 10,000 people's sensitive personal information since January 1 of the previous year?

If the answers to the above questions are all negative after self-checks, it is recommended that the enterprise may choose to sign the Standard Contract formulated by the Cyberspace Administration of China with the overseas data recipient and file the contract and other prescribed materials with the Cyberspace Administration, so as to satisfy the compliance requirements for outbound data transfer.

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<sup>1</sup> "Important data" refers to data that, if tampered with, damaged, leaked or illegally acquired or illegally utilized, may endanger national security, economic operation, social stability, public health and safety.

## 跨境数据传输：中小企业低成本合规建议

### 一、前言

随着中国《网络安全法》、《数据安全法》、《个人信息保护法》及其各项配套规定相继出台，跨境数据传输的合规要求已成为中国企业必须重视的任务。具体而言，凡是存在数据出境需求的企业（典型示例：境外企业在中国投资设立的生产或贸易企业，跨境电商网店等），均应当按照这些法律要求完成自己的跨境数据出境合规建设。但是，数据出境量相对较小的企业，特别是中小企业，又如何按需行事，力争用最低的成本建立起满足监管部门要求的数据出境合规体系呢？

### 二、何为数据跨境传输？

由于企业经营活动的复杂性，现实中很多数据处理活动，即便没有直接将数据通过邮件等方式传递至境外，实际上也构成了中国监管机构所认定的数据跨境传输，例如：数据处理者将在境内运营中收集和产生的数据传输、存储至境外；或者数据处理者收集和产生的数据存储于境内，令境外的机构、组织或者个人可以访问或者调用的情形。常见的情景可示例如下：

- 境内企业通过某种信息载体（例如电子邮件）向境外接收方（例如母公司或者商业伙伴）传递数据。
- 未在中国设立实体的境外企业在涉华跨境业务中收集使用中国境内客户信息；
- 境内企业使用其所属境外集团公司的统一信息管理系统，境外的集团成员公司利用该系统访问、收集境内企业所收集、存储的境内数据。
- 境内企业使用境外企业的服务（例如M365国际版及Slack）而形成的跨境数据流动。

### 三、合规义务

根据我国法律规定企业跨境传输数据的，至少

应当具备条件下列条件之一：（一）通过国家网信部门组织的安全评估；（二）按照国家网信部门的规定经专业机构进行个人信息保护认证；（三）按照国家网信部门制定的标准合同与境外接收方订立合同，并将合同向网信部门提交备案。

立法者针对特定主体规定了必须进行数据安全评估的情形：（一）数据处理者向境外提供重要数据<sup>1</sup>；（二）关键信息基础设施运营者和处理100万人以上个人信息的数据处理者向境外提供个人信息；（三）自上年1月1日起累计向境外提供10万人个人信息或者1万人敏感个人信息的数据处理者向境外提供个人信息。

### 四、针对一般中小企业的合规建议

许多中小型企业未必存在大量数据出境的问题，出境数据也不涉及重要数据或者关键信息基础设施，且大多集中在个人信息方面。对于这部分企业来说，建议首先按照如下流程进行自我检查：

- 向境外提供的数据中是否含有重要数据？
- 是否收到主管部门通知企业为关键信息基础设施运营者？
- 处理的个人信息数量是否达到100万人以上？
- 本企业自上年起1月1日起是否累计向境外提供10万人以上个人信息或者1万人以上敏感个人信息？

如以上问题在进行自查后，答案均为否定，则建议企业可以选择与境外的数据接收方签订国家网信办提供的《标准合同》，并将合同和其他规定材料提交网信部门备案，以此方式满足数据出境的合规要求。

<sup>1</sup>“重要数据”是指一旦遭到篡改、破坏、泄露或者非法获取、非法利用等，可能危害国家安全、经济运行、社会稳定、公共健康和安全等的的数据。

**Shanghai 上海**

10F Jinmao Tower, 88 Century Avenue, Pudong New District, Shanghai City, PR China, 200121

上海市浦东新区世纪大道88号金茂大厦10楼

+86 21 5010 6580

**Taicang 太仓**

Room 1613B, German Centre, 319 Middle Zhenghe Road, Taicang City, Jiangsu Province, PR China, 215400

中国江苏省太仓市郑和中路319号兰德集团东亭大厦德国中心1613B

+86 512 5398 5389

shanghai@shaohe-lawfirm.com

www.shaohe-lawfirm.com

**Your Contact 联系人**



**LIAO Yuhui | Partner 廖毓辉 | 合伙人**

+86 21 5010 6597

liao.yuhui@shaohe-lawfirm.com

- Corporate/M&A 公司法和并购
- International Trade Law 国际经济法
- Restructuring, Liquidation & Insolvency 重组、清算和破产

Languages: Chinese, English, German 语言: 中文、英文、德文



**CHEN Jiawei | Associate 陈佳玮 | 律师**

+86 21 5010 6527

chen.jiawei@shaohe-lawfirm.com

- IP Law 知识产权保护法
- Data Compliance 数据合规
- Anti-unfair Competition Law 反不正当竞争

Languages: Chinese, English 语言: 中文、英文



**ZHANG Yuemei | Senior Associate 张悦眉 | 资深律师**

+86 21 5010 6592

zhang.yuemei@shaohe-lawfirm.com

- IP Law 知识产权保护法
- Data Compliance 数据合规
- Anti-unfair Competition Law 反不正当竞争

Languages: Chinese, English 语言: 中文、英文

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