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SPECIAL REPORT

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New Developments in Legislation on Personal Electronic Information Protection (II)

MIIT Seeks Public Opinions on the Protection of Personal Information of Telecommunications Users and Internet Users as well as Registration of Telephone Users' Real Identities

On April 10, 2013, the PRC Ministry of Industry and Information Technology ("**MIIT**") published the Provisions on the Protection of Personal Information of Telecommunications Users and Internet Users (Exposure Draft) (《电信和互联网用户个人信息保护规定（征求意见稿）》) (the "**Provisions on Information Protection**") and the Provisions on the Registration of the Real Identities of Telephone Users (Exposure Draft) (《电话用户真实身份信息登记规定（征求意见稿）》) (the "**Provisions on Telephone Identities**") for public comments. The publication of the two exposure drafts, which follows the promulgation of the Resolution in Relation to Strengthening the Protection of Information on the Internet (《关于加强网络信息保护的决定》) (the "**Resolution**") by the Standing Committee of the National People's Congress on December 28, 2012 and the Information Security Technology – Guidelines on Personal Information Protection within Information Systems for Public and Commercial Services (《信息安全技术公共及商用服务信息系统个人信息保护指南(GB/Z 28828-2012)》) (the "**Guidelines**") on November 5, 2012, represents further development in the current legislative framework for personal information protection.

The Provisions on Information Protection and the Provisions on Telephone Identities set forth implementation measures for the various general principles provided in the Resolution. Both Provisions will be classed as legally binding regulations upon their official promulgation in the future.

I. Provisions on Information Protection

i. Scope of Protection

A "user's personal information" is specifically defined in the Provisions on Information Protection as the "information collected by telecommunication business operators and internet content providers during the course of service provision, which information can, either independently or when combined with other information, enable the identification of such user". Such personal information includes the user's name, date of birth, ID number, address and other identity information as well as the number, user ID, time, address and other log information in relation to the user's use of services. The aforesaid definition clearly covers all the key words in the definitions of personal electronic information under the Resolution (i.e., "in the course of business", "electronic information that enables the identification of an individual and electronic information that involves individual privacy") and the Guidelines (e.g., "enable the identification of such individual either independently or when combined with other information").

The scope of protection under the Resolution is limited to "personal electronic information", while the scope of a "user's personal information" under the Provisions on Information Protection seems broader because it does not make specific reference to the electronic information. Nonetheless, we note that the Provisions on Information Protection quote the Regulations on Telecommunications (《电信条例》) and the Administrative Measures on Internet Information Services (《互联网信息服务管理办法》), both of which are higher-level regulations promulgated by the State Council in relation to, among others, the management of electronic information. Further, given that the personal information of telecommunication users and internet users cannot be collected, used, saved or transmitted until such information is computerized, the seemingly broad scope of a "user's personal information" under the Provisions on Information Protection is arguably limited to the electronic information.

ii. Application

The Provisions on Information Protection apply to "telecommunication business operators and internet content providers as well as the staff of such entities" ("**Telecom Service Providers**"). In this sense, the application of the Provisions on Information Protection is in line with that of the

Resolution, which applies to “network service providers, other enterprises, public institutions and their staff”.

iii. Collection, Use and Security of Information

The Provisions on Information Protection set forth detailed requirements in relation to the collection and use of personal information on the basis of the general principles provided in the Resolution, and to some extent borrows and develops the principles and specific requirements under the Guidelines regarding the processing of personal information. For example, the Telecom Service Providers are required under the Provisions on Information Protection:

- to formulate and publish their rules on the collection and use of personal information; not to collect or use any personal information without consent from the user; to inform the user of the purpose, method and scope of the collection and use of personal information, the storage period, the manner in which the user may enquire about or correct the information, and the consequences of refusing to provide information;

- to supervise and control the agent’s activities when engaging an agent to directly provide services to the users and to collect and use the users’ personal information; not to authorize any agent which fails to meet the requirements for personal information protection to provide any related service;

- to establish a mechanism to accept and deal with the users’ complaints; to publish effective contact information, accept any complaint in relation to the protection of users’ personal information and reply to the complainant within 15 days from the receipt of such complaint; and

- to take measures to prevent any disclosure, damage or loss of any user’s personal information, such as “setting different permissions for different staff to access the information, reviewing the export, copying and destroying of information in batches and so on”.

iv. Legal Liability

The Provisions on Information Protection specifically authorize the telecommunication authorities to exercise their supervisory powers in relation to the protection of personal information. In accordance with the Provisions on Information Protection, the telecommunication authorities can require the Telecom Service Providers to submit related materials and access their premises to conduct inspections. Such authorities can also examine the protection of users’ personal information by the Telecom Service Providers during the annual inspection of their relevant permits, note any violation on the records of the provider in question and make such notes public.

Only three kinds of penalties, i.e., making corrections within a time limit, warnings and monetary penalties of no more than RMB 30,000, have been listed in the current exposure draft. It appears that the penalties provided in the exposure draft are not sufficiently severe for possible cases where serious violations occur e.g., where the user IDs of millions of users are released. In addition, pursuant to the PRC Administrative Penalty Law (《行政处罚法》), the Provisions on Information Protection are in the position but fail to detail the application and implementation of the administrative penalties provided in the Resolution (including, warnings, monetary penalties, confiscation of illegitimate gains obtained from such violation, revocation of permits or cancellation of registrations, suspension of websites, and prohibiting the responsible person from engaging in internet service provision). Given the specific descriptions, thresholds and seriousness of violations that may give rise to harsh penalties such as the “revocation of permits” or the “suspension of websites” are not provided for in this exposure draft, Telecom Service Providers may raise concerns about the discretion that the related governmental authorities may have.

II. Provisions on Telephone Identities

There is already system in place for identifying users when landline telephones are registered. Since September 1, 2010, registration with real identities has also been required for mobile phone services, although the implementation has been patchy. The Provisions on Telephone Identities have now added wireless internet cards to landline/mobile phones as items the registration of which will require disclosure of the real identities of the users. Further, in accordance with the Circular regarding the Implementation of Task Assignment under the Plan of Institution Reform and Function Transform of the State Council (《国务院办公厅关于实施<国务院机构改革和职能转变方案>任务分工的通知》), newly promulgated by the General Office of the State Council, the system for registration of real identities for information networks, as one of the missions of the government, is expected to be completed before the end of June, 2014.

The abovementioned measures will undoubtedly help Telecom Service Providers and the relevant governmental authorities track the identities of users who “unlawfully” use or abuse telecom services. However, on the other hand, the users, who are required to provide real individual identities, are bound to raise concerns regarding the security of their private information provided pursuant to the mandates. By seeking opinions on the Provisions on Telephone Identities together with the Provisions on Information Protection, it appears that the relevant governmental authorities have been fully aware of this necessity to balance.

In response to the demand for information security, nearly half

of the Provisions on Telephone Identities focuses on the protection of private information of users. At the stage of information collection, each Telecom Service Provider is required to make a copy of the proof of identity of the user and to note on the copy the name of the Telecom Service Provider, the purpose of making such copy and the date on which the copy was made. This is the application of the principle of "public notification" as set forth in the Resolution, Guidelines, and Provisions on Information Protection. At the stage of information processing, the Provisions on Telephone Identities take pains to emphasize the requirements in the Resolution, Guidelines, and Provisions on Information Protection. For instance, the Telecom Service Providers should establish a security management mechanism; their staff should keep secret information in relation to the real identities of the users obtained in the course of service provision and may not disclose, change or destroy such information, or sell or illegally provide such information to any third party, or use such information beyond its original purpose; the Telecom Service Providers should promptly remedy, report to the telecommunication authorities and cooperate with any inspection of any disclosure, damage or loss of personal information; the Telecom Service Providers should also supervise the activities of the agent providing internet access services for the telephone and may not engage any agent which fails to meet the requirements for registration and maintaining the security of information relating to real identities of users.

III. Overview

The exposure drafts of both the Provisions on Information Protection and the Provisions on Telephone Identities basically reflect the general principles under the Resolution and involve many of the technical details provided in the Guidelines. The issuance of such exposure drafts increases the pressure on the Telecom Service Providers to upgrade relevant technology, optimize service processes and enhance internal controls. In addition, considering that the application of requirements for the registration of real identities covers not only the telephone and access to the internet but also the provision of all contents on the internet, it is foreseeable that the protection of personal electronic information will draw much more public attention in the future.

The deadline for submission of comments on the exposure drafts is May 15, 2013. We welcome any questions, concerns, comments and suggestions from our clients, and would be more than happy to compile and submit all such opinions to MIIT.

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个人电子信息保护立法新发展（二）
工信部就电信和互联网用户个人信息保护及电话用户实名制征求意见

2013 年 4 月 10 日，工信部同时公布了《电信和互联网用户个人信息保护规定（征求意见稿）》（以下简称“《**信息保护规定**》”）和《电话用户真实身份信息登记规定（征求意见稿）》（以下简称“《**电话实名制规定**》”），向社会公开征求意见。这是继 2012 年 12 月 28 日全国人大常委会《关于加强网络信息保护的决定》（以下简称“《**决定**》”）和 2012 年 11 月 5 日《信息安全技术公共及商用服务信息系统个人信息保护指南》（GB/Z 28828-2012）（以下简称“《**指南**》”）相继出台后，个人信息保护立法的又一进展。

尚处在公开征求意见阶段的《信息保护规定》和《电话实名制规定》均属部门规章，是为具体实施《决定》中的各项原则性规定而即将颁行的配套措施。

一、 《信息保护规定》

1、 保护范围

《信息保护规定》明确将“用户个人信息”定义为“电信业务经营者和互联网信息服务提供者在提供服务的过程中收集的能够单独或者与其他信息结合识别用户的信息，包括用户姓名、出生日期、身份证件号码、住址等身份信息以及用户使用服务的号码、账号、时间、地点等日志信息。”显然，上述定义涵盖了《决定》中提及的“在业务活动中”、“能够识别公民个人身份和涉及公民个人隐私的电子信息”，以及《指南》中提及的“能够单独或通过与其他信息结合识别该特定自然人”等关键词。

《决定》的保护仅限于目前中国法律体系中尚无明确定义的“个人电子信息”。而《信息保护规定》则使用了似乎更为宽泛的“用户个人信息”概念。然而，《信息保护规定》引用的上位行政法规为《电信条例》和《互联网信息服务管理办法》。从电信服务和互联网信息服务的性质来看，用户个人信息的收集、使用、存储、传输过程通常都在电子化后才能有效实现。因此，《信息保护规定》实则以电信服务语境下的“电子信息”为基本前提，并未突破《决定》划定的保护范围。

2、 适用主体

受《信息保护规定》所规范的主体为“电信业务经营者和互联网信息服务提供者及其工作人员”（以下简称“电信运营服务商”）。这与《决定》重点关注的“网络服务提供者和其他企业事业单位及其工作人员”相呼应。

3、 信息收集、使用及安全保障措施

《信息保护规定》逐一细化了《决定》对个人信息收集、使用的一系列原则规范，并在一定程度上借鉴和发展了《指南》所建议的个人信息处理基本原则和具体要求。比如，《信息保护规定》要求电信运营服务商：

- 制定并公布个人信息收集、使用规则；未经用户同意不得收集、使用个人信息；明确告知用户收集、使用信息的目的、方式和范围，留存信息的期限，查询、更正信息的渠道以及拒绝提供信息的后果。

- 在委托他人代理直接面向用户的服务性工作涉及收集、使用用户个人信息时，应当对代理人的工作进行监督和管理，对不能满足用户个人信息保护要求的代理人不得委托代办相关服务。

- 建立用户投诉处理机制，公布有效的联系方式，接受与用户个人信息保护有关的投诉，并自接到投诉之日起十五日内答复投诉人。

- 采取措施以防止用户个人信息泄露、毁损或者丢失，包括“对工作人员实行权限管理，对批量导出、复制、销毁信息实行审查，并采取防泄密措施”。

4、 监督管理与法律责任

《信息保护规定》明确了电信管理机构对相关个人信息保护工作的监管权力。电信管理机构可以在执法过程中要求电信运营服务商提供相关材料，进入其生产经营场所调查情况；在实施相关许可证年检时对用户个人信息保护情况进行审查；将有违规行为的电信运营服务商记入其社会信用档案并予以公布。

鉴于《决定》已经规定了“警告、罚款、没收违法所得、吊销许可证或者取消备案、关闭网站、禁止有关责任人员从事网络服务业务”等处罚方式，依据《行政处罚法》，《信息保护规定》应该遵循“违反何种规定、达到何种程度即应该适用哪类处罚”的模式对法律责任的承担做出细化。但在公布的征求意见稿中，仅规定了责令限期改正、警告和最高三万元的罚款。如果违法行为导致几千万用户帐号泄密这种严重后果，显然无法通过数万元的罚款来解决问题。那么，为类似吊销许可、停业整顿、从业人员禁入这种“重磅炸弹”设定具体适用标准，防止执法中的宽严失据和恣意妄为，当属电信运营服务商的核心关切之一。

二、 《电话实名制规定》

实践中，固定电话的实名制入网早已实施。2010 年 9 月 1 日起，手机服务实名制也开始推行（尽管实践中仍有漏网之鱼）。根据此次《电话实名制规定》，“无线上网卡”作为移动电话的一种被纳入“电话用户真实身份信息登记”的范围。更进一步，新出台的《国务院办公厅关于实施<国务院机构改革和职能转变方案>任务分工的通知》提出，2014 年政府的任务之一就是出台并实施信息网络

实名登记制度，并计划在 2014 年 6 月底前完成。

无疑，上述措施有利于电信运营服务商及相关政府机构更加精准的确认以“违法”方式使用或滥用电信服务的用户身份。但作为硬币的另一面，有义务提供真实个人身份信息的用户也必然对个人信息的安全性提出更高的要求。此次《电话实名制规定》与《信息保护规定》同时出台征求意见，或许说明相关政府管理部门已经对这种辩证关系有充分的体察。

为回应信息安全诉求，《电话实名制规定》用了近半篇幅对用户个人信息保护做出规定。在信息收集阶段，要求电信业务经营者在用户身份证明复印件上注明电信业务经营者名称、复印目的和日期。这是对《决定》、《指南》和《信息保护规定》关于“公开告知”原则的适用。在信息处理阶段，《电话实名制规定》亦反复强调了《决定》、《指南》和《信息保护规定》中的多项原则要求。例如：应当建立健全保密管理制度；电信工作人员对在提供服务过程中登记的用户真实身份信息应当严格保密，不得泄露、篡改或者毁损，不得出售或者非法向他人提供，不得用于提供服务之外的目的；信息发生或者可能发生泄露、毁损、丢失的，应当立即采取补救措施、向相关电信管理机构报告、配合调查处理；对电话入网手续代理人进行监督和管理，对于不能满足用户真实身份信息登记和保护要求的代理人，不得委托代办相关手续。

三、 综述

《信息保护规定》和《电话实名制规定》两部征求意见稿总体上反映了《决定》的原则，并在具体操作层面多处借鉴了《指南》中的技术细节。这一趋势，对电信运营服务商升级技术、优化流程、加强自律提出了紧迫的要求。

另一方面，随着“实名制”要求由电话扩大到互联网、由入网扩大到内容提供，个人电子信息保护的议题会受到更加广泛的关注。

对上面两部规章草案征求意见的截至期限为 2013 年 5 月 15 日。我们欢迎客户从维护自身权益的角度出发提出自己的忧虑、意见和建议，并通过我们一并向工信部汇总。

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