

## E-Alert | China Practice

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### New Internet Competition Rules in China Include Personal Data Protections

On December 29, 2011, China's Ministry of Industry and Information Technology ("MIIT") promulgated [Several Provisions on Regulating the Market Order of Internet Information Services](#) ("Provisions") to govern the competition-related activities of Internet information service providers in China. Significantly, the Provisions, which take effect March 15, 2012, define personal information collected online and govern its collection and handling.

The Provisions appear to subsume two draft measures previously promulgated by MIIT: the *Interim Measures for Supervision and Management of the Internet Information Service Market (Draft for Comment)*, released on January 12, 2011, and the *Administrative Provisions on Internet Information Services*, released for comment on July 27, 2011.

#### New Protections for Personal Information

The Provisions apply to Internet information service providers ("IISPs"), a somewhat ambiguous term under PRC law but commonly understood to refer to website operators in China.<sup>1</sup> Website operators should be aware of these new rules which address the relationship of the website to its users.

On the data privacy front, the Provisions impose two broad sets of obligations on IISPs relating to (a) notification, collection, and use of "Users' Personal Information" (defined below), and (b) storage and unauthorized disclosure of Personal Information.

##### *(a) Notification, Collection, and Use*

Article 11 provides that an IISP may "collect any information relevant to the user that would identify the user if used alone or together with other information (hereinafter referred to as 'Users' Personal Information'), and shall not provide Users' Personal Information to others, unless otherwise provided for by laws and administrative regulations."

While certain sector-specific regulations have included protections for online personal information, the Provisions represent the first time a broad definition for online personal information has appeared in PRC law. This definition mirrors that in a draft personal information protection standard

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<sup>1</sup> The term is defined in the *Regulation on Internet Information Services* (2000) as any entity that "provides information through the internet to web users." While some have argued that this definition may include wireless and broadband service providers such as China Mobile, the context of the regulation suggests otherwise.

– the *Information Security Technology - Guide for Protection of Personal Information* (“Guide”) – issued by MIIT for public comment in February 2011, and suggests that the Guide’s terms, though they would lack the force of law upon official promulgation, may still play a persuasive role for future data privacy regulations.

Article 11 further provides that, following user consent, the IISP shall inform the user of the ways the IISP collects and processes information, what kind of information is collected, and the purposes for the collection. IISPs may not collect any information unnecessary for provision of services or use Users’ Personal Information for any purpose outside its scope of service.

The Provisions do not clarify why the aforementioned information disclosure of the IISP should occur after and not before obtaining user consent.

The Provisions also do not clarify whether users have rights in their own personal information. Article 13 of the Provisions prohibits an IISP from using, modifying, or deleting users’ “uploaded information.” But it is unclear from the text whether this “uploaded information” is meant to include Users’ Personal Information as defined in Article 11. If not, this absence of user rights would diverge from data privacy standards in other major jurisdictions.

#### *(b) Storage and Disclosure*

Article 12 requires IISPs to “properly” keep their Users’ Personal Information. Where Users’ Personal Information is or may be divulged, the IISP must take remedial action. If the violation is “serious,” then the IISP shall report the violation to MIIT and jointly cooperate in taking further remedial measures.

The Provisions do not define “properly” or explain what would constitute a “serious” disclosure violation. It is also unclear whether, as part of taking “remedial action,” an IISP would be expected to notify a user for all breaches of user data or merely for significant ones.

While the Provisions represent a step toward a more codified China’s data privacy regime, the lack of detailed drafting and explicit definitions will require further interpretation for effective implementation.

## Anti-competitive Practices

The Provisions also regulate competition between IISPs in their provision of services. These include:

- **Unfair Competition.** The Provisions prohibit IISPs from any action that would infringe upon the legal rights and interests of another IISP, including disrupting or disparaging the service provided by other IISPs or maliciously making one’s products incompatible with the services or products of other IISPs.<sup>2</sup>

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<sup>2</sup> It’s widely understood that the impetus behind MIIT’s drafting of the Provisions was in response to the highly publicized “3Q War” between IISPs Tencent and Qihoo. In September 2010, Qihoo publicly alleged that Tencent’s popular QQ instant messaging program was scanning the private data of its more than 600,000 users. In response, Tencent sued Qihoo for anti-competitive practices and disabled its QQ service on any computer found to have Qihoo software installed. In September 2011, (continued...)

- **Assessment.** The Provisions require IISPs utilizing assessment tools to rate their services to provide clear and accurate information regarding how such assessments are carried out.
- **User Rights.** The Provisions prohibit IISPs from any action that would infringe upon the lawful rights of users such as, *inter alia*, refusing, delaying, or suspending the provision of services without a legitimate reason, providing Internet information services or products to users by deceitful, misleading, or coercive means, or amending the service agreement or operational procedures at its own discretion.
- **Software Functionality.** The Provisions require IISPs to provide clear and complete information on software functions and to obtain users' consent in advance before allowing users to download, install, run, upgrade, or uninstall software.
- **Software Bundles.** The Provisions require IISPs to notify users of any bundled software packages and allow them to voluntarily choose which portion of the bundle they wish to install.
- **Pop-Up Windows.** The Provisions require "conspicuous buttons to close or exit the window" when an ISP displays an advertising pop-up window or any information window unrelated to the functions of that particular software.
- **Complaint Process.** The Provisions require all IISPs to post their contact information in a readily noticeable matter, accept complaints from users and other IISPs, and respond within 15 days of receipt of a complaint.

Recent actions by the Chinese government, including an explicit call in an [October 2011 Communist Party report](#) for "increased protection of online personal information", evidence a trend towards further legislative activity. We will continue to monitor the development and interpretation of these regulations as they occur.

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If you have any questions concerning the material discussed in this client alert, please contact the following members of our firm:

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Qihoo was found guilty of anti-competitive practices by a Beijing court and ordered to pay RMB 400,000 (about US \$63,000) in damages to Tencent.

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