

## E-ALERT | Global Privacy & Data Security

January 11, 2013

### CHINA ENACTS NEW DATA PRIVACY LEGISLATION

#### New Requirements to Protect Users' Personal Information and to Implement Real Name Registration for Certain Websites

On December 28, 2012, China's national legislature enacted a new law to further regulate the collection and use of online personal information and to require certain network service providers to implement real name registration for all users.

As described below, the new law may affect all businesses handling an individual's "personal electronic information" in China, even if that information is not necessarily processed over the internet. For many companies operating websites hosted in China, the new law will require only slight modifications to existing data handling practices, as many of the new law's provisions reflect or only slightly modify other provisions found in existing law. However, websites providing "internet publication services," such as blogs, microblogs, or online forum providers, will be required to implement a real name registration system for their users. The specifics of the real name registration system have not been announced and will likely come from China's principal internet regulator, the Ministry of Industry and Information Technology ("MIIT"), which is drafting regulations in furtherance of the new law.

#### NEW REQUIREMENTS ON PRIVACY NOTICES

The new law, entitled the *Decision of the Standing Committee of the National People's Congress on Strengthening Online Information Protection* (全国人大常委会关于加强网络信息保护的決定) (the "Online Information Decision"), requires "network service providers" (网络服务提供者) and other "enterprises or public institutions" (其他企业事业单位) to clearly indicate the "use, method, and scope" of their collection of an individual's "personal electronic information," and not to collect or use this information without the individual's consent.<sup>1</sup> It is not clear at this time how a user may evidence consent.

"Personal electronic information" is described as information "by which the individual identity of citizens can be distinguished as well as that which involves a citizen's privacy," but no formal definition or further interpretive guidance is given for this term. The application of the notification requirement to "other enterprises and public institutions" (also undefined) would presumably require all institutions to notify users of the collection and use of their "personal electronic information," even for information that is not collected online (such as information collected at the point-of-sale), so long as that information is transmitted or stored electronically. Further interpretive guidance and implementation will likely provide a clearer understanding.

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<sup>1</sup> This notification requirement expands on a current requirement affecting "internet information service providers" ("IISPs," 互联网信息服务提供者) found in the *Several Provisions on Regulating the Market Order of Information Systems* ("Market Order Provisions"), promulgated by MIIT, which require IISPs to provide users with notice of the "use, content, and purpose" of the collection of users' personal information.

## REAL NAME REGISTRATION REQUIREMENTS NATIONALIZED FOR CERTAIN PROVIDERS

The Online Information Decision requires network service providers “providing internet publication services” to require their users to supply verified identify information when registering on the provider’s website. (This is often referred to as “real name registration.”) Likewise, network service providers “providing website access services” also must require real name registration at the time of registration.

Although “network service providers” is undefined in the regulation, the delineation of “internet publication” and “website access” indicates the term may encompass, at the least, both content providers such as websites as well as network access providers such as China Unicom or China Mobile. As the real name registration system is widely understood to target websites such as online forums, blogs, and microblogs, it seems unlikely that the Online Information Decision will apply solely to network access providers, as has been reported in some publications.<sup>2</sup> (We have spoken with officials at MIIT who indicated that their personal understanding is that “network service providers” includes websites and that further implementing legislation for the Online Information Decision is now being drafted.)

Real name registration first made its appearance in a pilot measure targeting microblog operators such as Sina’s Weibo (the Chinese version of Twitter) issued by the Beijing Municipal Government in December 2011 and effective March 2012.<sup>3</sup> Real name registration also was included in a June 2012 draft amendment to China’s principal regulation governing online services, the *Measures for the Administration of Internet Information Services*, which remains in draft form. The insertion of the real name registration requirement in the newly enacted Online Information Decision represents the first nationwide implementation of this registration scheme.

## OTHER SIGNIFICANT REQUIREMENTS

In addition to the requirement of real name registration, the Online Information Decision also contains the following significant provisions:

- Network service providers, other enterprises or public institutions, or their employees may not obtain an individual’s “personal electronic information” via theft or other means, nor sell or “illegally provide” an individual’s “personal electronic information” to others. This provision mirrors a 2009 amendment to the PRC Criminal Law barring the sale or illegal provision of “personal information” by businesses and state organs in certain industries and their employees.
- Network service providers, other enterprises or public institutions, or their employees must “strictly maintain the confidentiality” of personal electronic information collected during their provision of services and may not “disclose, distort, or damage” that information. These provisions expand on current disclosure requirements found in the Market Order Provisions which require internet information service providers to ensure the users’ personal information is “properly kept” and to take “remedial measures” in the event of disclosure or possible disclosure, though neither law or regulation defines these key terms.

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<sup>2</sup> Part of the confusion apparently stems from the alternative translation of “network service providers” as “internet service providers,” which is then assumed to refer solely to network access providers – the typical meaning of internet service providers outside of China.

<sup>3</sup> Although the Beijing regulation requires microblog service providers to verify their users’ real identity, Sina reported in a May 2012 regulatory filing that it had yet to fully implement the system owing to “existing user behavior, the nature of the microblogging product, and the lack of clarity on specific implementation procedures.”

- Network service providers must ensure that any information disseminated by users on their networks does not violate PRC law. If such information is published, the network service provider must report such publication to the appropriate authorities (although undefined in the regulation, this is likely to be MIIT), cease its further dissemination, and preserve the records for later investigation. This provision mirrors similar requirements found in other laws pertaining to online content, such as the *Measures for the Administration of Internet Information Services* and the *PRC Telecommunication Regulations*.
- Network service providers and other enterprises or public institutions must adopt technological and other measures necessary to ensure information security and to protect against “disclosure, damage, or loss of an individual’s personal electronic information.” Similar requirements for technological safeguards exist in other regulations, such as the *Provisions on the Technical Measures for the Protection of the Safety of the Internet*, although the Online Information Decision represents the first time that protection against “disclosure, damage, or loss of an individual’s personal electronic information” has been explicitly required.
- Without the consent or request of an email recipient, or following a user’s clear refusal, no organization or individual may send “commercial electronic information” (e.g., spam or other commercial solicitation) to a recipient’s email box, fixed-line telephone, or mobile phone. This appears to be the first law or regulation referring to “commercial electronic information,” although the *Measures for the Administration of Internet Email Services* contains a similar provision barring the sending of “emails containing advertising content” without the recipient’s consent.

The Online Information Decision was drafted by the Standing Committee of the National People’s Congress as national law, and thus occupies a higher level in China’s legislative hierarchy than ministerial regulations such as the Market Order Provisions. Violation of the Online Information Decision may lead to warnings, fines, confiscation of illegal income, cancellation of operating permits, website closure, or the prohibition of involved individuals from engaging in other network services business.

China’s state-affiliated news media has in recent weeks run a number of stories regarding stricter regulation of the internet, and the Online Information Decision may foreshadow a number of new regulations in 2013. At a press conference announcing the passage of the Online Information Decision, a representative of MIIT noted that it is currently drafting regulations in response to the Online Information Decision that may cover the protection of users’ electronic information, commercial solicitations, and the collection and handling of personal information over mobile networks.

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