

E-ALERT | Privacy & Data Security

November 6, 2013

CHINA'S AMENDED CONSUMER PROTECTION LAW EMPOWERS SAIC OVERSIGHT OF COMPANIES' PERSONAL INFORMATION PRACTICES

On October 25, 2013, the Standing Committee of China's National People's Congress passed amendments to the *Law of the People's Republic of China on the Protection of Consumer Rights and Interests* (the "Amendments") that include a new provision regulating the collection and use of consumers' personal information by companies in all industries. The Amendments, effective March 15, 2014, empower China's State Administration of Industry and Commerce ("SAIC") and other "relevant ministries" to enforce the new rules, potentially heralding an enhanced oversight role for the SAIC and its local offices over a company's privacy-related actions in China.

BACKGROUND OF THE AMENDMENTS

Over the last year, China has witnessed a notable increase in data privacy-related legislation, providing basic rules for the collection and use of personal information by companies in a number of industries, particularly in the online sector. These efforts have helped to clarify some of the general or ambiguous privacy-related provisions found in past Chinese laws and regulations, assisting companies in developing suitable compliance practices for their collection and use of personal information within China.

The release in December 2012 of the *Decision of the Standing Committee of the National People's Congress on Strengthening Online Information Protection* ("Online Information Decision") (see our [client alert here](#)) was perhaps the most notable of these promulgations, providing basic, if broadly drafted, rules for the collection and use of an individual's "personal electronic information" by network service providers and "all other enterprises and institutions." The law's broad aims were further clarified in an implementing regulation applicable to internet and telecommunication service providers promulgated July 16, 2013 (see our [client alert](#)).

The privacy-related provisions of the Amendments also seem intended to serve as an additional implementing regulation (albeit as a law) for the Online Information Decision, further clarifying the latter's application to "all other enterprises and institutions," identifying the specific administrative authority responsible for supervising compliance, and setting forth explicit remedial measures for a company's violation of privacy requirements.

PRIVACY REQUIREMENTS IN THE AMENDMENTS

The privacy-related provision of the Amendments takes many of the basic privacy requirements found in the more general Online Information Decision and applies them specifically to consumers' personal information (both online and offline). Specifically, the Amendments require all companies providing goods and services within China to:

- collect a consumer's personal information only with their consent;

- notify consumers regarding their collection and use of personal information, including the purpose, method, and scope of use;
- make public their collection and use rules;
- not collect or use any personal information in violation of laws or administrative regulations, or any agreement reached with the consumer;
- maintain strict confidentiality of a consumer's personal information, and not disclose, sell, or "illegally provide" a consumer's personal information to others (this provision also applies to a company employee's handling of consumers' personal information);
- adopt the necessary technological measures to protect the security of a consumer's personal information and to prevent its loss or disclosure; and to
- send promotional communications only upon the consent or request of the consumer.

The Amendments do not contain any additional information clarifying these requirements.

SAIC'S ENHANCED PRIVACY ROLE

The Amendments are primarily enforced by the SAIC and its subordinate agencies at the provincial, municipal, and sub-municipal levels. This development is particularly significant as it represents the first time SAIC has been specifically entrusted with administrative enforcement of privacy-related regulations. SAIC's general mandate is the regulation of China's marketplace; this has included, among other responsibilities, supervising the quality of commodities and services provided in China, online transactions, and commercial bribery. Although such supervisory responsibilities may have touched indirectly on consumer privacy issues, SAIC has not historically been active in administrative enforcement of a company's privacy-related practices.

In addition to its enhanced responsibilities under the Amendments, SAIC has also issued a draft regulation in furtherance of the Amendments entitled *Administrative Measures for Online Commodities Trading and Related Services* ("Administrative Measures"). A draft version released for public comment on September 11, 2013, contains personal information protection requirements that are almost identical to those found in the Amendments, further indicating a potential enhanced role for SAIC's administrative enforcement of consumer privacy.

For online businesses in China, the passage of the Amendments (and potential passage of the Administrative Measures) means that SAIC joins China's primary internet regulator, the Ministry of Industry and Information Technology, as the main administrative agencies tasked with supervising online privacy practices. How this jurisdiction will be split between the two administrative agencies remains to be seen.

PENALTIES

Companies violating the personal information-protection provision of the Amendments may receive a warning, confiscation of illegal gains, and or fines of up to one to ten times the amount of the illegal gains. If there are no illegal gains, then the company may receive a fine of up to RMB 500,000 (around USD 82,000). Where the violation is "serious" (undefined), SAIC may revoke the company's business license or order the company to suspend business operations.

In light of these new laws, all companies with customers in China, whether online or offline, should re-evaluate their current privacy programs to ensure ongoing compliance with applicable PRC privacy requirements.

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