

## 个人信息保护法律热点问题

### 新修订的《消费者权益保护法》加强对于消费者个人信息的保护

2013年10月25日，十二届全国人大常委会第五次会议表决通过了《全国人民代表大会常务委员会关于修改〈中华人民共和国消费者权益保护法〉的决定》。经修订的《消费者权益保护法》（以下简称“《新消法》”）将自2014年3月15日起施行。这是《消费者权益保护法》1993年颁布后的首次修改。

#### 综述

《新消法》第十四条确立了消费者在购买、使用商品和接受服务时“享有个人信息依法得到保护的权利”，在第二十九条中基本沿袭了《关于加强网络信息保护的決定》之中的原则性规定。《新消法》之中关于个人信息保护的规定与今年八月向社会公众征求意见的二审稿没有实质性差异。

《新消法》关于个人信息保护的规定包括以下方面：

- 收集、使用消费者个人信息，应当遵循合法、正当、必要的原则；
- 明示收集、使用信息的目的、方式和范围，并经消费者同意；
- 公开收集、使用规则，不得违反法律、法规的规定和双方的约定收集、使用信息；
- 严格保密、不得泄露、出售或非法向他人提供；
- 采取技术措施和其他必要措施，确保信息安全，防止消费者个人信息泄露、丢失；在发生

或者可能发生信息泄露、丢失的情况时，应当立即采取补救措施；

- 未经消费者同意或者请求，或者消费者明确表示拒绝的，不得向其发送商业性信息；
- 对于经营者违反保护消费者个人信息义务的情形规定了民事责任和行政责任。

#### 简评

《新消法》加入个人信息保护的规定，对于中国消费者个人信息的保护具有里程碑式的意义。

《新消法》的亮点是关于行政执法权的明确。在第五十六条，《新消法》规定了工商行政管理部门在法律、法规对于处罚机关和处罚方式没有明确规定时的行政执法权。根据这条规定，工商行政管理部门在实践之中对于个人信息侵权的情况可以有法可依、依法管理。如果在实践之中能够得到有效执行，第五十六条规定的行政处罚（如没收违法所得、处以违法所得一倍以上、十倍以下罚款以及没有违法所得，处以50万元以下罚款等）可能对于侵犯消费者个人信息权利的行为有很强的威慑力。

当然，《新消法》之中关于个人信息保护的规定仍然非常原则。例如，对于个人信息，新消费者权益保护法并没有规定具体的范围。对于合法、正当、必要的原则，如何在实践之中认定和执行，都将有待于执法机关进一步解释。

## 实践

在信息社会，对于消费者信息和隐私的尊重和保护，不仅是出于遵守法律规定的需要，更是将成为产品和服务的一部分，为消费者所看重。对于公司来说，如何根据《关于加强网络信息保护的決定》、《新消法》以及工信部《电信和互联网用户个人信息保护规定》，在公司的隐私政策、信息保护规范

和实践中积极实施个人信息保护，将是一个挑战，特别是在目前法规规定仍然过于原则、没有具体执行细则和规范的情况下。但是，如何积极的向消费者传递对其个人信息有效保护的信号、加强消费者对于其产品和服务的信心，也是一个重要的商机。

我们期待具体业务之中，积极支持和配合公司尽快建立关于消费者个人信息的良好商业实践规范。

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## Protection of Personal Information

### Newly Amended Consumer Rights Protection Law Enhances the Protection of Consumer's Personal Information

On October 25, 2013, the Standing Committee of the National People's Congress ("NPC") approved the Decision of the Standing Committee of the NPC on Revising the Consumer Rights Protection Law of the People's Republic of China, which is the first amendment made to the law in a decade following its issuance in 1993. The amended Consumer Rights Protection Law (the "**Amended Law**") will come into effect on March 15, 2014, the consumer rights protection day in China.

#### General Review

The Amended Law has established the principle in Article 14 that consumers "are entitled to the rights of personal information being protected by law" when they purchase and use commodities or receive services, and has included in Article 29 several general requirements, based on the stipulations of the Decision on Strengthening the Network Information Protection issued by NPC in 2012.

We also note that these requirements are not substantially different from those in the second

examination draft of the Amended Law released in August this year for public comments.

The Amended Law includes the following requirements on business operators for protecting consumers' personal information:

- to obey the principles of lawfulness, fairness and necessity when collecting and using personal information of consumers;
- to explicitly inform consumers of the purpose, methods and scope of collection and use of personal information and obtain consumers' consent;
- to publish rules for collection and use of consumers' personal information;
- to keep consumers' personal information strictly confidential, and not to disclose, sell or illegally provide such information to others;
- take necessary measures to ensure security of consumers' personal information and at disclosure or loss of such information, immediately take remedial measures;
- not to send any commercial information to a consumer without his consent or request, or if

the consumer has expressly refused to receive such information; and

Civil and administrative liabilities may be imposed in case of breach of the above requirements.

### **Comments**

The Amended Law may become a milestone in terms of protecting consumers' personal information in China, in the current marketplace where consumers' personal information is not properly respected, and is frequently sold, leaked or abused.

Notably that the Amended Law has granted the administration and enforcement authority to SAIC (the administration for industry and commerce) and its local counterparts for consumers' personal information, except in areas or sectors where a specific authority has been designated for such responsibilities.

The administrative penalties provided in the Amended Law are considerably material, e.g. SAIC can confiscate all illegal earnings, and impose a fine from one to ten times of the illegal earnings, or in an amount up to RMB 500,000 if there is no illegal earnings. This penalty provision may bring more attention from business operators to this area, which has been for a long time ignored, intentionally or not, by many of them due to the lack of clear legal requirements and explicit legal consequence for breach. Practically if SAIC could effectively enforce its administrative authority, we would expect a decrease of serious cases infringing consumers' personal information rights in the commercial practice.

However, as a law governing all aspects in relation to consumers' rights, the Amended Law may hardly set forth detailed provisions in respect of personal information issue. For example, there is no explicit definition or scope of personal information provided, and there is no explanation as to the principles of lawfulness, fairness and necessity. These issues are still to be tested in practice and subject to SAIC's explanation.

### **Influence in Practice**

In an information society, protection of consumers' information and privacy rights will not only be a compliance requirement, but may constitute part of the "quality" service which consumers will take into consideration when they chose products or services.

It will be a challenge to companies in China to actively respond to the general requirements under the Amended Law, as they are still too general to implement. Wisdom is needed for "transplanting" the written rules into practice and "balancing" such regulatory change with the commercial practice. However, this will also be a valuable opportunity for business to attract consumers and show how they respect and protect the personal information, which may potentially increase their profile and reputation among consumers and distinguish them from other competitors.

We would expect to see companies reviewing and updating their privacy policy and information protection rules and procedures to ensure compliance with the Amended Law and establishing a good commercial practice soon.

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