

## 广告法热点问题

### 《互联网广告监督管理暂行办法》出台征求意见稿

国家工商总局于2015年7月1日发布了《互联网广告监督管理暂行办法（征求意见稿）》（以下简称“《征求意见稿》”），征求意见截止日期为7月30日。这是继2015年4月修订的《广告法》（以下简称“新《广告法》”）颁布后针对互联网（包括移动互联网）媒介实施商业广告活动的专门规定。

#### 一、定义

《征求意见稿》针对的是“以互联网（含移动互联网）为媒介实施的商业广告活动”（第二条），包括“通过各类互联网网站、电子邮箱、以及**自媒体、论坛、即时通讯工具、软件**等互联网媒介资源，以文字、图片、音频、视频及其他形式发布的**各种商业性展示、链接、邮件、付费搜索结果**等广告。”（第三条）

我们注意到，《征求意见稿》特别明确将近年来才流行起来的自媒体（如新浪微博、腾讯微博）、即时通讯工具（如微信）、各类论坛（如百度贴吧、天涯）、软件（如手机APP）等多种互联网推介广告的形式纳入监管范围。

#### 二、主要规定

《征求意见稿》特别有以下几个亮点值得注意：

##### 1. 工商登记

《征求意见稿》要求互联网广告经营者、发布者办理工商登记注册，并在其互联网媒介资源的明

显位置加载工商登记的相关信息（第六条），从事互联网广告经营、发布的自然人必须通过第三方有资质的广告经营者开展广告活动。

##### 2. 广告真实性

该项要求与新《广告法》第四条的规定相同，也是《广告法》强调的重点之一，要求广告主对广告内容的真实性负责。

新《广告法》加大了对虚假广告的打击力度，《征求意见稿》则主要针对互联网这一特殊媒介，从广告主到商业广告发布的多个环节通过各项具体制度要求参与者证明其身份的真实性和广告内容的真实性，以便于控制发布的广告质量以及监督执法。

##### 3. 用户自主权

《征求意见稿》第十三条规定：“在电子邮箱、即时通讯工具等互联网私人空间发布广告的，应当在广告页面或者载体上**为用户设置显著的同意、拒绝或者退订的功能选择。不得在被用户拒绝或者退订后再次发送电子邮件等广告。**

**通过移动互联网终端以电子邮件、即时通讯信息发送广告的，在用户同意或者拒绝接收广告的选项内，还应设置同意或者拒绝接收广告的时间选项，不得在用户设定的拒绝接收的时间发送广告。与用户另有约定的除外。”**

本条规定的立法精神与2012年《全国人民代表

大会常务委员会关于加强网络信息保护的决定》中的第七条、2014年修订的《消费者权益保护法》的第二十九条相一致，但本条规定进一步就互联网广告提出了更细致、新的要求，包括显著性、时间选项和一键关闭要求。

#### 4. 广告可识别性

由于互联网的特殊性，广告在互联网媒介上相比在其他传统媒介上，如电视广告、广播广告、报纸广告等较为隐蔽，而使消费者可能未意识到所接受的内容是一个广告而轻易相信其内容的真实性和准确性，从而受其影响做出消费行为。《征求意见稿》第十六条因此特别强调了通过互联网发布广告，应当具有显著的可识别性，使一般互联网用户能辨别其广告性质。

《征求意见稿》还针对两类特殊的情形特别做出规定，一是将付费搜索结果这一模糊地带也明确纳入广告概念，要求搜索引擎服务提供者向用户做出明确的提示；二是对目前普遍的“软广告”（即

论坛、微博上的明星、网络红人或普通用户假装没有任何利益关系的推荐自己使用的产品给公众，但实为收受广告费用有偿推广）进行规制，要求使普通互联网用户能够清楚了解该等有偿关系。

#### 5. 限制不正当竞争

《征求意见稿》第十五条特别规定了互联网广告中的不正当竞争行为，例如对他人正当经营各类广告采取拦截、过滤、覆盖等限制措施、篡改或者遮挡他人正当经营的各类广告等。

### 结 语

《征求意见稿》在新《广告法》的基础上对互联网广告的规制提出了一些更为详尽、更为适用的规定。我们期待在经过征求意见程序后，该法规能精益求精，为净化互联网的广告环境，规范互联网广告行为，提供更诚信透明的互联网平台发挥作用。

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## Advertising Law

### Draft Internet Advertising Measures Released for Public Comment

The State Administration for Industry and Commerce (“SAIC”) released the Interim Measures for Internet Advertising Supervision and Management (Draft for Comments) (the “Draft Measures”) on July 1, 2015, to solicit public comments. The deadline for comments is July 30. This is a specific regulation with a view to regulating commercial advertising via the Internet (including mobile Internet) following the recent amendment to the Advertising Law (the “**New Advertising Law**”).

#### Definition

The Draft Measures mainly regulate “commercial advertising via the Internet (including mobile Internet)” (Art. 2), including “advertisements as **commercial presentations, links, emails, paid search results** in the forms of text, picture, audio, video and other forms via various websites, emails, “**we” media, forums, instant message tools, software** and etc.” (Art. 3).

We note that the Draft Measures specifically include in their regulatory scope various new popular platforms for advertising in the Internet era, such as “we” media (e.g. Sina Weibo, Tencent Weibo), instant message tools (e.g. Wechat), forums (e.g. Baidu Tieba, Tianya bbs), and software (e.g. Apps for mobile phones).

#### Highlights

The following points in the Draft Measures are worth noting:

#### 1. Requirements for Registration with the Administration for Industry and Commerce (the “AIC”)

The Draft Measures require Internet advertising agents and advertisement publishers to register with the AIC, and to publish their AIC registration information in a predominant place on their Internet media. Natural persons that are engaged in Internet advertising or publishing need to engage third party qualified advertising agents.

#### 2. Authenticity of Advertisements

In line with the requirement under Article 4 of the New Advertising Law, the Draft Measures require advertisers to be responsible for the authenticity of the content of their advertisements, which requirement is considered to be part of the authorities’ efforts to crack down on false advertising. Furthermore, the Draft Measures require all operators, including advertisers and publishers involved in Internet commercial advertising, to verify the authenticity of the identity of all participants in the entire commercial chain as well as the content of the advertisements. Through these requirements, the governmental authorities will be able to control the quality of published advertisements and supervise advertising activities.

#### 3. Choice by Users

Article 13 of the Draft Measures provides that when publishing advertisements via online private space, such as emails and instant messages, advertisers shall

provide users with the choice to consent to, refuse, or cancel subscriptions. Such election shall be offered predominantly on the advertisement webpage or the advertising platform. Advertisers are not allowed to send advertisements, such as emails, to users that have refused such advertisements or that have unsubscribed from the mailing lists.

The Draft Measures further require that advertisements sent by email and instant messages via mobile Internet shall include, as a component of the options to consent, refuse, or unsubscribe, the option to choose the time period for receiving the advertisements. Unless otherwise agreed by the users, advertisements shall not be sent to users outside of this designated time period.

This article is consistent with Article 7 of Decision of the Standing Committee of the National People's Congress on Strengthening Network Information Protection (2012) and Article 29 of Law on the Protection of Consumer Rights and Interests (revised in 2014), and includes specific requirements, such as subscription and time period options and the “one-click to close” setting for users.

#### **4. Distinguishable Advertisements**

Compared to information disseminated via traditional media, such as via television, radio, and newspaper advertisements, it is more difficult for consumers to

distinguish advertisements on the Internet from other information. Consumers may easily trust the authenticity and accuracy of the content on Internet that is not designated as advertising, but was paid to be published. Article 16 of the Draft Measures emphasizes that Internet advertisements should be distinguishable in order to provide additional protection to consumers.

Specifically, the Draft Measures include “paid search results” in the scope of advertisements and require search engine service providers clearly identify any paid search results. Also, so-called “soft advertisements” fall into the scope of advertising under the Draft Measures and any Internet users, including movie stars and web celebrities, that are paid to recommend and promote products must inform the public of such relationship when the users recommend such products via the Internet.

#### **5. Restriction of Unfair Competition**

Article 15 of the Draft Measures specifically lists conduct in Internet advertising that is considered unfair competition, for example intercepting, filtering, covering, tampering with, and blocking others' advertisements.

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