君合研究简讯



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个人信息保护法律热点问题

《电信和互联网用户个人信息保护规定》出台

继 2013 年 4 月 10 日工业和信息化部(以下简称 "**工信部**") 发布征求意见稿后, 2013 年 7 月 16 日,工信部正式颁布了《电信和互联网用户个人 信息保护规定》(以下简称"《个人信息保护规 **定》"**), 并将于 2013 年 9 月 1 日起实施。近几年 来,工信部持续关注并逐步加强个人信息保护方 面的立法工作。从《互联网电子邮件服务管理办 法》、《互联网电子公告服务管理规定》之中零星 原则的规定,到 2012年3月15日实施的《规范 互联网信息服务市场秩序若干规定》(以下简称 "《2012 年规定》") 中关于个人信息保护的具体 规定,再到组织起草《信息安全技术 - 公共及商 用服务信息系统个人信息保护指南》(标准号: GB/Z 28828-2012,以下简称"《指南》",国家质 量监督检验检疫总局与国家标准化管理委员会于 2012年11月5日正式发布,2013年2月1日实 施),工信部关于个人信息保护方面的思路逐渐清 晰。一方面加强监管,但在目前这个阶段并未也 不可能像欧盟一样设立严格的监管要求; 另一方 面,学习美国的行业自律,希望形成有一定中国 特色的、既能保护用户,又不给电信/互联网公司 上太重的枷锁的中间道路。

2012年12月28日,全国人民代表大会常务会员会颁布了《关于加强网络信息保护的决定》(以下简称"《决定》"),为《个人信息保护规定》的起草和颁布提供了基础和铺垫。《个人信息保护规定》在《决定》的基础上,进一步细化和落实了《决定》涉及电信和互联网方面的规则。这也体现出立法机关对

于近几年来个人信息泛滥、无法得到有效保护的应对。

一、《个人信息保护规定》的主要内容

(一) 义务主体

《个人信息保护规定》所规范的主体是"电信业务 经营者和互联网信息服务提供者"(以下简称"电信 互联网服务商")。

(二) 保护对象

《个人信息保护规定》中所保护的对象为"用户个人信息",并将其定义为"电信业务经营者和互联网信息服务提供者在提供服务的过程中收集的用户姓名、出生日期、身份证件号码、住址、电话号码、账号和密码等能够单独或者与其他信息结合识别用户的信息以及用户使用服务的时间、地点等信息。"

(三) 信息收集和使用规范

《个人信息保护规定》要求电信互联网服务商在收集、使用用户个人信息时,遵循合法、正当、必要的原则,对用户个人信息的安全负责。《个人信息保护规定》对电信互联网服务商的具体要求如下:

- (1) 制定用户个人信息收集、使用规则并予以公布;
- (2) 未经用户同意,不得收集、使用用户个人信息;

- (3) 明确告知用户收集、使用信息的目的、方式 和范围,查询、更正信息的渠道以及拒绝提 供信息的后果等事项;
- (4) 不得收集提供服务所必需以外的用户个人 信息或者将信息用于提供服务之外的目的, 不得以欺骗、误导或者强迫等方式或者违反 法律、行政法规以及双方的约定收集、使用 信息:
- (5) 在用户终止使用服务后,停止对用户个人信息的收集和使用,并为用户提供注销号码或 者账号的服务;
- (6) 对用户个人信息严格保密,不得泄露、篡改 或者毁损,不得出售或者非法向他人提供;
- (7) 委托他人代理涉及收集、使用用户个人信息 的,对代理人的用户个人信息保护工作进行 监督和管理,不得委托不符合本规定有关用 户个人信息保护要求的代理人;
- (8) 建立用户投诉处理机制,公布有效的联系方式,接受与用户个人信息保护有关的投诉,并自接到投诉之日起十五日内答复投诉人。

(四)安全保障措施

《个人信息保护规定》就电信互联网服务商对于用户个人信息的管理责任、管理制度、人员权限、信息审查、保管储存、系统审查、操作记录、安全防护工作方面等提出了较为具体的安保措施要求。此外,还规定了电信互联网服务商采取补救措施、向电信管理机构报告、配合调查处理及监督检查、对工作人员进行培训、定期自查等义务。

(五) 监督检查

《个人信息保护规定》明确提出了电信管理机构对于电信互联网服务商保护用户个人信息情况的监督检查责任,并确定了电信管理机构在监督检查时的权力和义务,且要求电信管理机构在实施电信业务经营许可及经营许可证年检时,对用户个人信息保护情况进行审查,并将有违反规定的电信互联网服务商记入其社会信用档案并予以公布。

(六) 法律责任

《个人信息保护规定》对于法律责任部分规定了责令限期改正、警告和罚款。对于未按规定制定和公布个人信息收集、使用规则,或未建立和公布用户投诉处理机制的电信互联网服务商,责令限期改正,予以警告,可并处以一万元以下的罚款;对于违反其他实质性个人信息保护义务的行为,责令限期改正,予以警告,可并处以一万元以上三万元以下的罚款,向社会公告。构成犯罪的,追究刑事责任。

二、简评

《个人信息保护规定》将《决定》的原则性规定落实到具体规范和操作。对于个人信息收集和使用、安全保障措施、监督检查方面,相比《决定》,《个人信息保护规定》对电信互联网服务商和电信管理机构均提出了更高且更加细致的要求。当然《个人信息保护规定》的规定均在《决定》的范围之内,并未有所突破。

《个人信息保护规定》延续了《2012 年规定》的立法方向,扩充和细化了《2012 年规定》中有关个人信息保护的内容。例如,《个人信息保护规定》增加了"电信业务经营者"这一义务主体,对于个人信息的定义进行了列举,大大扩充了《2012 年规定》对于个人信息收集和使用、安全保障措施、监督检查方面的规定。因此,电信互联网服务商将面临制定业务规范,明确人员职责和权限,建立审查和记录机制等要求。

《个人信息保护规定》出台后,《指南》作为非强制性国家标准,对于其今后的实施仍具有指导意义。特别是《指南》中关于信息处理的各个环节(收集、加工、转移、删除)的细致要求,将对电信互联网服务商在制定业务规范和进行日常经营管理时达到《个人信息保护规定》的要求起到一定的指导作用。

当然,《个人信息保护规定》出台后,实践中众多的 互联网电信服务商是否将遵守相关规定,每一条具 体要求将如何落实,工信部如何进行合规监管,都 将有待进一步在实践中检验。另外,如果由于互联 网电信服务商未能遵守《个人信息保护规定》的要 求,侵害了用户个人权益的,个人虽然可以提请工 信部门调查处罚相关的互联网电信服务商,但是, 个人权益的根本保护还是需要依靠《侵权责任法》 公在实践中的发展也值得进一步关注。

项下的民事诉讼。《侵权责任法》下个人的隐私权诉

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JUN HE BULLETIN



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Protection of Personal Information

MIIT Issued New Regulation on Protection of Personal Information

The Regulation on Personal Information Protection of Telecom and Internet Users ("Regulation") was officially issued by the Ministry of Industry and Information Technology ("MIIT") on July 16, 2013 and will take effect from September 1, 2013, following a draft of which was circulated for public comments in April earlier this year.

Users' Personal Information

"Users' Personal Information" is specifically defined under the Regulation as the information of the users, such as name, date of birth, ID number, address, telephone number, account number, password, that can be used, either independently or when combined with other information, to identify the users, and the information concerning the time and location of the users' use of service, which is collected by telecom business operators and internet information service providers ("Operators") during their provision of services.

Collection and Processing Rules

The Regulation requires Operators to comply with the principals of legitimacy, rightfulness and necessity and be responsible for the safety of Users' Personal Information in the course of collecting and using such

information, and under such principles, they are specifically required:-

- to formulate and publish rules for collection and use of Users' Personal Information;
- not to collect or use Users' Personal Information without their consent;
- explicitly inform users of the purpose, methods and scope of collection and use of Users' Personal Information, channels for inquiry and correction, and consequences for refusing to provide information;
- not to collect any information of users other than necessary for its services, and not to deceive, mislead or compel users to provide such information, or collect or use such information in a way not consistent with laws and administrative regulations or the agreement with users;
- to supervise and manage the protective measures
 of Users' Personal Information by third party
 vendors who are engaged to provide direct
 marketing and/or technology services for
 Operators and are therefore involved in collecting
 and processing Users' Personal Information; and
- to stop collecting or using any information of Users upon termination of services to such Users;
 and

 to establish complaints mechanism, publish effective contact methods, accept complaints, and respond within 15 days upon receipt of such complaints.

Security Measures

The Regulation stipulates several security precaution requirements for Operators in aspects such as internal allocation of administration responsibilities, establishment of management system, stipulation of individual's access authority, information review and examination, system examination and retention of operational records.

The Regulation also requires Operators to take remedial measures, report to telecom regulators, cooperate with investigation and supervision, provide personnel training, and perform periodic self-inspection.

Legal Consequence

The Regulation provides that Operators which have failed to formulate and publish rules for collection and use of Users' Personal Information or failing to establish and publish complaint mechanism should take corrective measures within a specified time limit, and may be subject to a fine of up to RMB 10,000. Operators that fail to perform other material personal information protection obligations as required under the Regulation may be imposed a fine of RMB 10,000 to RMB 30,000. Nevertheless, if any violation activity constitutes a crime, the responsible Operator may be subject criminal liabilities as well.

IN SUMMARY, the Regulation is a further step taken by MIIT on strengthening legislation in the personal information protection area.

In 2012, MIIT issued Several Provisions on Regulating the Market Order of Internet Information Services ("Market Order Provisions"), which include several provisions stipulating obligations for ISPs to protect users' personal information that they collect and use in played an important role in the draft and issuance of the Information Security Technology - Guideline for Personal Information Protection within Information System for Public and Commercial Services (the "Guideline") that was issued in 2012, and took effect from February 1, 2013. Compared with the Market Order Provisions, the Regulation includes more explicit and clear requirements on Operators, and imposes more requirements on them to establish their internal security precaution measures in this respect.

In addition, as the NPC Standing Committee promulgated the *Decision on Strengthening the Network Information Protection* (the "**Decision**") on December 28, 2012, the Regulation has, on the basis of the Decision, elaborated the principles thereunder with more implementing rules for the telecom sector.

It seems that MIIT is taking an approach which combines practices of both EU and the US, including both enhancement of statuary regulations and promotion of non-binding rules for industry self-discipline. Now it remains to be further tested in practice whether and how Operators will comply with such Regulation and how MIIT will implement the Regulation requirements.

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