

个人信息保护法律热点问题

《网络交易管理办法》加强对信息权的保护

2014年1月26日，国家工商行政管理总局颁布了《网络交易管理办法》（以下简称“《管理办法》”），自2014年3月15日生效，《网络商品交易及有关服务行为管理暂行办法》（以下简称“《暂行办法》”）同时废止。

适用范围

《管理办法》适用于在中国境内从事网络商品交易及有关服务的行为。其中，网络商品交易是指通过互联网（含移动互联网）销售商品或者提供服务的经营活动；有关服务是指为网络商品交易提供第三方交易平台、宣传推广、信用评价、支付结算、物流、快递、网络接入、服务器托管、虚拟空间租用、网站网页设计制作等营利性服务。从事上述交易及服务的主体（以下简称“经营者”）都受《管理办法》规范。

《管理办法》中规定的信息保护不仅包括消费者信息，也包括经营者信息。经营者信息虽未特别定义，但从第十八条的规定可以推论，不仅包括经营者的个人信息，也包括商业秘密。

收集和使用规范

《管理办法》加入了对经营者在经营活动中收集、使用消费者或者经营者信息的要求，但这些要求与全国人大常委会《关于加强网络信息保护的決定》及即将生效的新《消费者权益保护法》之中的规定类似，未能进一步细化。相关规定如下：

1. 明示收集、使用信息的目的、方式和范围，并经被收集者同意；

2. 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；
3. 对收集的消费者个人信息或者经营者商业秘密的数据信息须严格保密，不得泄露、出售或者非法向他人提供；
4. 采取技术措施和其他必要措施确保信息安全，防止信息泄露、丢失，并在发生或者可能发生信息泄露、丢失的情况时，立即采取补救措施；以及
5. 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电子信息。

法律责任

《管理办法》未专门规定侵犯消费者或经营者信息行为的罚则。参照第四十九的规定，对于侵犯消费者或经营者个人信息的行为，可以按照《消费者权益保护法》或者《电信和互联网用户个人信息保护規定》，进行责令改正、警告、没收违法所得、处以罚款、责令停业整顿、吊销营业执照等处罚。而对于侵犯经营者商业秘密的行为，则仍依据《反不正当竞争法》及《关于禁止侵犯商业秘密行为的若干規定》等规定予以处罚。

信用信息

《管理办法》对一类特别的个人信息——信用信息的收集和使用，专门进行了约束。要求为网络商品交易提供信用评价服务的有关服务经营者应通过合法途径采集信用信息，坚持中立、公证、客观原则，不得任意调整用户的信用级别或者相关信息，不得

将收集的信用信息用于任何非法用途，并特别规定了罚则。

投诉和监管路径

《管理办法》第二十六条要求第三方交易平台经营者对于通过平台销售商品或者提供服务的经营者及其发布的商品和服务建立检查监控制度，发现有违反法律法规的情形，应立即向工商部门报告并采取措施制止。《管理办法》第四十二条规定消费者可向工商部门投诉经营者的违法行为。上述投诉和监管路径的规定力图加强对于经营者合规的管理，但实践效果还有待观察。

简评

相比《暂行办法》，《管理办法》不仅保护消费者信息，还保护经营者信息，扩展了保护的信息范围，这是首次在法律法规之中明确特别对于经营者信息保护的要求。在现有法律法规的基础上，增加了经营者义务的具体规定，虽然仍待细化和实践，但仍显示了政府机关试图加强信息权保护的趋势。另外，《管理办法》增加了对于与网络交易相关的线下服务（如物流、快递等）的监管，以完善网络交易链中的个人信息保护。当然《管理办法》中有关信息保护的规定仍然较为宽泛，仍然有待具体实践和主管部门的进一步解释。

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Protection of Personal Information

Administrative Measures for Online Transactions Enhance the Protection of Information Right

On January 26, 2014, the State Administration for Industry and Commerce issued the *Administrative Measures for Online Transactions* (“**Administrative Measures**”), which will come into effect on March 15, 2014. The *Interim Measures for the Administration of Online Commodities Trading and Relevant Services* (“**Interim Measures**”) will simultaneously be annulled.

Scope of Application

The Administrative Measures are applicable to all behaviors engaging in online product trading and relevant services. Online product trading refers to business activities of selling products or providing services via the Internet (including mobile Internet), and the relevant services refers to profitable services provided for online product transactions, including, among others, third-party transaction platform, publicity and promotion, credit rating, payment and settlement, logistics, courier services, Internet access, server hosting, virtual space rental, and website and webpage design. Individuals, enterprises and other entities that engage in the aforesaid transactions and services (“**Business Operators**”) are regulated by the Administrative Measures.

The information protected by the Administrative Measures includes not only consumers’ information, but also Business Operators’ information. Although Business Operators’ information is not specifically defined, Article 18 implies that it includes the Business Operators’ personal information as well as business secrets.

Rules of Collection and Use

The Administrative Measures include requirements for Business Operators to comply with in the course of collecting and using the information of consumers or Business Operators in their business activities. Those requirements are similar to the principle stipulations in the *Decision of the Standing Committee of the National People’s Congress on Strengthening Network Information Protection* and the newly revised *Law on the Protection of Consumer Rights* which will come into effect soon, without more specific rules. The Business Operators are required:-

- to explicitly inform the data subjects of the purpose, methods and scope of collection and use of information and obtain data subjects’ consent;
- to publish rules for collection and use of data subjects’ information, without violating laws, regulations and agreement with data subjects;
- to keep collected data of consumers’ personal information or Business Operators’ business secrets in strict confidence, and not to disclose, sell or illegally provide such information to others;
- to take necessary measures to ensure the security of information, prevent leakage or loss of information and take remedial measures immediately when leakage or loss of information occurs; and

- not to send any commercial information to consumers without consumers' consent or request, or where consumers have expressly refused.

Legal Responsibilities

The Administrative Measures do not provide any specific penalty on infringement of consumers' or Business Operators' information. According to Article 49, for infringement of consumers' or Business Operators' personal information, the infringer may be punished according to the existing laws and regulations, which include, for example, the *Law on the Protection of Consumer Rights* or *Provisions on Protecting the Personal Information of Telecommunications and Internet Users*, whereby the infringer may be required to take corrective measures, or exerted punishment of warning, or subject to confiscation of illegal gains, fine, suspension of business for rectification or revocation of business license, and for infringement of business secrets of Business Operators, the *Anti-unfair Competition Law* and *Certain Provisions on Prohibition of Infringement of Trade Secrets* may apply.

Credit Information

The Administrative Measures include stipulations on the collection and use of a particular type of personal information, which is the credit information. Credit rating service providers for online product transactions are obliged to collect credit information through legitimate channels and comply with the principles of neutrality, impartiality and objectivity, and are prohibited from either arbitrarily adjusting the credit ratings or related information of users, or using the credit information collected for any illegal purposes. Specific penalty provisions are also provided.

Complaint and Supervision Approach

Article 26 of the Administrative Measures provides that

the Business Operators of a third-party transaction platform shall establish inspection, monitoring and control systems to supervise the Business Operators that sell products or services via such platform and the information published by such Business Operators regarding products and services. The Business Operators of third-party transaction platform shall immediately report any violation of laws or regulations to the administration for industry and commerce and take timely measures to stop such violations.

Article 42 of the Administrative Measures entitles consumers to file complaints to the administration for industry and commerce if they identify any violation behavior of Business Operators. The aforesaid provisions regarding complaints and supervision approaches are aimed to enhance the compliance management of Business Operators, yet the effect in actual practice remains to be further tested.

Our Observation

Compared to the Interim Measures, the Administrative Measures extend the protection scope of information by protecting not only the consumers' information, but also information of the Business Operators. It is the first time that the Business Operators' information has been specifically defined as a type of information regulated by law. Business Operators' obligations are further specified in the Administrative Measures compared with the Interim Measures. Besides, the Administrative Measures provide supervision over certain offline services (such as logistics, express delivery) relevant to online trading as a part of the online trading chain. Although these stipulations may still need to be interpreted by the authorities and are subject to practice, the inclusion of such stipulations in the new Administrative Measures reveals the intention of the authorities to enhance the protection of information rights in online transactions, as one of the major concerns for consumers nowadays.

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