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Newsletter

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MIIT Issues Provisions Governing Protection of Personal Information of Telecommunications and Internet Users (Authors: Charles LI, Rae LIU, Arong)

On July 16, 2013, the Ministry of Industry and Information Technology (“**MIIT**”) published the *Provisions for Protection of Personal Information of Telecommunications and Internet Users* (“**MIIT Provisions**”), to implement the *Decision to Strengthen Network Information Protection* (“**NPC Decision**”) issued by the Standing Committee of the National People’s Congress on December 28, 2012 and further Strengthen the protection of the personal information of telecommunications and internet users.

The MIIT Provisions have twenty five (25) clauses that specify: 1) the scope of protection and entities that bear protection obligations, 2) the specific obligations of telecommunications business operators and internet information service providers when collecting and using personal information from users, 3) agency management and supervision, 4) information security measures, 5) administrative supervision, and 6) penalties for violations. The key points of the MIIT Provisions are as follows.

1. Clarified Scope of Protected Personal Information and Entities Who Bear Protection Obligations

The NPC Decision broadly states that personal network information, meaning electronic information that identifies an individual and involves such individual’s privacy, shall be protected. Under the MIIT Provisions, the “personal information of telecommunications and internet users” to be protected is defined as information collected by telecommunications business operators or internet information service providers in the provision of services. Such personal information can individually or in combination with other information be used to distinguish a user, such as the name, date of birth, identification card number, address, telephone number, login username, login number, account, time and place.

Unlike the NPC Decision, which requires that “network service providers” shall bear the obligations to protect personal network information, the MIIT Provisions identify the obligated entities as “telecommunications business operators or internet information service providers”.

2. Rules for Information Collection and Use

According to the principles set forth in NPC Decision, the MIIT Provisions require that the collection and use of personal information of telecommunications and internet users must done on a legal, justified and necessary basis. Therefore, telecommunications business operators and internet

information service providers are obligated under the MIIT Provisions:

- a. to formalize and publish their policies on information collection and use;
- b. not to collect or use personal information without consent from users;
- c. to notify users of the purpose, method, scope of data collection and other relevant matters;
- d. not to collect or use personal information when it's unnecessary;
- e. to stop information collection and use and to provide account cancellation services when telecommunications services are terminated;
- f. to refrain from any disclosure, distortion, damage, unlawful sale or provision of personal information to any third party;
- g. to establish and publish a compliant management process, and respond effectively within fifteen (15) days from receipt of any complaint.

3. Agency Management and Supervision

Pursuant to the principles the “one who conducts business shall be in charge” and the “one who delegates work shall be responsible”, as well as the agency theory in civil law, the MIIT Provisions require telecommunications business operators and internet information service providers to supervise and control agencies’ activities when engaging an agency to provide end user services (such as marketing and technical services) to users and to collect and use the users’ personal information. Additionally, any agency that fails to meet the requirements for personal information protection in providing any related service shall not be hired.

4. Detailed Information Security Measures

The MIIT Provisions set forth detailed information security protection measures to keep safe collected information from any leakage, damage, distortion or loss in areas such as roles and responsibilities, management system, authority, data storage mediums, information systems, operating records, and safeguards. The rules for information security incident handling and reporting, information protection self-inspection and training are also provided in the MIIT Provisions.

5. Administrative Supervision

The administrative authority related to network information protection is not specified in the NPC Decision. Under the MIIT Provisions, MIIT and its local counterparts are responsible for supervising the collection and use of the personal information of telecommunications and internet users, and may require the relevant telecommunications business operators or internet information service providers to submit related materials and access their premises to conduct inspections. MIIT

and its local counterparts are required to examine the personal information protection rules during the annual inspection of telecommunications licenses. Any violation of the MIIT Provisions by telecommunications business operators or internet information service providers will be recorded in their social credit files.

6. Penalties for Violation

The NPC Decision generally provides that the legal liabilities for violating such decision include administrative penalties (warnings, fines, confiscating unlawful gains, revoking licenses or cancelling registration, closing down websites, etc.), criminal liabilities and/or civil liabilities. The MIIT Provisions further specify the administrative penalties for violating the relevant personal information protection rules that are set out in the MIIT Provisions below:

- a. Telecommunications business operators and internet information service providers who fail to formalize and publish policies on information collection and use, or establish and publish a compliant management process and respond effectively may be ordered to rectify within a specified period, and be subject to warnings and fines not exceeding RMB 10,000;
- b. Penalties for other violations in relation to information collection and use such as unlawful disclosure, distortion, damage, sale or provision of personal information to third parties, and failure to adopt regulatory information security measures, include rectification orders, warnings, fines ranging from RMB 10,000 to RMB 30,000, and public releases.

Legal Updates

1. MOFCOM Further Strengthens Management of Foreign-invested Financing Leasing Companies (Authors: Evan ZHANG, Xinfeng ZHANG)

To clarify specific requirements of approving foreign-invested finance leasing companies (“FIFLCs”), the Ministry of Commerce issued the *Notice on Strengthening and Improving the Approval and Management of Foreign-invested Financing Leasing Companies* (the “**Notice**”) on July 18, 2013. The attachment to the Notice, the *Approval Guidelines for Access of Foreign-Invested Financing Leasing Companies* (the “**Guidelines**”), further defines the access requirements of FIFLCs specified in the *Measures for the Administration of the Foreign-Invested Lease Industry* (Order of the Ministry of Commerce [2005] No. 5) . The main contents of the Guidelines are as follows:

Investor Qualifications

The Guidelines provide that investors of FIFLCs shall meet the following requirements:

- a. Investors shall be companies, enterprises or other economic organizations. Foreign investors or their overseas parent companies shall be engaged in substantive business operations, and shall have good credit;
- b. Investors shall have existed for at least one year. Where qualified overseas parent companies establish FIFLCs through their wholly owned overseas subsidiaries (“SPVs”), the 1-year existence requirement may not be applicable to such SPVs;
- c. the total assets of foreign investors shall not be less than \$5,000,000;
- d. The audit report of the investors for the recent year, which shall be submitted to the relevant commerce departments, shall not display insolvency.

Professional Personnel Qualifications

The Measures for the Administration of the Foreign-Invested Lease Industry provide that FIFLCs shall have personnel with relevant expertise, and the senior managers shall have the corresponding professional qualifications and not less than three years’ working experience in the relevant industry. In practice, there was a lack of clear guidelines for defining the requirements related to professional qualifications and working experience. The Guidelines specify such requirements as follows:

- a. “Professional” refers to the personnel with professional knowledge, skills and experience on finance, trade, law, accounting, engineering and technical management and other related areas, which is required for the performance of his/her duty. Such personnel shall also have sound working records.

- b. "Senior Manager" refers to the general manager and deputy general manager, business executive, financial executive, risk control executive and operations executive.
- c. "With the corresponding professional qualifications" means the expertise in the business areas that the personnel take charge of and the relevant practicing certificates issued by the administrative departments or authoritative organizations of the industry. The personnel in principle shall also have a bachelor's degree level of education or above.
- d. "Not less than three years' experience in the industry" means more than three years' managerial experience in FIFLCs or related financial institutions.

Application Materials Required for Establishment of FIFLCs

Based on the Guidelines, in respect of the application materials, investors intending to establish FIFLCs are suggested to pay attention to the following requirements:

- a. The feasibility study report shall cover the to-be-established company's prospective business development plan, business industries and areas to engage in, organizational structure, cost-benefit analysis and risk control capability analysis and other related matters;
- b. The same investor or its parent company, which has established two or more FIFLCs, shall provide the audit report, capital verification report (the registered capital shall have been paid on time) and business description of the established FIFLCs. There shall be significant differences in the business areas between the newly established company and the existing company;
- c. The administrative departments in charge of examination and approval will require the foreign investors to truthfully disclose the actual investors' background information, and will rigorously review the status of their overseas assets.

Business Scope of FIFLCs

As stipulated in the Notice, FIFLCs shall not: 1) engage in deposits, loans, entrusted loans and other related activities, 2) without the approval of relevant administrative departments, engage in interbank lending, equity investments and other related businesses, and 3) provide direct or indirect financing for local government financing vehicles undertaking public welfare projects in any form.

In addition, the Guidelines specify that FIFLCs may engage in guarantee business associated with leasing transactions, but such guarantee business shall not be the main business, and the names of the FIFLCs shall not include the word "guarantee".

Other Requirements

In addition to the above provisions, the Guidelines restate and emphasize certain substantive

requirements for FIFLCs, i.e.:

- a. the term of FIFLCs shall in principle not exceed 30 years;
- b. the registered capital shall not be less than \$10 million;
- c. the proportion of foreign investments shall not be less than 25%; and
- d. the name and the business scope shall not contain “financial leasing(金融租赁)”.

2. MOHRSS Released Implementing Measures on Labor Dispatch Licensing (Authors: Wenyu JIN, Allan WANG)

On December 28, 2012, the 30th Session of China’s Standing Committee of the Eleventh National People’s Congress adopted *The Decision of the Standing Committee of the National People’s Congress on Amending the Employment Contract Law of People’s Republic of China* (the “**Decision**”), to amend and regulate the current system of labor dispatch. On June 20, 2013, the PRC Ministry of Human Resources and Social Security promulgated the *Implementing Measures for Administrative Licensing for Labor Dispatch* (the “**Implementing Measures**”) to further specify the details of the administrative licensing for labor dispatch. The Implementing Measures, together with the Decision, both effective on July 1, 2013, mainly regulate the following aspects:

Conditions of Engaging in Labor Dispatch Business

The Implementing Measures further reiterated the following conditions of engaging in labor dispatch business, which have been provided in the Decision: (a) The registered capital shall not be less than RMB2 million; (b) Have fixed premises and facilities adapted to the business development; (c) A labor dispatch management system in conformity with laws and administrative regulations has been established; and (d) Other conditions stipulated by laws and administrative regulations.

The Implementing Measures further provided that, before engaging in labor dispatch business, an administrative license shall be applied for with the administration of human resources and social security, and no entity or individual is allowed to carry on labor dispatch business without a license.

Procedures for Obtaining a Labor Dispatch Operation License

a. Application Materials

As provided in the Implementing Measures, to apply for a Labor Dispatch Operation License (an “**Operation License**”), an applicant shall submit the following materials to the Licensing Authority:

- a) The written application for Operation License;
- b) The Business License or the Notice of Pre-approval of the Business Name;

- c) The Articles of Association and the report on the verification of capital issued by a capital verification institution or financial audit reports;
- d) The using certificate of the business premises and list of office facilities and equipments, information management system and etc., which are adapted to the business development;
- e) The identity certificate of legal representative; and
- f) The labor dispatch management system, including texts of rules and regulations related to the laborers' immediate interests such as employment contract, remuneration for labor, social security, working hours, rest and vacation, and labor discipline, etc.; the samples of the labor dispatch agreements to be entered into with the employers.

b. Application Procedures

The Implementing Measures provided specific provisions regarding the procedures, conditions and term of different processes of licensing for labor dispatch, including the Acceptance, Examination, Modification and Extension, etc.

a) Acceptance

As provided in the Implementing Measures, if there is any fault that may be corrected on the spot in the application materials, the applicant shall be allowed to do so; If the application materials are not complete or not in accordance with the statutory format, the applicant shall be informed to supplement the other necessary materials on the spot or within five working days; If the Licensing Authority decides to accept the application submitted by applicant, it shall issue the Acceptance Decision; If not, it shall issue a Dismissal Decision, inform the applicant of specific reasons for dismissal and the rights to appeal.

b) Examination

As provided in the Implementing Measures, the Licensing Authority shall examine the substance of application materials, and make a decision regarding whether or not to approve the administrative licensing within 20 working days from the date of acceptance. If the decision is made to approve the administrative licensing, the Licensing Authority shall inform the applicant to receive the Operation License within five working days from the date of decision-making; but, if not, the Licensing Authority shall inform the applicant of the specific reasons and the rights to appeal.

c) Modification

As provided in the Implementing Measures, If the name, address, legal representative, registered capital or other relevant issues of a labor dispatch entity have changed, and such changes meet the lawful conditions, the Licensing Authority shall carry on the procedure of modification according to laws within ten working days from the date of acceptance of application, and issue a new Operation License or give clear indication of the original Operation License; If such modification fails to meet the lawful conditions, the Licensing Authority shall make a written decision, including its reasons,

within ten working days from the date of acceptance of application. In addition, if a new company is set up after a merger or division of the original labor dispatch entity, the Operation License shall be re-applied for.

d) Extension

As provided in the Implementing Measures, the validity period of an Operation License is three years, the labor dispatch entity shall submit a written application for extension of the Operation License to Licensing Authority at least 60 days before expires, meanwhile the report of basic business situation in the last three years shall be submitted too; the Licensing Authorities shall, according to the application of a labor dispatch entity for extension, decide whether or not to approve the extension before the expiry of the validity period of such administrative license; If the decision fails to meet the time limit, the extension of application shall be deemed as approved.

The Authority of Issuing the Operation License

According to the Implementing Measures, the Ministry of Human Resources and Social Security shall take responsibility for the supervision and guidance of nationwide administrative licensing for labor dispatch. Local administrations of human resources and social security at or above the county level are responsible for the implementation of administrative licensing for labor dispatch and the relevant supervision and inspection within their respective administrative areas, in accordance with the division of licensing jurisdiction determined by administrations of human resources and social security of provinces, autonomous regions and municipalities directly under the Central Government.

Based on our understanding, due to the differences of actual situations among different places, the Implementing Measures did not unify the provision on the division of licensing jurisdiction, but left such division to be determined by administrations for human resources and social security of provinces, autonomous regions and municipalities directly under the Central Government. We will pay close attention to the specific regulatory developments of each place, and share the messages with you promptly.

Norms and Legal Liabilities of Labor Dispatch Entities

- a. Labor dispatch business shall not be operated without license. As provided in the Implementing Measures, no entity or individual is allowed to carry on labor dispatch business without license. Furthermore, the Implementing Measures clearly defined the legal liabilities regarding unlawful operation of labor dispatch business, including: (a) If any entity and individual, in violation of the provisions of the PRC Labor Contract Law, operates labor dispatch business without license, the administration of human resources and social security shall order it to stop illegal activities, confiscate the illegal gains, and impose a fine of more than one time but less than five times of the illegal gains; If there is no illegal gains, a fine

- amounting to less than CNY50,000 could be imposed; (b) If any labor dispatch entity violates the provisions of labor dispatch in the PRC Labor Contract Law, the administration of human resources and social security shall order it to make rectification within a specified time limit; If it fails to make rectification within the specified time limit, it shall be imposed a fine of more than CNY5,000 but less than CNY10,000 for each laborer, and the Operation License shall be revoked.
- b. The obligation to keep the Operation License appropriately. According to the Implementing Measures, the labor dispatch entity shall keep the Operation License appropriately and shall not alter, resell, rent, lend or illegally transfer it in any other forms. If the labor dispatch entity violates the aforesaid provision, normally a fine of less than CNY10,000 could be imposed; When the circumstances are serious, a fine of more than CNY10,000 but less than CNY30,000 could be imposed.
- c. The obligation to report regularly. As provided in the Implementing Measures, a labor dispatch entity shall submit the labor dispatch operation report of previous year to the Licensing Authority before March 31 in each year; A subsidiary or branch set up by a labor dispatch entity, shall also submit the labor dispatch operation report of previous year to the administration for human resources and social security with which it went through the licensing and filing procedures.

Transitional Provisions

According to the Implementing Measures and The Decision, since July 1, 2013, the entities that engaged in labor dispatch business before July 1, 2013, may operate new labor dispatch business after obtaining an Operation License in accordance with the Implementing Measures; After the Implementing Measures come into effect, those entities that fail to obtain the Operation License shall not operate new labor dispatch businesses. However, (a) Labor contracts and labor dispatch agreements entered into by labor dispatch entities before the promulgation of the Decision (December 28, 2012), may continue to be performed until the expiry of the term, but if the contents of such contracts or agreements fail to conform to the principle of equal pay for equal work, such provisions shall be adjusted; (b) Labor contracts and labor dispatch agreements entered into by labor dispatch entities between December 28, 2012 and June 30, 2013 shall be performed in accordance with the Decision after July 1, 2013.

We hope the above introduction will be helpful to you. If you have any questions, you are welcomed to contact us at any time.

3. Alimony Trusts and Family Wealth Management (Author: Han CHEN)

Alimony Payment Dilemma

Paying child support is the legal obligation of the parents of minor children. When parents and minor children live together, the payment of alimony does not usually create a legal issue. Today, however, in light of the high rates of divorce and children born out of wedlock, it is not uncommon for one parent not to live with the child, which makes child support payment a central issue.

There are two main issues concerning the payment of alimony. The first is the regular payment of alimony. If the obligor frequently either makes late payments or does not pay at all, the cost of securing the legal remedies of the underage children is excessive. As a second issue, when the payment of child support is conducted in a one-time payment, there exists a high risk that one of the parents will abuse the money controlled by him/her. For example, in one divorce case, the parties mutually agreed that the mother would live with the minor children, and the father would make a one-time payment of 5 million in cash, and two sets of housing registration for the children, as a one-time payment for underage child support. However, the mother, acting as the guardian of the children, sold the houses and deposited the money in the bank, and then ran away to a far-away place, letting the nanny bring the children to the father. At that point, the father had to make other preparations for the futures of the children, and as he had remarried, he had to balance the relationship between the children and his new family. Although in theory there is possibility of legal recourse against such a woman who takes such an action on behalf of her children, in reality enforcement of such an action is difficult to obtain.

Alimony Trusts

Through the use of an alimony trust, both of these two issues discussed above can be resolved. In an alimony trust, the parents support the child by giving the payments to a third party, or “trustee,” and the trust income is used to support the children on a regular basis; this money also counts as part of the family’s wealth management.

An alimony trust framework works as follows:

- a. The party obligated to raise the minor children (either one or both parents) becomes a principal capital contributor for setting up the trust, with the children designated as the beneficiaries of the trust.
- b. The duration of an alimony trust contract is often designated to be either the age of adulthood (18) or college graduation. For the duration of this time period, there is an obligation for child support.
- c. An investment committee is set up to determine every two to three years when the next of the fiduciary investment will occur, as well as set up a committee in order to ensure compliance of investment and to control the need for child support payments.
- d. The return on the investment will be paid either at regular intervals, or as needed in

accordance with the expenses, the returns on the investment of the trust estate, the life of the minor children, and the necessity to pay for studies.

- e. After the trust expires, the trust will be fully liquidated by the beneficiaries, to become either his/ her family fund or capital for his/her business.

The above framework is just a standard design, as in reality the design may vary depending on the amount of family property, the age of the children, or the number of children, and the design will be correspondingly adjusted to create a “custom” trust.

Using an alimony trust also prevents the possibility of the failure to make regular payments, as well as preventing the above-mentioned example situation of a guardian damaging the interests of the beneficiary. A child support trust, once set up, can protect children until they become adults, and through contingency factors prevents domestic misfortune, which can negatively affect children’s growth. Finally, a trust such as this protects both the interests of the minor children and family’s wealth and financial management together.

Of course, due to the high cost of the trust company to set up a single alimony trust (usually around 30 million RMB) and the cost of setting up an investment committee and an oversight committee, as well as the fee charged by the trust company, an alimony trust is not suitable for all families. But for those wealthy families and individuals of high net worth, because of the combination of protecting both family wealth management and the interests of minor children, a trust is worth considering under the current system.

If the money available for the alimony trust does not reach the amount necessary required by a trust company, you can also consider entrusting a specific individual or institution (for such as the foundation. It is best to use a non-profit organization, or one with a government background, in order to avoid mixing up with the business trust).

Important Announcement

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If you have any questions regarding this publication, please contact:



Contact Us

Beijing Office

Tel.: +86-10-8525 5500
Suite 906, Office Tower C1, Oriental Plaza
No. 1 East Chang An Ave.
Beijing 100738, P. R. China

Estella CHEN Attorney-at-law

Tel.: +86-10-8525 5541
Email: estella.chen@hankunlaw.com

Shanghai Office

Tel.: +86-21-6080 0909
Suite 5709, Tower 1, Plaza 66, 1266 Nanjing
West Road,
Shanghai 200040, P. R. China

Yinshi CAO Attorney-at-law

Tel.: +86-21-6080 0980
Email: yinshi.cao@hankunlaw.com

Shenzhen Office

Tel.: +86-755-3680 6500
Suite 4709, Excellence Times Plaza, 4068
Yitian Road, Futian District,
Shenzhen 518048, P. R. China

Jason WANG Attorney at-law

Tel.: +86-755-3680 6518
Email: jason.wang@hankunlaw.com