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LAWS REGARDING SOLID WASTE DISPOSAL AND TREATMENT REVISED

Key Points:

- ***Principle of “He who pollutes the environment shall be liable”***
- ***Defendants obliged to provide evidence to prove innocence in pollution cases***
- ***Manufacturers’ responsibility extended***
- ***Pollution prevention obligations established upon termination or restructure***

Effective as of April 1, 2005 China revised the existing Solid Waste Environment Pollution Prevention Law (“Revised Law”). This law, first introduced in 1995, is repealed by the Revised Law.

The generation of solid waste keeps increasing with the rapid development of China’s economy. Industrial waste rises by 7% annually while household garbage increases by 4% each year. In China, the capacity for disposal of solid waste is insufficient, worsening the pollution problem. New types of pollutants, such as waste electrical appliances, have also added to pollution.

The Revised Law clarifies the definitions of solid waste, industrial waste, household waste and dangerous waste. For the first time, the revised law adds punitive provisions targeting illegal import of solid waste to reflect the revision of the Criminal Law in 2002 regarding smuggling of waste. The Revised Law provides that the import of solid waste is subject to fines ranging from RMB 100,000 to RMB 1 million, and that the waste may be ordered for re-shipment; if the importer commits criminal liabilities, criminal

liabilities shall be pursued. Moreover, any imported waste must be in compliance with State standards and must be inspected by the State inspection authority. To avoid disputes between importers and the authorities, the Revised Law adds dispute resolution measures, i.e., that the importer may either apply to the higher level authorities for re-examination or may bring administrative actions to the People's Court. Additionally, the Revised Law requires that the courier take responsibility for re-shipment of the solid waste or payment for disposal of the solid waste if the importer cannot be identified.

Another major change is that the Revised Law indicates that defendants accused of causing damage with solid wastes pollution are obliged to provide evidence to prove their innocence.

The Revised Law adopts the principle of "He who pollutes the environment shall be liable." At the same time, the manufacturer, importer, seller, and user are responsible for solid waste pollution prevention and treatment they generate. Further, the Revised Law extends the liabilities of manufacturers and makes retrieval of some products and packages compulsory.

Based on the experiences of other countries, the Revised Law imposes restrictions on excessive packaging. According to statistics, 30% of urban household garbage derives from packaging. To solve this problem, the Revised Law requires that some packages be subject to compulsory retrieval; at the same time, the State standards administrative authorities will set relevant standards to restrain excessive packaging.

The Revised Law also pays attention to pollution in China's rural areas and provides some requirements in principle, such as reasonable utilization and pollution prevention, but no punitive provision for rural household garbage yet at this time.

With regard to hazardous solid waste, the Revised Law requires planning and construction of centralized disposal facilities and storage time in warehouses, and grants authorities' power to take emergency measures. Furthermore, collection, storage and disposal of hazardous solid waste are subject to operation licensing issued by the environmental administration at the county or a higher level. Companies engaging in utilization of hazardous waste are subject to operation licensing issued by the environmental administration authority at the provincial or higher level.

In addition to the above, the Revised Law also sets certain requirements in the event that a company terminates or changes due to merger, division, cancellation, dissolution, etc. Before termination, the company must adopt measures toward providing for equipment and sites for solid waste storage and disposal to prevent pollution and proper disposal of solid waste. Relevant parties may allocate these responsibilities through contracts. A company that survives and continues to exist after a change must dispose of its solid waste and ensure the safe operation of its facilities and sites for storage and disposal of solid waste. The Revised Law further provides that in the case of companies that terminated before the Revised Law came into effect and have solid waste that has not yet been disposed of, or for which safety treatment equipment and sites

for solid waste storage and disposal are still required, the relevant People's Government will bear the cost. However, if such companies' land use rights were transferred according to law, in the absence of different agreements among relevant parties, the transferee(s) shall be responsible for the relevant cost. To reduce industrial solid waste pollution, the Revised Law provides for the State to publish information on outmoded techniques and equipment that generate serious pollution, and requires manufacturers, sellers, importers and users of such techniques or equipment to terminate their manufacture, sale, import or use within a statutory period announced by relevant departments of the State Council. According to the Revised Law, in addition to fines, the People's Government at the county or above level may order companies that cause serious pollution to terminate their operation or shut down. – *Jennifer Liu*

STANDARDS RELEASED FOR MBO OF SOES

Key Points:

- ***Does not apply to large SOEs and listed companies***
- ***Includes restrictive procedures and qualifications***

On April 14, 2005 a long-expected regulation on management buyout (“MBO”) of State-owned enterprises (“SOEs”) was published jointly by the State-owned Assets Supervision and Administration Commission (“SASAC”) and the Ministry of Finance.

The regulation clarifies requirements and standards applicable to such transactions for the first time.

The Interim Regulation on Transfer of State Ownership to Management of Enterprises (the “Regulation”), however, excludes the possibility of the MBO of large State-owned enterprises, State-controlled enterprises and their major wholly owned or controlled subsidiaries dealing with the same main businesses, as well as the State-owned equity interest of public companies. The Regulation limits the MBO of SOEs to small and medium-sized enterprises. SASAC statistics indicate that by the end of 2003, China had around 150,000 SOEs, of which 98% were small and medium-sized firms. (For standards categorizing enterprise sizes, please refer to the information on the chart at the end of this article.)

The standards set up for MBOs include qualifications for management buyers of smaller and mid-sized firms, procedures and venues for dealings, and relevant financing channels and information disclosure procedures.

The regulation is designed to ensure transparency and fairness in management purchases of State-owned property, a popular practice in China's SOE reforms in recent years but one that has in the meantime been accompanied by many problems, such as self-dealing, illegal financing, and erosion in the interests of State and ordinary employees due to legal loopholes in the sector.

According to the Regulation, potential management buyers of smaller SOEs cannot participate in the design plans to sell State assets or relevant audits,

asset evaluations and pricing matters. They should compete in such actions on equal terms with other potential buyers in designated assets and equities markets. The terms and conditions for the transfer and assignment of State ownership of enterprises as provided in the ownership transfer announcements must not contain any exclusive terms favoring the management, or any other arrangement specifically beneficial to the management. Those found liable for declining performances of their enterprises or

engaged in fraud in their dealings cannot take part in bidding.

The Regulation does not allow the management to take over the State-owned enterprises indirectly by means of trust, consignment or otherwise. When the management takes over any transferred SOE, the management must provide evidence certifying the source of its capital funds used for the purchase. MBOs must not be financed by any State-owned and State-controlled enterprises, including the transferred

Reference: Standards for Categorizing Enterprise Sizes					
Industries	Items	Unit	Large Size	Medium Size	Small Size
Industrial Enterprises	Employee Number	Persons	2,000 and above	300-2,000	Less than 300
	Sale Revenues	10,000RMB	30,000 and above	3,000-30,000	Less than 3,000
	Total Assets	10,000RMB	40,000 and above	4,000-40,000	Less than 4,000
Construction Enterprises	Employee Number	Persons	3,000 and above	600-3,000	Less than 600
	Sale Revenue	10,000RMB	30,000 and above	3,000-30,000	Less than 3,000
	Total Assets	10,000RMB	40,000 and above	4,000-40,000	Less than 4,000
Wholesale Enterprises	Employee Number	Persons	200 and above	100-200	Less than 100
	Sale Revenue	10,000RMB	30,000 and above	3,000-30,000	Less than 3,000
Retail Enterprises	Employee Number	Persons	500 and above	100-500	Less than 100
	Sale Revenue	10,000RMB	15,000 and above	1,000-15,000	Less than 1,000
Transport Enterprises	Employee Number	Persons	3,000 and above	500-3,000	Less than 500
	Sale Revenue	10,000RMB	30,000 and above	3,000-30,000	Less than 3,000
Postal Services Enterprises	Employee Number	Persons	1,000 and above	400-1,000	Less than 400
	Sale Revenue	10,000RMB	30,000 and above	3,000-30,000	Less than 3,000
Hospitality and Food Enterprises	Employee Number	Persons	800 and above	400-800	Less than 400
	Sale Revenue	10,000RMB	15,000 and above	3,000-15,000	Less than 3,000

Based on the Notice to Circulate the Interim Regulation on Medium and Small Size Enterprises (Guojingmao Zhongxiaoqi [2003] Decree No. 143, issued jointly by the former National Economic and Trade Commission, former National Plan Commission, Ministry of Finance and State Administration of Statistics in 2003) and the Interim Measure of Statistic Categorization on Large, Medium and Small Size Enterprises (Guotongzi [2003] No. 17, issued by the State Administration of Statistics in 2003)

enterprise. The management also may not provide any guarantee, mortgage, pledge, or discount, or otherwise use any State-owned assets or properties possessed by such enterprises in order to benefit itself. Now that China's economy is in a drastic reshuffle and a diversified equity structure is being encouraged, it is essential for China to hasten the pace of legislation in the State assets management scheme to set clearer standards for the reforms of State-owned enterprises and ensure fairness of such reforms. It has been reported that the SASAC is actively working on a regulation on the adoption of stock options in SOEs, which will be encouraged on an experimental basis. – *Zhong (John) Wei*

Notes:

1. "Industrial Enterprises" includes mining enterprises, manufacturing enterprises and production and suppliers of power, fuel gas and water.
2. Large and medium size enterprises must satisfy all minimum requirements, or will be categorized into the next category.

NEW REVISIONS TO THE PRC COMPANY LAW PROPOSED

Key Points:

- **Transparency and accountability of boardroom operations enhanced**
- **Rights of minority shareholders enhanced**
- **Relaxation of restrictions on raising capital**

Given developments in China's corporate governance, the growth in the number of company formations, and China's continuing drive toward

export-driven economic growth, it is not surprising that further revisions have been proposed to the PRC Company Law. The proposed revisions are designed: (a) to ease corporate investment by Chinese citizens by reducing the minimum investment thresholds; (b) to improve the regulatory environment for companies wishing to raise capital; and (c) to enhance the protection and rights available to Chinese shareholders. The proposed changes are as follows.

First, the existing dedicated minimum investment threshold amounts applicable to different sectors are to be abolished and replaced by a single minimum investment sum of just RMB 30,000. It is proposed that this sum be injected over a maximum two-year period, rather than the existing requirement to invest the sum immediately. This should have considerable impact, given that the existing minimum threshold for a manufacturing enterprise is RMB 500,000, while that for a services enterprise is now RMB 100,000. However, note that the revised law also proposes to permit the establishment of sole-person corporate entities having a minimum registered capital threshold of RMB 100,000. Moreover, the scope of matter that may be invested is set to expand to include other intellectual property and rights and interests, subject to the restriction that the direct monetary investment must account for at least 30% of the total investment.

Second, shareholders are set to be better protected. Shareholders who collectively hold 10% or more will be entitled to call for an interim shareholders' meeting holding, while shareholders with – collectively – as little as 3% or more will be entitled to

have matters placed before the board of directors. Improved transparency and accountability will be achieved through a series of new provisions. These will require the disclosure of directors' salaries and other benefits, while shareholders will be permitted to take joint legal action against the company and will also see a new requirement that at least one-third of the board be independent.

Finally, the raising of capital in the marketplace is to be eased, with the existing minimum share capital requirement of RMB 50M prior to listing set to be reduced to RMB 30M. Other measures aimed at loosening the existing listing requirements are expected to emerge in due course. Overall, the proposed amendments mark yet another milestone in the gradual transition to a market economy and are certainly most welcome. To date, the Legislative Affairs Office has not given any expected date for the revisions to be introduced. – *Diarmuid O'Brien*

NEW RULES TIGHTEN FOREIGN INVESTMENT IN RADIO AND TV PROGRAM JOINT VENTURES

Key Point:

- *Tighter control of the media industry*

After the State Administration of Radio, Film and Television ("SARFT") and MOFCOM jointly issued the Provisional Rules on the Administration of Sino-Foreign Joint Ventures Engaged in Radio and TV Program Production (the "Provisional Rules") in the fall of 2004, SARFT issued a notice on February 25, 2005 that provides detailed rules for the Provisional

Rules, tightening the government's control on the media industry.

This Notice provides detailed rules that apply to joint ventures establishment under Article 6 of the Provisional Rules. First, with respect to Article 6.1 of the Provisional Rules that requires that establishment of joint ventures conform to the development plan for the radio and TV program industry, the Notice states that "in principle," foreign companies are allowed to establish one joint venture, although in exceptional circumstances, a foreign company may apply for a second joint venture with appropriate explanations. Second, while the Notice stresses that the foreign company must be a professional radio or TV enterprise as provided in Article 6.2 of the Provisional Rules, it explains that this kind of foreign company includes a radio station, a television station or a professional television program producer, but Chinese domestic radio stations or television stations cannot participate in these joint ventures. Third, the "three-year term" rule provided in Article 6.7 of the Provisional Rules is clarified to provide for stringent qualification requirements for the Chinese party and the foreign party. The foreign party may not have had any "unfriendly" record filed against it within three years prior to the application of the joint venture establishment. The Chinese party may not participate in joint ventures if it has owned the relevant licenses¹ or has been established for no more than three years. In addition, Chinese parties that have held licenses or existed for more than three years are not eligible to participate in a joint venture

¹ Radio and Television Program Production Operation License, or TV Series Production License (Type A).

if they have been warned or punished in any way within three years prior to the application.

The Notice provides for detailed sanctions for joint ventures that cannot meet the requirement that two-thirds of their total annual production be China-related. Business operations of joint ventures that cannot meet this requirement within three years will be suspended. Furthermore, the Notice provides that radio and TV joint ventures shall not engage in any operation on the frequencies or channels of domestic radio stations or TV stations. Finally, the Notice stresses that the power and rights owned by the Chinese party shall not be authorized or entrusted to the foreign party. –*Wei Zhang*

DRUG REGISTRATION RULES UPDATED

Key Points:

- *Tentative regulation of 2002 updated*
- *Procedural transparency improved*

The Drug Registration Administration Measures (the “Measures”) issued by the State Food and Drug Administration (“SFDA”), which took effect May 1, 2005, are an update from the previous “tentative” regulation of 2002 on the same subject matter.

Most of the 200-plus articles in the tentative regulation remain in the Measures, and changes are limited. Among the changes, however, some are significant and worth noting.

One change is the improvement in procedural transparency. The registration of a drug may involve

a variety of SFDA approvals at different stages. Under the Measures, when SFDA rejects an application, SFDA must issue a written response to the applicant citing the reasons for the rejection. Furthermore, the Measures require that SFDA and all local counterparts make available to the public all approval requirements, detailed procedures, time limits, examination results on applications, etc., on the Internet and through other media accessible to the public.

On substantive provisions, one addition to the circumstances in which “fast track approval” procedures may apply to a new drug application is the presence of an emergency situation. This addition was probably prompted by the SARS breakout in 2003. Another change was that the Measures require clinical trials, requisite for most drug registrations, to be implemented within three years after approval for such trial by SFDA, as opposed to two years under the tentative regulation.

– *Yong Zhao*

AMENDMENTS TO RULES GOVERNING FOREIGN-INVESTED TRAVEL AGENCIES RELEASED

Key Points:

- *Minimum registered capital lowered*
- *Geographic restrictions removed*

The China National Tourism Administration (“CNTA”) and Ministry of Commerce (“MOFCOM”) recently released two amendments to the Provisional Regulation on the Establishment of Foreign Majority

Joint Venture and Wholly Foreign-Owned Travel Agencies (the "Provisional Regulation") issued June 12, 2003.

The first amendment lowers the minimum registered capital of foreign-invested travel agencies from RMB 4 million to RMB 2.5 million. This is mandated by China's WTO commitments for December 2004.

The second amendment removes geographic restrictions, almost three years ahead of China's WTO commitments. The original regulation restricted foreign majority joint venture or wholly foreign-owned travel agencies in State Council-approved tourism and resort areas and five cities, namely Beijing, Shanghai, Guangzhou, Shenzhen, and Xi'an.

However, other restrictions in the Provisional Regulation remain unchanged. Neither a foreign-controlled nor a wholly foreign-owned travel agency is, in principle, allowed to set up any branch office for the purpose of expanding its business. Foreign shareholders of foreign-controlled and wholly foreign-owned travel agencies must meet the following criteria:

- 1) The annual tourism-related turnover of a shareholder of a foreign-controlled travel agency must be US\$40 million or more, and US\$500 million or more for a shareholder of a wholly foreign-owned travel agency;
- 2) The foreign shareholder must be a travel agency or an enterprise mainly engaging in the tourism business;
- 3) The foreign shareholder must be a member of the tourism association in its country or region;
- 4) The foreign shareholder must have an international reputation and advanced management experience.

Among the remaining restrictions, the one on establishing branches will be lifted by the end of 2007 according to China's WTO commitments. The commitments also require national treatment in respect of minimum registered capital, which, based on the Regulation on Management of Travel Agencies, would be RMB 1.5 million for travel agencies engaging in international tourism business and RMB 300,000 for travel agencies engaging only in the domestic tourism business.

It should be noted that a foreign-controlled or wholly foreign-owned travel agency is prohibited from engaging in the business of overseas travel of Chinese citizens or travel of persons from other regions of China to Hong Kong, Macau, and Taiwan. This is, possibly, the most critical restriction to foreign-invested travel agencies, but not a part of China's WTO commitments. Compared to the inbound tourism service, foreign travel agencies have an advantage in the outbound tour market. Outbound tours are also much more profitable than inbound tours. The purpose of restricting foreign-invested travel agencies from engaging in outbound tour services is to protect domestic travel agencies. However, according to an official at the Tourism Administration, foreign-invested travel agencies may be granted certain outbound tour quotas in the future. – *Lindsay Zhu*

AMENDMENT PASSED ON HUMAN RESOURCES MARKET MANAGEMENT

Key Points:

- *Attempts to unify China's regulations on administration of human resource joint ventures*
- *Only human resource joint ventures are allowed and wholly foreign-owned human resource agencies are not permitted*

On March 22, 2005, the Ministry of Personnel ("MOP") and the State Administration for Industry and Commerce ("SAIC") amended the Regulations for Human Resources Market Management ("Regulations"), first issued in September 2001. The amendment provides that an application to establish a human resources joint venture shall be made to a local Department of Personnel at the provincial level, rather than the Ministry of Personnel in Beijing. An important purpose of the amendment is to keep the Regulations consistent with the Provisional Regulations for the Administration of Sino-Foreign Equity Joint Venture Human Resource Agencies ("Provisional Regulations"), which were also jointly issued by MOP and SAIC in September 2003 and provide more detailed regulations governing the establishment and operation of human resources joint ventures. In the Provisional Regulations, the examination and approval agency for establishing a human resources joint venture is the Department of Personnel at the provincial level.

According to both two regulations, only joint ventures are allowed and wholly foreign-owned human resources agencies are not permitted.

Other conditions in the Provisional Regulations for establishing a Sino-foreign human resources joint venture include:

- The foreign party's stake in the joint venture may not exceed 49%. Foreign investment, however, must account for at least 25% of the joint venture's registered capital.
- The PRC domestic investor in such a joint venture must be a human resources agency that has been established for at least three years. The foreign party must be a company, enterprise or other type of economic organization with at least three years of experience in the human resources agency business.
- The joint venture must have at least five full-time staff members who have completed tertiary education and obtained a qualification certificate for human resources intermediary services.
- Registered capital of the joint venture may not be less than US\$300,000.

Joint ventures may engage in five types of business, depending on their approved business scope:

- Information and consulting services related to personnel supply and demand;
- Personnel recommendation;
- Personnel recruitment;

- Personnel appraisal;
- Personnel training.

Although the amendment of the Regulations is an attempt to unify the Regulations and the Provisional Regulations, it produces new inconsistencies between the two regulations. For example, the time

limit within which the examination and approval agency must approve the establishment of a human resources joint venture according to the Provisional Regulation is 30 days, while according to the amendment, it is 20 days. According to an official at MOP, an updated version of the Provisional Regulations will be released in the near future.

– Guojun Ye

Presentations, articles and publications

May 24 and May 26 **Eduardo Sebastián de Erice, Carlos Rodriguez and Diego Ramos** of Squire Sanders' Madrid office spoke on Chinese foreign investment regulations and incentives, the PRC Contract Law and tax aspects of doing business in China at a seminar organized by the Municipality of Madrid.

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Please Note

Squire Sanders' China practice in Beijing, Hong Kong and Shanghai has expanded to new offices in **Shanghai**. The address and phone number for the new Shanghai offices are provided above.



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