

	<p><b>China Law Deskbook (3rd Ed. 2010)</b>  <b>a publication of the American Bar Association</b></p> <p><b>March 1, 2011</b></p> <p><b>James M. Zimmerman, Esq.</b>  <b>Beijing, China</b></p>
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Colleagues:

The following is the March 2011, posting of *China Law Deskbook Monthly: News & Views from Beijing*. My intent with each monthly newsletter is to provide readers with useful on-the-ground sourced intelligence and observations about topics that may be helpful to business in China, and to supplement the 3rd Edition of the Deskbook published in June 2010. Here are a few new laws, regulations, and policy trends that I find of interest this month including the upcoming National People's Congress meeting in Beijing in March 2011, amendment to the Criminal Law, new court rules of the Supreme People's Court concerning judicial ethics, and the State Council's standards concerning the national security review process:

- The month of March 2011 will be busy from a **legislative and policy perspective**. the Chinese People's Political Consultative Conference meets on March 3-10, 2011, and the National People's Congress (NPC) meets on March 5-10, 2011. Several key issues on the agenda include the review and promulgation of the 12<sup>th</sup> five-year program, which outlines the plan for national development from 2011 to 2015. In January, the State Council held a series of seminars to review the economic and social action items in the program, and led by Premier Wen Jiabao. In addition to the 12<sup>th</sup> five-year program, the NPC will review various ongoing tax programs including the controversial property tax program which is designed to cool down the market, social security reform, and other issues. *With the pressures from the tumult in the Middle East, the Chinese leadership is keen to maintain its relevance and will continue to tackle issues important to maintaining social stability and continued growth.*
- In February 2011, the Supreme People's Court has issued a series of regulations designed to improve **judicial ethics**. On February 20th, the SPC issued regulations that provide that judges and other court officials are prohibited from privately meeting litigants, their lawyers, or family members of matters that they are handling in their courtrooms. This is a significant development and a positive step to move away from the uncontrolled practice of *ex parte* communications. In addition, the new court rules forbid judges and court officials, including those that are retired, from assisting litigants in filing documents, or to intervene on their behalf. If judges or judicial officials, while performing their duties, are required to issue opinions or directives with respect to ongoing litigation, the orders or suggestions must be in written form and included in the case file for recordkeeping. The rules provide for a range of sanctions for violating the rules including warnings, disciplinary action, or criminal prosecution. On February 10th, the SPC issued court rules that require judges who have a family member that works as a lawyer in the same judicial district to disclose of a potential conflict of interest and to be recused from taking on litigation when the family member is employed or involved in the litigation. *Corruption of the judiciary remains a serious problem, and especially after former SPC vice-president Huang Songyou was investigated for corruption in 2008. Huang received a life sentence in 2010 for accepting bribes of more than RMB 3.9 million (US\$574,000). Favoritism and suspicious ex parte communications have long been a problem in China's judicial system. The SPC's ongoing reform is welcome and a positive development to enhance the professionalism of the judiciary.*

- The State Council, pursuant to the Anti-Monopoly Law, promulgated its *Notice Regarding the Establishment of National Security Review Mechanism for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors* on February 3, 2011, which is effective as of March 5, 2011. In accordance with the Circular, national security review applies in two key categories of mergers and acquisitions (M&A) activities including in the following circumstances (Article 1.1): (1) *Defense Related Acquisitions*: Foreign investors' mergers and acquisitions (“M&A”) of domestic military enterprises and military supporting enterprises, enterprises adjacent key and sensitive military facilities, and other entities relating to national defense security, or (2) *Acquisitions in Key Technology Sectors*: Foreign investors' M&A of *domestic enterprises* involving key agricultural products, energy and resources, infrastructure, transportation service, key technology and major equipment manufacturing which may impact the national security and such M&A may result in the acquisition of *de facto control* by the foreign investor of such enterprise. (National Security Review Circular, art. 1.1) Relevant to the second category of acquisitions, the Circular defines foreign M&A of “domestic enterprises” as follows: (a) a foreign investor's purchase of the equity of a domestic non-foreign-invested enterprise, or subscription of the capital increase of a domestic non-foreign-invested enterprise, thereby transforming said enterprise into a foreign-invested enterprise; (b) a foreign investor's purchase of the equity held by Chinese shareholders in a domestic foreign-invested enterprise, or subscription of the capital increase of a domestic foreign-invested enterprise; (c) a foreign investor establishes a domestic foreign-invested enterprise, purchases by agreement the assets of a domestic enterprise through said foreign-invested enterprise, and operates such purchased assets, or purchases the equity of a domestic enterprise through the said foreign-invested enterprise; or (d) a foreign investor directly purchases the assets of a domestic enterprise and uses the purchased assets to invest and establish a foreign-invested enterprise for operation of such assets. (National Security Review Circular, art. 1.2) Also relevant to the acquisition of “domestic enterprises”, the Circular provides that a foreign investor shall be deemed to have acquired “de facto control” of the domestic enterprise by M&A in any of the following situations: (a) a foreign investor holds more than 50 percent of the equity interest of a domestic enterprise after the M&A; (b) a number of foreign investors aggregately hold more than 50 percent of the equity interest after the M&A ; (c) foreign investor(s) hold less than 50 percent of the total equity interest but have sufficient voting right to substantially influence the resolutions of the domestic enterprise after the M&A; or (d) any other situations that may result in the shift of the de facto control over the domestic enterprise’s operational decision, finance, human resources and technology to foreign investors. (National Security Review Circular, art. 1.3) *Defense-related acquisitions under Article 1.1 (1) appear to trigger national security review, and no matter the extent of control by a foreign party. M&A activities involving domestic enterprises with key sectors or involving key technology require that result in a foreign party having de facto control are required to go through a national security review. The review standards under Article 2 of the Circular are very vague and ambiguous, and the Circular is silent as to what constitutes “key” technology or products under Article 1.1. It’s left for observation as to how the review process will work in practice.*
- The Standing Committee of the National People's Congress (NPC) passed the **amendment to the Criminal Law** at its bi-monthly session on February 25, 2011, which reduces the number of crimes subject to the death penalty to 55. This is the first reduction in death penalty cases since the Criminal law took effect in 1979. The 2011 amendment exempts 13 crimes from the death penalty including economic-related non-violent offences such as smuggling cultural relics, gold, silver, and other precious metals and rare wildlife products; fraud involving financial instruments and letters of credit; the false issuance or selling of fraudulent value-added tax invoices; and grave robbing of cultural ruins. The amendment follows a 2007 decision that all verdicts involving capital punishment are to be reviewed and approved by the Supreme People's Court (SPC). *The amendment further provides that the death penalty will not be imposed on people aged 75 or older at the time of trial, with the exception of murder cases involving exceptional circumstances. Prior to the amendment, only minors below the age of 18 and pregnant women at the time of the trial, were exempt from capital punishment. While removing certain non-violent crimes from the death penalty, the amendment increases the mandatory jail*

*time for various crimes including involvement with organized crime, food safety and poisoning crimes, intentional wage default, and trafficking of human organs.*

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