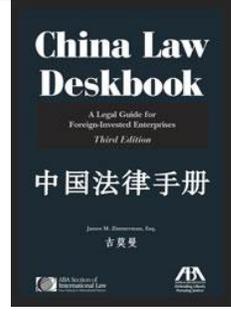


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|  | <p style="text-align: center;">CHINA LAW DESKBOOK (3rd Edition 2010)</p> <p style="text-align: center;">A PUBLICATION OF THE AMERICAN BAR ASSOCIATION</p> <p>March/April 2012</p> <p>JAMES M. ZIMMERMAN, ESQ. BEIJING, CHINA</p> |
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China Law Deskbook Monthly: News & Views from Beijing

The following are a few new laws, regulations, and policy trends that I find of interest this month:

- *Chinese Lawyers: The Duty of Loyalty to the “Client” (the Party)*
- *China imposes new rules on online purchases of overseas products*
- *China amends the Law on the Promotion of Clean Production and thus emphasizes the need to cut down on excessive product packaging*
- *State Council will adopt non-binding guidelines designed to protect online personal information*
- *China amends regulations concerning nutrition enhancers*
- *SASAC limits overseas investment by SOEs to core business sectors*

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The Ministry of Justice of the People’s Republic of China issued a requirement that mandates that all newly admitted Chinese lawyers (and those applying for license renewal) give an oath of loyalty to the Communist Party. The oath is set forth in a document entitled “*The Issuance of the Notice of the Decision on the Establishment of the System of Lawyers Oath*” and was promulgated by the MOJ on February 3, 2012, and formally published on March 23, 2012.

The oath requires a Chinese lawyer to declare as follows:

I swear to faithfully fulfill the sacred mission of legal workers in socialism with Chinese characteristics. I swear my loyalty to the Motherland, to the people, *to uphold the leadership of the Communist Party of China and the socialist system*, and to protect the dignity of the Constitution and the laws. I swear to practice law for the people, keep industrious, professional honest and corruption free, safeguard the lawful rights and interests of clients, maintain the right implementation of the law, uphold social fairness and justice, diligently strive for the cause of socialism with Chinese characteristics.

This oath is not optional but is mandatory for Chinese lawyers working for Chinese law firms. This rule does not apply to Chinese qualified lawyers working for foreign law firms, since they effectively are required to suspend their practitioner’s license to join a foreign firm. A lawyer that refuses this oath, will be declined a practitioner’s license.

While much of the oath language is a reasonable reflection of the duties of the legal profession, the Party oath requirement is a reminder that the Chinese judicial system and Chinese lawyers and law firms are simply not independent from the political process and their expressed loyalty – and notwithstanding their personal views – is first and foremost to the State. While it’s one thing that the ethical standards for Chinese lawyers and law firms are vastly inconsistent from US law firms – including the absence of the attorney-client privilege – the requirement of a loyalty oath to the Communist Party is interference at best and clearly a violation of China’s own Constitution (Article 35, freedom of association) and 30 years of commitment to an observance to the rule of law. Most Chinese lawyers that disagree with the “oath” view it as a temporary measure and/or something that is informal and non-binding. Those that tend to agree with the oath emphasize the need for political stability first then legal or economic reform will follow. Having worked with Chinese lawyers and law firms for over 20 years, the MOJ’s oath requirement is an embarrassment if not insult to the Chinese lawyers, judges, and academics that seek to improve the quality of the legal system in China. Chinese lawyers deserve better. Their clients deserve better. Until China moves in the direction of a truly independent judiciary and legal system, Chinese lawyers and law firms will never get the international respect that they yearn for. As the practice of law continues to globalize, Chinese lawyers and law firms will realize that their borders are indeed limited, if not blocked from international expansion. And the MOJ is misinformed if they believe that Chinese lawyers and law firms will be effective in carrying the Party’s message to the global stage since that message is unlikely to be welcome in the global practice of law. Indeed, in most established legal systems worldwide, justice is or should be meted out objectively, without fear or favor, regardless of identity, money, power, privilege, or political affiliation.

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China imposed new rules on **online purchases of overseas products** (known as *haitao* in Chinese), which may restrict the flow of foreign goods purchased by Chinese shoppers. On March 28, 2012, the General Administration of Customs adopted a set of measures that impose new duty procedures for imported products through online purchasing, and restrictions on collaboration between PRC domestic and overseas postal/logistics companies. Imported online purchased goods of less than RMB5000 (US\$794) and for personal use are exempt from import duties and value added tax (VAT). Goods valued at greater than RMB5000 are subject to a ten percent (10%) tax. The new rules also require that logistics providers are required to go through a special customs channel which may delay the delivery process and thus add to customer costs. The new rules are effective April 15, 2012. *The online purchase of overseas goods by Chinese buyers equaled RMB24 billion (US\$3.8 billion) and growing rapidly, and primarily includes cosmetics, garments and accessories, and skincare products. The real intent of the new rules is to enhance the revenue collection of China Customs for imported goods purchased online and delivered through the postal services. Customs also claims that the new rules will help to protect consumers from quality problems and to guard against the sale of counterfeit goods, but the new rules do not provide any guidelines or standards to explain how the process will prevent counterfeiting and product quality issues.*

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On February 29, 2012, the Standing Committee of the National People's Congress (NPC) **amended the Law on the Promotion of Clean Production**, which now emphasizes the need to cut down on excessive product packaging. The amendment is effective on July 1, 2012. The amended Clean Production Law requires that business operators package their products in a manner that *"well fits the content's quality, size and cost and makes less packaging waste."* The law requires that companies take into account the environmental impact in developing packaging

that is non-toxic, harmless, and bio-degradable and/or subject to recycling/reuse. The amended Law on the Promotion of Clean Production also sets up a disclosure and compulsory agency review process for companies that are deemed to be enterprises that have excessive emissions of pollutants, that consume excessive energy, or with production and products that involve toxic materials. *Interestingly, when the law was under debate during the NPC, one legislator – Wang Guangtao – publicly commented that excessive packaging not only caused pollution but also “fostered corruption and extravagant living”. Companies in the consumer products markets need to quickly review their packaging policies and interface with the agencies to determine whether the company is in compliance with the law.*

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A set of non-binding guidelines on the **protection of online personal data** is set to be released by the State Council in July of 2012. A draft law on privacy protection, which followed many of the principles of the EU privacy rules, was published in 2005 but has not been included in the annual agenda of the NPC in recent years. Rather, the State Council will opt for the non-binding guidelines, designed to protect online personal data. The draft guidelines have been previously approved by the National Information Security Standard Technology Committee in 2011. The Online Personal Data Guidelines will protect private information which includes identity, property interests, family data, e-mails, browser history and search history. The non-binding guidelines are designed to be provisional standards pending the drafting process for the more detailed and binding law on the protection of personal information. *China's Internet population is over 513 million people, which is the largest in the world (per the January 2012 data released by the China Internet Network Information Center). Data abuse is common in China, and the Center is taking steps to raise awareness of the issues with website operators before the compulsory standards are eventually adopted. The current legal regime for personal information protection is dismal and current regulations fail to effectively supervise financial institutions, medical institutions and health care providers, and telecom companies. The Electronic Technology Information Research Institute at the Ministry of Industry and Information Technology reports that sixty percent (60%) of Chinese internet users have experienced online data misuse at some time. Such abuse is likely to continue until the government gets serious about adopting and enforcing a law that protects personal information. In contrast, the United States adopted laws protecting personal information in the 1970s and the US courts have much experience with these issues.*

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On April 1, 2012, the Ministry of Health released an **amended regulation on the use of nutrition-enhancing food supplements** and requires that manufacturers "strictly abide by the formulation procedures stipulated under national food safety laws". The amendment is effective on January 1, 2013, and the original regulation was adopted in 1994. The amended regulation updates national requirements for nutrition enhancers to ensure that they are compliant with relevant Chinese laws and standards. Nutrition-enhancing food supplements include a variety of micronutrients added to food products to enhance nutritional absorption and to prevent disease. *The amended regulations follow the government's trend and focus on food safety issues and given the increased level of enforcement activities, food industry companies are encouraged to implement an effective compliance food production safe program.*

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The State-owned Assets Supervision and Administration Commission of the State Council (SASAC) adopted a regulation effective May 1, 2012, which is designed to regulate and supervise the **overseas investments by centrally-administered State-owned enterprises**. The new regulation restricts an SOE from investing in a sector that is not their core business, and requires approval from the SASAC to invest in areas that are outside their core business. *SOEs have experienced significant losses in overseas investments that were deemed to be risky and outside their core competency. Since the deep pocket is the national-level government, more scrutiny of SOE overseas investment is likely to take place going forward.*

See www.chinalawdeskbook.com for more postings, updates, and resources. If you have any questions or comments concerning the content of this posting, please feel free to contact me. Visit the American Bar Association for more information about the Deskbook: www.ababooks.org. Email: JZimmerman@sheppardmullin.com. *About the Author: James Zimmerman is a partner in the Beijing China office of the international law firm Sheppard Mullin Richter & Hampton LLP. Mr. Zimmerman is a former chairman of the American Chamber of Commerce China. He served two terms as chairman of the Chamber in 2007 and 2008, and has lived and worked in China since 1998. Mr. Zimmerman's China Law Deskbook: A Legal Guide for Foreign-Invested Enterprises is one of the American Bar Association's (ABA) leading publications. The 1st Edition was published in 1999, and the 3rd Edition was released in 2010. The opinions expressed herein are his own and this email newsletter is designed to be for informational purposes only and not designed to be legal advice. Copyright 2012 James Zimmerman*