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subject **Food Safety Law:
A Law that Concerns Many**

FOOD SAFETY LAW: A Law That Concerns Many

On February 28th, 2009, the Food Safety Law was adopted by the 7th meeting of the Standing Committee of National People's Congress of China (hereinafter "the Law"). The Law will become effective as of June 1st, 2009.

The Law will affect many persons and companies, not only because in general, food safety is a matter closely related to the health or even lives of a vast amount of people in and outside of China, but also because this Law specifically grants rights to each individual consumer, directly or indirectly.

But also from a pure business point of view, this Law will affect many persons and companies: the Law regulates not only the food businesses, but also food-related businesses (packages, container, washing detergent, disinfectant, food production equipments, etc.), certain conveniences-providers for food business (operators of centralized market, booth owners, organizers for food exhibition & sales, etc.), and others (advertisers for food products, food transporters, etc.).

In light of the above, this issue of our China Legal Report will give an in-depth introduction of this new Law, covering its background, structure, content, relation with neighboring laws, and considers possible future developments.

I. Reasons for the new Law

The Law comes as a legislative response to a series of food safety incidents that happened in recent years in China and that have caused health hazards and the death of many. The widely-reported "Melamine-Milk Scandal" is only one of those incidents: before or even after it, a number of other major food scandals have been reported.

The official legislative initiative to address food safety can be traced back to the year 2005. The Standing Committee of the National People's Congress, however, did not include this initiative into its working plan until 2007. The Melamine-Milk Scandal has probably speeded up the legislative process and it has considerable influence on the content of the Law – in terms of tightening the administration system and in aggravating the responsibilities of the food industry and related parties.

Before the implementation of this Law, the Chinese legislation was naturally not silent about food safety. At present, there are nearly 20 laws, 40 administrative regulations, and 150 orders effective, which were issued by different ministries at the national level. In addition to these laws, regulations and orders a wide variety of provincial and lower level regulations can be found. The recent food safety incidents however, exposed the present system to be inadequate: there is not a consolidated Food Safety Law and the Food Hygiene Law, around which the existing system is built, is not able to cover all food safety issues; furthermore, the power to regulate food safety is divided among various government departments and conflicts between the involved authorities about their respective responsibilities are not uncommon; at the moment so many food safety standards are effective in so many different laws, regulations and rules and issued by so many different governmental bodies that it is difficult for companies involved in this business to know, which regulations and standards are applicable to their respective business.

The above background is important to understand the concerns and rationale behind this new Law, including also why the approach of enacting a new Food Safety Law is chosen, instead of revising the old Food Hygiene Law. The latter procedure was discussed at first, but apparently the concerns of the public could not be satisfied by amending the old law.

The old Food Hygiene Law, issued in 1995, will still remain effective until June 1st and will at that time be replaced by the new Law.

II. Structure of the new Law

The Law consists of 104 articles in ten Chapters:

1. General Provisions (Art.1-10)
2. Surveillance and Assessment of Food Safety Risks (Art.11-17)
3. Food Safety Standards (Art.18-26)
4. Food Production and Distribution (Art.27-56)
5. Food Examination (Art.57-61)
6. Food Import and Export (Art.62-69)
7. Dealing with Food Safety Incidents (Art.70-75)
8. Supervision and Administration (Art.76-83)
9. Legal Responsibilities (Art.84-98)
10. Supplementary Provisions

III. The new Law changes a lot

The Law is not a revision of the old Food Hygiene Law, of course not because of the change in name, but because of substantial material changes:

1. Reorientation: emphasis on business operators

Compared to the Food Hygiene Law and the system built around it, the new Law implements a clearly identifiable shift from emphasizing the food business operators' passive compliance with the laws and the government's supervisory responsibilities, to underlining the business operators' role as an active and principal responsible actor for guaranteeing food safety.

This can clearly be seen in article 3 of the Law: *"The food business operators shall pursue their business in compliance with the law, regulations and food safety standards, shall be responsible to the society and the public, guarantee food safety, accept the supervision of the society, and assume social responsibilities"*.

The most conspicuous embodiment of this reorientation is the food-recalling system. According to the provisions of the new Law, if a food producer finds that the products it produced do not meet the food safety standards, it shall stop the production and call back the products that have already been delivered to clients. Besides, the Law also requires a complete system of examination of food products and requires food business operators to record the in- and out-flow of food materials, additives and products, etc.

2. New Administration System: more coordination, stricter responsibilities

According to the Law, a Food Safety Committee will be set up by the State Council. The functions of this Food Safety Committee shall be defined by the State Council. Supposedly, this Committee is intended to ensure a more effective coordination of the different departments.

Like according to the old law, the Ministry of Hygiene will still be responsible for general coordination, food safety assessments, promulgation of safety standards, etc.; and the General Administration of Quality Supervision, Inspection and Quarantine, the State Administration of Industry and Commerce, and the State Food and Drug Administration will be responsible respectively for the administration of food production, distribution, and catering services.

At the local level, instead of different departments working on their own, the Law provides that local governments at and above the county level, shall in an integrated way lead, coordinate, and organize food safety administration and supervision. These measures should improve the coordination between the different departments involved. However, there are also concerns that granting so much power to the local governments might aggravate local protectionism.

The Law also imposes stricter responsibilities on the government and its relevant departments. In case of major food accidents, the officials in charge and other directly responsible officials of the local government may receive disciplinary punishment or may even be dismissed, if their failure to fulfill their duties contributed to the accidents. The officials in charge and other directly responsible officials of the relevant departments may also receive the same disciplinary punishments for misuse or negligence of their duties.

3. Risk Surveillance and Assessment System

Drawing the lessons from several major food safety incidents in the past, during which a delayed reporting of these incidents caused additional damages, the Law introduced a risks surveillance and assessment system. It basically requires the authorities to implement surveillance plans and requires the relevant departments of the State Council to immediately report any food safety risks to the Ministry of Hygiene. Regarding the assessment of these risks, the Law requires the respective authorities to conduct an assessment, if the Ministry of Hygiene suspects the existence of risks. The other relevant departments of the State Council also have the right to propose an assessment.

However, due to the fact that the law is rather general in this regard, and no legal liabilities are provided for in case of violation of this system, the effectiveness of this system still remains to be seen.

4. Sorting out the Standards

A news report by Xinhua News Agency in August 2007 states that until that date more than 400 national standards were implemented. In addition to these national standards, there are many other industrial standards, local standards, quality standards, etc.

In light of this, the Law provides that the Ministry of Hygiene shall reassess and unify the existing standards and publish them. In principle, only the Ministry of Hygiene has the power to promulgate new national food safety standards.

The local government may only promulgate food safety standards, in case there are no national standards covering the same issue. In case neither a national nor a local food safety standard exists, the food producer shall stipulate the enterprise's own standards and file such standards in the records of the provincial administration of hygiene.

5. Stricter Requirements for Food Businesses and Related Parties

Compared to the Food Hygiene Law, the new Law introduces the following important changes:

- (a) It is expressly forbidden to produce food, which is intended for consumption by children and other special groups of people, without the nutrition ingredients meeting the respective standards.

- (b) Only the central government has the power to ban, for specific purposes such as prevention of certain diseases, the production and distribution of certain food. The provincial governments do not have this power anymore.
- (c) The Law also contains specific provisions on food additives and implements a permission system for the production of food additives, the application procedure for using new food materials or producing new food additives or new food-related products, use and labeling of food additives, etc.
- (d) Organizers of centralized markets, booth renters, and hosts of exhibitions & sales have the obligation to check the food business permits of the food business operators in their venues, inspect the sites, and report any violation, etc. to the responsible authorities. Otherwise, these persons and the operators shall bear joint responsibility.
- (e) Requirements for food advertisements: food advertisements shall not contain any reference to disease prevention or curing functions; the authorities and the examination institutions, food industrial associations, and consumers' association shall not advertise or otherwise recommend food; and social associations or other organizations or individuals shall not provide services to fraudulent or misleading food advertisement – otherwise, they shall be jointly responsible for the damage caused to consumers.
- (f) The Law also maintains the Food Hygiene Law's requirement on food transportation: Containers and other equipment used for transporting, loading and unloading food shall be safe, clean, meet temperature requirements, etc.

6. Abolishment of Examination-Exemption

The most notable change in this regard is that, the system of exemptions from examination is abolished. This has the effect that every food business operator will be subject to periodic or non-periodic examinations. This is also a lesson directly drawn from the major food incident in the past: “Sanlu” the main producer of contaminated milk was at the relevant time enjoying an exemption from examination.

7. Strengthened Import & Export Regulation

- (a) The Law reaffirms that imported food shall meet the national food safety standards of China. For food to be imported, on which no food safety standards are implemented yet, or for the first-time importation of new food additives and new food-related products, the law requires the importer to submit safety assessment documents in order to receive an import permission by the Ministry of Hygiene.
- (b) Companies exporting foods to China shall be registered with the administration of entry-exit inspection and quarantine, which shall periodically publish the list of registered enterprises.
- (c) Pre-packaged food products, exported to China, shall also have Chinese labels and instructions, which shall meet the requirements of the Chinese law, indicating the origin of the product and the name, address and contact methods of the Chinese distributor. Otherwise, the export of these products to China will not be allowed.
- (d) The administration of entry-exit inspection and quarantine will establish and publish the credit records (i.e. to our understanding, based on the results of

inspection and quarantine) of food importers, exporters and producers of exported foods. For enterprises with lower credits, a stricter inspection will be imposed.

8. Aggravated Punishments for Violations by Business Operators

Not only the punishments for the government and its relevant departments have been aggravated as mentioned above, so do the legal consequences for violations by business operators. This is reflected in the following:

- (a) More punishable violations: For example, the following are now explicitly punishable: food intended for children or special groups of people does not meet the nutrition standards; the enterprise's own food safety standards fail to be put in the records of competent authorities; the operator of centralized market, etc. fail to examine the food business permit; the food business operators do not establish an in-out-flow record system, etc.
- (b) Higher Fines: the standard fine for most violations conducted by a business operator accumulates to 2,000-50,000 RMB (for cases, in which the value of food products involved do not exceed 10,000 RMB), or 5-10 times of value of the food products involved (for the case, in which the value of food products involved is above 10,000 RMB). If the circumstances are serious, the business license may also be cancelled. In this case the responsible person is not allowed to be active in food business operations or management within five years.
- (c) 10-Times Payment: in case a violation by a food business operator causes personal or property damage, the consumers, besides asking for compensation, may ask the food producer or seller to pay a compensation in the amount of 10 times of the food price.
- (d) Responsibilities of Related Parties: in line with the obligations of the other related parties, the Law provides for the legal basis for punishments and liabilities of operators of centralized markets, booth owners, exhibition & sale organizers, food transporters, food examination institutions and personnel, people involved in fraudulent or misleading food advertisement, food industrial associations, consumers' associations, etc.

IV. Relationship between the Law and other laws/regulations

The Law does not apply to the regulation of products primarily sourced from agriculture. Products primary sourced from agriculture are governed by the Law on Quality and Safety of Agricultural Products (effective as of November 1, 2006). However, the promulgation of quality and safety standards and the publication of the safety information for such products are subject to this Law.

The Law does not provide for any special rule about its relationship with other laws, such as the Products Quality Law and the Consumers Protection Law. In our opinion, within their respective common areas, the Food Safety Law shall be considered as "special law" of Products Quality Law and Consumers Protection Law respectively, and therefore the Food Safety Law enjoys a priority in application. In matters, which are not covered by the Food Safety Law, the other two laws shall be applied respectively.

Its relationship with other laws shall be dealt with according to the general principles regarding conflicting regulations: laws implemented by a higher legislative organ enjoy priority over those from lower level organs; special laws enjoy priority over general laws; newer laws enjoy priority over older laws.

V. What's next?

The preceding part introduces – from the author's perspective – the most, but obviously not all, important changes brought by the new Law. As a general comment, it can be said that the Law is a big progress in many aspects. However, it has also been criticized for lack of operable provisions in some aspects, for a poor legislative technique, for the implementation of not thought-through changes, etc.

Hopefully, the follow-up legislations will amend those drawbacks. At present, the Implementation Rules of Food Safety Law is in process of being contemplated, and they are anticipated to be issued on June 1st, 2009, i.e. the time when the Law becomes effective.

Also, the Food Safety Committee is supposed to be established before the Law comes into effect. In the meanwhile, the unified food safety standards are expected to be published, as is required by the Law.

According to the routine, it is also probable that the Ministry of Hygiene and other relevant departments of the State Council will promulgate their special implementation measures around June 1st, 2009.

WENFEI will follow up the developments of the Food Safety Law and will report the important progresses in our "China Legal Briefing". After all, this is a law that deserves the attention of many people and companies.

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