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The New Food Safety Law of the People's Republic of China

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I. Introduction

A number of scandals in the food industry in China, such as the milk and infant formula scandal, which occurred in 2008 and caused the death of six babies as well as the hospitalization of thousands of others, due to Melamine contaminated milk and infant formula, as well as for

example the scandal involving Shanghai Fuxi Company, a supplier of many international restaurant giants such as McDonald's and KFC, which was investigated in 2014 for selling expired meat products on a massive scale, has shown that food safety in China causes serious concerns. The weak spots in regard to food safety in China have been pointed out be due to both: 1) insufficient self-management among food producers themselves; 2) food safety supervision conducted by government organs has shown to be insufficient.

Due to the above scandals, the government has been facing increasing pressures from both consumers as well as global trading partners to improve the food safety situation. Ensuring food safety therefore became a priority of the Chinese government. This led to the enactment of the *Food Safety Law of People's Republic of China* in 2009 (the “**FSL 2009**”). In 2013, China began the process of modifying the FSL 2009, aiming to implement the “strictest food safety law” in the history of food regulation in China. The revised Food Safety Law of People's Republic of China (the “**FSL 2015**”) was thereafter adopted by the Standing Committee of the National People's Congress on 24 April 2015 and will come into effect on 1 October 2015. The FSL 2015 includes 10 chapters with 154 articles. Compared to the old version published in 2009, which has 104 articles, the FSL 2015 added nearly 50% new and revised 90% of the articles. You may find the Food Safety Law 2015 under the following link: http://www.npc.gov.cn/npc/cwhhy/12jcw/2015-04/25/content_1934591.htm

The FSL 2015 constitutes the foundation of government supervision in the food industry and it is expected that implementing rules or regulations will be released after the enforcement of the FSL 2015. The reform will have a significant impact on both domestic and foreign entities engaging in the food industry in China, including producers, traders, catering service providers and other related parties.

II. Regulatory Authority

The China Food and Drug Administration (the “**CFDA**”) is the primary regulatory authority in charge of food safety. Other regulatory authorities such as the Ministry of Health as well as the Ministry of Agriculture, the Entry-Exit Inspection and Quarantine Bureau and the Quality Supervision Bureau will also be involved in regulating food safety and will coordinate and share information with the CFDA with respect to food safety issues.

III. “Whole- Process” Regulation

The FSL 2015 puts an emphasis on the supervision and control of every step in the whole process of food production. The responsibilities and obligations of a full range of market participants are demonstrated and clearly shown. The regulated participants include producers of edible agricultural products, food manufacturers, food additives producer and other businesses with direct contact to food, such as retailers, catering services providers, canteens, entities which provide services of centralized disinfection, importers and exporters but also third-party platforms such as organizers of centralized transaction markets, lessors of counters, organizers of trade fairs

and providers of third-party online food transaction platforms.

Following are some specific provisions contained in the FSL 2015.

1. New rules for online food platforms and retailers

Besides the due diligence requirements for organizers of centralized transaction markets, lessors of counters and organizers of trade fairs, the FSL 2015 also adds new articles (Article 62, 131) regarding the liabilities of online food transaction platforms. Online food platforms are required to carry out due diligence in order to register the real identity of their vendors and check whether they have received all necessary government approvals necessary for their respective activity. They are required to report malpractice of vendors to the responsible government offices and to deny delinquent vendors access to their platform.

2. Edible agricultural products are also regulated

The FSL 2015 also regulates edible agricultural products. Marketing activities for edible agricultural products, the release of relevant quality and safety standards and issuing relevant safety information shall be subject to the FSL 2015, while the quality and safety management of the product shall remain to be governed by the *Law of the People's Republic of China on Quality and Safety of Agricultural Products*. A seller of edible agricultural products shall establish a procurement inspection record system and truthfully record the information of their suppliers and retain copies of their suppliers' relevant certificates. The records and certificates shall be kept for at least six months. Anti-staling agents, preservatives and other food additives as well as the packaging materials and other food-related products used in the process of packaging, preservation, storage and transportation of edible agricultural products entering the market, shall be in conformity with the national food safety standards.

3. Comprehensive obligations imposed on food producers

Food producers will be required to create a whole-process food safety self-examination, self-control and traceability system and they will be held strongly liable for the safety of their food products. According to Article 50 to Article 54 of the FSL 2015, a food production enterprise shall establish a procurement inspection record system and the respective records and certificates shall be kept until at least six months after the expiry of the shelf life of these products. If a product does not have a shelf life, the respective records and certificates shall be kept for at least two years. A food production enterprise is also required to establish and implement a health management system, a food safety self-inspection system, a food ex-factory testing record system and a food sale record system. Moreover, it shall conduct regular checks of food inventory to promptly clean up deteriorated food or food whose shelf life has expired. Last but not least, it is required to implement a control system for its food transportation and delivery.

4. Catering services providers' obligations are clarified

The FSL 2015 implements the duty of catering services providers to play a more positive role in ensuring food safety. Pursuant to Article 55 to Article 58, catering services providers shall formulate and implement raw material control requirements and shall not purchase any food or raw materials, which fail to meet the food safety standards. Maintenance of the food processing, storage and display facilities and equipment and wash and heat preservation facilities, refrigeration and freezing facilities shall be conducted on regular basis. Catering services providers may not use any tableware or drinking utensils which have not been washed and disinfected.

IV. Strengthening of Enforcement Measures

The FSL 2015 explicitly stipulates a comprehensive administrative, civil and criminal liability system, which shall be imposed on producers and operators, but also on local governments and regulatory departments.

1. Liability for civil damages

The FSL 2009 is ambiguous in regard to from whom a consumer may claim compensation for losses suffered due to products not in compliance with the food safety standards. In practice, the difficulty in determining whether the producer or the trader is the responsible party, usually leads to consumers' inability to obtain timely and adequate compensation. This situation has now been changed in the FSL 2015, since the FSL 2015 holds producers and traders jointly and severally liable. According to Article 148, consumers, who suffer damage due to food that fails to meet food safety standards, may now demand compensation for their losses from either any business operator involved in the respective transaction or from the producer of the product.

The operator or producer who receives a demand for compensation from a consumer for losses suffered due to a product not in compliance with food safety regulations, shall be fully liable and pay full compensation. Only thereafter may the respective business operator or producer be entitled to seek recovery from other parties.

In addition to compensation for losses, consumers may ask for an additional compensation of three times the amount of the losses suffered or ten times the price of the food not in compliance with food safety standards. The FSL 2009 on the other hand only entitles a consumer to a compensation of damages amounting to 10 times the product's sale price, which has been widely criticized as being too low to deter violations.

The FSL 2015 further prescribes that a party, who knowingly provides places or other conditions for illegal food production activities, shall also bear joint and several liability, together with the illegal producer. Moreover, a social group or any other organization or individual shall also bear

joint and several liabilities, if it recommends food to consumers in false advertisements or other false publicity.

Online food transaction platforms and organizers of centralized transaction markets, lessors of counters and organizers of trade fairs are required to register the real identity of vendors and check their respective government certificates. If they fail to do so, they too will bear joint and several liability.

The FSL 2015 therefore considerably improves the protection of consumers and tries to ensure that they receive compensations and damages in case they suffer from food not in compliance with food safety standards.

2. Administrative liability

In case of a food safety issue, administrative liabilities may be applied in addition to the above mentioned consumer claims. The FSL 2015 increases the cap for administrative fines for various situations. As an example, if the value of illegally produced food is less than RMB 10,000, a fine of not less than RMB 100,000 but not more than RMB 150,000 is applied. On the other hand, if the value of the illegally produced food is RMB 10,000 or more, a fine of not less than 15 times but not more than 30 times the value of such food shall be applied.

In addition to the above mentioned fines, illegal gains and illegally produced food shall be confiscated and the tools, equipment, raw materials and other items used in the production process may also be confiscated.

Under grave circumstances, the producer or operator's license shall be revoked and the public security organ may impose a detention of not less than five days but not more than 15 days on the principal directly in charge, as well as on other directly responsible persons. The producer or business operator and the legal representative, the principal directly in charge and other directly responsible persons thereof may not apply for the license for food production and operation, engage in the management of food production and operation or act as the food safety management personnel of a food production or operation enterprise for a duration of five years.

A staff member of a food testing agency who is sentenced to criminal punishments due to food safety illegalities or expelled due to issuance of a false testing report which causes a major food safety incident may not engage in food testing work anymore for his/her full life.

Besides the liability for market participants, liability for food regulators and local governments is also strengthened and clarified. For instance, if a local government delays, conceals, or falsifies reports on food safety incidents, both the government official who is directly in charge and the executive directly responsible must be punished by recording a special demerit against them. In serious cases, they shall be demoted or removed from office and when severe consequences occur, key persons in charge must take the blame and resign.

These strict provisions all signal that the Chinese government is determined to crack down on food scandals and tries to rebuild consumers and trade partners' confidence in Chinese food products.

3. Criminal Liability

The new law also strengthens criminal liability. If a behavior constitutes a crime, the person shall be prosecuted for criminal responsibility under Criminal Law. If a person receives a prison sentence or is convicted of another severe crime, the person will not be allowed to engage in food related work for the rest of his/her life.

4. Punishment exemption clause for business operator

Article 136 is a punishment exemption clause for business operators such as traders and catering service providers. Such punishment exemption may only be applied under the following conditions: 1) the operator has fulfilled the procurement inspection and other obligation prescribed by the law; 2) the operator can present sufficient evidence to show that he is ignorant of the fact that the purchased products do not conform to the food safety standards; 3) the operator can give correct information about the source of the products.

Nevertheless, the food that does not conform to the food safety standards shall be confiscated. Also, such business operator shall still be liable for civil compensation in accordance with the law if personal, property or other damage occurs. In other words, food operators could exempt from administrative punishments, but shall still bear joint and several civil liability with the producers of the food that does not conform to the food safety standards.

V. Concluding remarks

The implementation of the FSL 2015 in October 2015 will most likely bring along substantive improvements in regard to food safety in China and hopefully prevents further major food safety incidents in the upcoming years. For companies engaging in the food industry, it is now time to review their internal control, supervision and traceability procedures in order to ensure that they are in compliance with the new FSL 2015 and to prevent in the best possible way that food, which does not meet the food safety standards, does end up with consumers, since the punishments even for not very severe incidents will increase harshly.

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End Notes:

* The laws and regulations as contained on the government websites provided in our links above are the official versions, published in Chinese language. In case you are interested in receiving an English translation of said laws/regulations, please inform us accordingly. We will be able to provide you with an unofficial translation of said laws/regulations for your information within a few days.

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