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Legal Updates

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Legal Updates

1. Legal Breakthrough in Online Food Sales Regulation (Authors: David TANG, Min ZHU)

On August 18, 2015, the China Food and Drug Administration (“CFDA”) issued the *Notice of Soliciting Opinions on the Administrative Measures on Online Food Sales (Draft for Comment)* on its official website. As a supporting regulation of the *Food Safety Law* and the *Administrative Measures on Food Sales Licenses (“Sales Licensing Measures”)*, both of which were implemented on October 1, 2015, the *Administrative Measures on Online Food Sales* legislation (“**Online Sales Measures**”) not only shows that the CFDA is making a continuous effort to improve its regulatory process, but also reflects that the sale of food products online, as a new mode of doing business in the food industry, is important with respect to both public consumption and governmental supervision.

Application Scope of the Online Sales Measures

There are various kinds of online food sales operators, such as food producers, food trading companies (wholesale and retail), food sales websites without offline physical stores (e.g., some fruit and fresh food direct delivery companies) and online self-produced food stores. Another important market participant is the third-party online food e-commerce platform provider (“**platform provider**”), such as Taobao, T-mall, Yihaodian, and Jingdong.

Pursuant to Article 3 of the *Online Sales Measures*, “online food sales” refers to the sale of food products via internet channels, which also includes edible agricultural products and food additives. Article 8 stipulates that online food business operators may conduct online food sales either by setting up their own websites or through platform providers. With such provisions, it is clear that all types of online food business operators fall within the scope of the *Online Sales Measures*.

From a supervisory perspective, online food operators are essentially no different than traditional offline food operators. The only difference between the two types is that the operators utilize different platforms or means of doing business. Regardless of whether the food operators set up their own websites or do business via a platform provider, they are still subject to the same requirements as offline operators, such as applying for operating permits (such as food operator licenses or alcohol distributor licenses) or filing records with the authorities as the laws and regulations require (for example, some provinces have enacted local publicity card systems for small family workshops and food vendors).

Therefore, the *Online Sales Measures* do not have additional entry requirements for online food operators, but merely act to regulate specific aspects which are associated with online food sales. For example, requirements for setting up online food sales websites (Article 8), obligations to give

written notice to the supervisory department regarding website information (Article 9), delivery requirements for selling fresh, heat preserved, refrigerated or frozen food (Article 12), and the obligation to remind purchasers of a “no questions asked return” policy (Article 18), etc.

Supervisory Mode---“Licensing + Recording”

Article 7 of the *Online Sales Measures* stipulates that online food operators must acquire a legal license or recording certificate. Failing to do so will result in the business operator not being allowed to participate in any online food sales activities, except for those activities for which such a license or certificate is not required. However, the *Online Sales Measures* do not have specific regulations regarding the conditions of applying for licenses, recording procedures or any applicable exceptions. In fact, these provisions can be found in other related laws and regulations.

According to Article 35 of the *Food Safety Law*, the State has implemented a licensing system for food manufacturing and sales. Engagement in food manufacturing, selling and catering services is subject to licensing according to law, with the exception of selling edible agricultural products. In addition, according to the 2009 *Food Safety Law* and its implementation in practice, food manufacturers or catering service providers which have already acquired licenses do not need to apply for additional food operation licenses if they sell their self-produced food products.

Article 36 of the *Food Safety Law* provides that small family workshops and food vendors should be regulated by provincial level governments. According to a sample of 15 different local jurisdictions, a majority have implemented either a register or recording system.

Thus, we can see from the current legislation that, theoretically, licenses are required for all online food sales activities with the exception of circumstances in which no licenses are required or where only recording (filing) is needed for small family workshops and food vendors.

Nowadays, many people use WeChat to sell self-produced food, most of which, strictly speaking, shall be treated as small family workshops. Therefore, according to applicable local legislation, such WeChat food sellers are only required to register or file a record with the relevant local authorities. In this sense, such WeChat food sellers are actually covered by the existing legislation, although some in the press have reported that they face no regulatory oversight. Nevertheless, government authorities shall still seek a more effective means of supervision due to the particular characteristics of such small shops.

Additional Obligations for Platform Providers

Pursuant to the *Food Safety Law*, platform providers are required to register the real names of online food operators, examine the operators’ food manufacturing or trading licenses, promptly stop and report to the authorities any violations committed by online food operators and immediately terminate online services for violators in the event of any serious violation. Where a platform

provider fails to perform these obligations and, as a result, the lawful rights and interests of consumers are harmed, the platform provider shall be held jointly and severally liable with online food operators for any damages. Furthermore, in the event that consumers' lawful rights and interests are harmed as a result of purchasing food via an online food e-commerce platform, but the platform provider is unable to provide the true address and current contact information of that online food operator, the platform provider must make advance compensation to consumers.

Before the new *Food Safety Law* came into effect on October 1st, 2015, some platform providers, such as Taobao, Tmall and Jingdong had already updated or modified their applicants' qualification recording and license examination rules to tackle the challenges presented by policy changes in the new law.

Besides for the provisions related to platform entry and legal liabilities which are already included in the *Food Safety Law*, the *Online Sales Measures* also bring forward more detailed and specific provisions for the creation and maintenance of platform providers' websites, including some encouraging provisions. These provisions include:

- a. setting up specific regulatory agencies or designating specific managers to do daily inspection and reporting (Article 22);
- b. obligating platform providers to save information data evidence (Article 23);
- c. food recall obligations (Article 25);
- d. encouraging the use of professional services such as third-party authentications, evaluations, and information management (Article 26); and
- e. encouraging a consumer advance compensation system (Article 28).

Construction of the Online Food Sales Legislative System

Until now, the *Food Safety Law* and the *Sales Licensing Measures* have been the main legal documents which regulate online food sales. Chapter IV of the *Food Safety Law*, "Food Production and Business Operations," establishes the basic principles and system of food sales operations. Article 62 regulates the "obligations of third-party online food e-commerce platform providers." Article 131 regulates the "liabilities for violations committed in online food transactions." However, the *Food Safety Law* does not have specific provisions regarding the sale of food on self-created websites.

The *Sales Licensing Measures* regulate food sales and catering industry services through administrative licensing. The *Sales Licensing Measures* also act to divide food sales operations into separate functions: food sales operators, catering service providers and unit cafeterias.

In contrast, the *Online Sales Measures* provide for a more detailed regulatory framework, specifically with respect to "business transactions regarding online food sales, including edible

agricultural products and food additives.”

In addition to food industry-specific legislation, the *Product Quality Law*, *Tort Liability Law*, *Consumer Protection Law* and the 2014 SAIC-promulgated *Administrative Measures on Online Trading* also regulate the related areas of business operator supervision and consumer rights.

Separate Supervision for Online Food and Drug Sales

In May 2014, the CFDA issued the *Administrative Measures on Online Food and Drug Sales (Draft for Comment)* (“**Online Food and Drug Sales Measures**”) which, although once expected to be finalized in early 2015, were not ultimately issued after several rounds of consideration.

The *Online Food and Drug Sales Measures* seek to regulate food (including edible agricultural products and food additives), dietary supplements, drugs, cosmetics and medical devices in one piece of legislation. However, the promulgation of the legislation in its current form is considered challenging in part due to the inherent differences among these products and in approaches to regulating them. In particular, certain provisions which call for lifting a ban on online prescription drug sales have proven to be controversial. The effectiveness of the measures after they have been promulgated has also been called into question.

Although the CFDA has not given any clear explanation on this matter, the promulgation of the *Online Sales Measures* indicates that the CFDA is taking the approach of regulating the online sale of food and drugs through separate legislation.

In addition, it has been learned that the CFDA has begun to have discussions on drafting the *Administrative Measures on the Online Sale of Medical Devices*. This further supports the notion that the CFDA will regulate the online sale of each of the five product categories under its supervision through separate legislation.

2. Brief Summary of Amendments to the Administrative Provisions on Business Scope Registration for Enterprises (Authors: Wenyu JIN, Fanglu LIN, Yuxiang TANG)

On August 27, 2015, the State Administration for Industry and Commerce (“**AIC**”) published the *Administrative Provisions on Business Scope Registration for Enterprises* (“**New Provisions**”), which amended the original *Administrative Provisions on Business Scope Registration for Enterprises* (“**Original Provisions**”) that came into effect on July 1, 2004. The New Provisions include amendments which aim to facilitate the AIC registration system, reflect the State Council “license before certificate” concept, and relax conditions for AIC registration. The *New Provisions* became effective as of October 1, 2015. The *New Provisions*’ amendments may be summarized as follows:

Broadening the Wording of Business Scope Registrations

The *New Provisions* set forth the principle that enterprise applicants are to submit the wording for their business scope, and also broaden the scope of business category applications and the wording of registrations. In accordance with the *New Provisions*, an enterprise may itself choose the wording of its business scope with reference to the sections, subcategories or categories found in the *Industrial Classifications for National Economic Activities* (“**Classifications**”). In the case of ambiguous wording in the *Classifications*, or for emerging industries or specific business projects not included therein, enterprises may instead refer to policy documents, industry practices, or professional literature. This change reflects policymakers’ respect for the autonomy of enterprises and the relaxation of pre-conditions for registration as required by the AIC registration reforms.

Cancelling the Division of Business Scope

The *New Provisions* abandon the division of business scope as stipulated by the *Original Provisions*, which required operating items in the business scope to be divided into “licensed items” and “general items.” In addition, in order to provide more flexibility to the registration process, the original “licensed items” are now to be classified as either *Pre-registration Licensed Items* that require administrative approval before registration or *Post-registration Licensed Items* that require administrative approval after registration, based on the sequence of administrative approvals and AIC registration.

Adjusting the Particulars of Registered Business Scope

The *New Provisions*’ amendments no longer require the registration of an operating term for *Pre-registration Licensed Items*. In addition, in accordance with the State Council’s principle of further reducing administrative examinations and lowering the standard for market entry, the *New Provisions* clearly stipulate that *Pre-registration Licensed Items* shall be registered after the issuance of and in accordance with the required licenses, while non-*Pre-registration Licensed Items* are to be registered directly with the AIC with reference to the *Classifications* as well as relevant policy documents, industry practices, or professional literature. For *Post-registration Licensed Items*, the registration authority shall add at the end of the business scope the phrase “(in case of licensed business items, business operations shall commence only after approval by the relevant authorities).”

Adjusting and Increasing License Information Disclosure Requirements

The *New Provisions* specify that an enterprise shall publicly disclose the acquisition of, and amendments to, its administrative approvals through the enterprise credit information disclosure system. Specifically, where an enterprise business scope includes licensed items, the enterprise shall disclose the name of the approval or certificate, the approving authority, the matters approved,

and the period of validity through the enterprise credit information disclosure system within 20 working days of obtaining the approval document or certificate. An enterprise whose business scope includes *Pre-registration Licensed Items* at the time of establishment shall make a public disclosure within 20 working days of the date of establishment. Enterprises are also required to make public disclosures through the enterprise credit information disclosure system of any amendments to an approval or certificate within 20 working days of such amendment.

The amendments found in the *New Provisions* constitute a part of the AIC registration system reforms and serve as an ancillary to other amendments previously made to the *Company Law* and the *Administrative Regulations on Company Registration*. The New Provisions reflect the principles of respecting enterprise autonomy, easing AIC registration conditions, and realizing the facilitation of AIC registration. The reform of the AIC registration system is closely related to enterprise and social development, and involves the adjustment, update, and improvement of laws, regulations and normative documents in various aspects. We will continue to monitor the status of laws and regulations related to AIC registration reforms and will provide you with any updates as they occur.



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If you have any questions regarding this publication, please contact:



Contact Us

Beijing Office

Tel.: +86-10-8525 5500
Suite 906, Office Tower C1, Oriental Plaza
No. 1 East Chang An Ave.
Beijing 100738, P. R. China

Estella CHEN Attorney-at-law

Tel.: +86-10-8525 5541
Email: estella.chen@hankunlaw.com

Shanghai Office

Tel.: +86-21-6080 0909
Suite 5709, Tower 1, Plaza 66, 1266 Nanjing
West Road,
Shanghai 200040, P. R. China

Yinshi CAO Attorney-at-law

Tel.: +86-21-6080 0980
Email: yinshi.cao@hankunlaw.com

Shenzhen Office

Tel.: +86-755-3680 6500
Room 2103, 21/F, Kerry Plaza Tower 3, 1-1
Zhongxinsi Road, Futian District, Shenzhen
518048, Guangdong, P. R. China

Jason WANG Attorney at-law

Tel.: +86-755-3680 6518
Email: jason.wang@hankunlaw.com

Hong Kong Office

Tel.: +00852-2820 5600
Suite Rooms 2001-02, 20/F, Hutchison
House, 10 Harcourt Road, Central,
Hong Kong, P. R. China

Dafei CHEN Attorney at-law

Tel.: +852-2820 5616
Email: dafei.chen@hankunlaw.com