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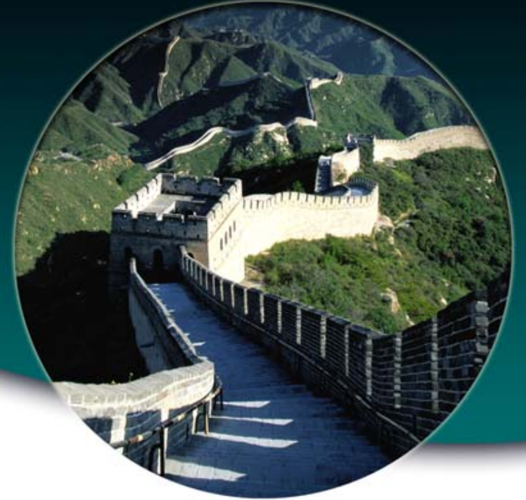

CHINA UPDATE

Squire, Sanders & Dempsey L.L.P.

September 2010

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The SAFE Relaxes Requirements for Provision of Security to Foreign Entities by Domestic Entities

Key Points:

- ***New circular lowers the qualification requirements for the secured party, as well as requirements for security providers***
- ***Procedures for performing the security obligation are specified***

To facilitate overseas investment by China-based entities, the State Administration of Foreign Exchange (SAFE) promulgated the Circular on Issues Concerning Administration of the Provision of Security to Foreign Entities by Domestic Entities (the Circular).

The Circular lowers the qualification requirements for the secured party. According to the Circular, the secured party should be a domestic or foreign enterprise in which the enterprise (except for banks) acting as the security provider directly or indirectly owns equity. With the release of the Circular, whole ownership of the overseas secured enterprise is no longer required. In addition, a loss-generating enterprise may not apply for the security under the old provisions. However, according to the Circular, as long as the value of the net assets of the secured party is positive and the secured party has generated net profits in any one of the latest three years, the provision of security may be approved.

The Circular loosens requirements for security providers, as well. According to the previous regulations, the balance amount of security provided by an enterprise (except for financial institutions) may not exceed 50 percent of its net assets or its foreign exchange income from the previous year. In addition, there were various requirements applicable to different types of enterprises (except for financial institutions) providing security regarding the ratio between net assets and total assets. With the promulgation of the Circular, the foreign exchange income requirement has been eliminated, and the ratio between the security provider's net assets and total assets is uniformly set at 15 percent or greater (not applicable to financial institutions).

In addition, the Circular specifies the procedures for performing the security obligation. A bank may perform the security obligation directly without the SAFE's approval. For a nonbank financial institution or an enterprise, the SAFE's approval is needed before performing the security obligation.

– Daniel Yao

Octopus Saga and Personal Data (Privacy) Ordinance in Hong Kong

Key Points:

- ***Sale of personal data by the Octopus Card issuer in Hong Kong brings discontent among customers and the public***
- ***The Hong Kong government is prompted to review the Personal Data (Privacy) Ordinance in light of perceived inadequacies in the legislation for protection of personal data***

I recently tried to join the "Earn & Redeem Reward$" program of Octopus Card Limited, issuer of the Octopus Card (a contactless stored-value smart card used to transfer electronic payments for virtually all public transport in Hong Kong and used by almost everyone in Hong Kong), on its website. When I entered the page, it displayed the following message: "We are now re-designing the Octopus Rewards registration form, new registration is temporarily suspended. The new registration form will be available in October 2010."

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This was not a technical problem, nor was it likely a routine update procedure; it was, from the point of view of many people in Hong Kong today, a result of the latest Octopus saga that made headlines in the local media during the summer heat in Hong Kong.

Prudence Chan Bik-wah, the former CEO of Octopus Holdings (Octopus) who has since resigned, made statements at a press conference in July of this year that Octopus had not sold personal data to other companies. Several days later, she "corrected" this during an investigation conducted by the Privacy Commissioner, and the public in Hong Kong was confronted with the fact that Octopus had sold personal data of 1.97 million cardholders to its business partners for HK$44 million over the past four-and-a-half years. This apparent flip-flop has led to public outrage and disappointment.

According to the Personal Data (Privacy) Ordinance (Cap. 486 of the Laws of Hong Kong) (PDPO), which went into effect on 20 December 1996, data users (i.e., those who collect personal information of individuals) are required to collect, store, use and provide access to personal data in accordance with the PDPO and its data protection principles. Schedule 1 of the PDPO sets out six data protection principles: to regulate notifications, collection, accuracy, use, security and access to personal data. In particular, "Principle 4 – Use of Personal Data" provides that "personal data shall not, without the prescribed consent of the data subject, be used for any purpose other than (a) the purpose for which the data were to be used at the time of collection of the data; or (b) a purpose directly related to the purpose referred to in paragraph (a)."

It is interesting to note that pursuant to paragraph 7 of the Privacy Data Policy posted on the Octopus website (the Octopus Privacy Policy), the personal data of the cardholder may be used for the following purposes, *inter alia:* (i) marketing of goods and/or services by Octopus, its subsidiaries, its affiliates or **any of its selected business partners**; and (ii) **other related purposes**. Also, paragraph 8 of the Octopus Privacy Policy states that all personal data will be kept confidential, but the company (Octopus Cards Limited) may, where such disclosure is necessary to satisfy the purpose or a directly related purpose for which the data was collected, **provide such information to the following parties *inter alia*, whether within or outside the Hong Kong Special Administrative Region**: "any other person under a duty of confidentiality to us [Octopus] including our subsidiaries, our affiliates **or our business partners** (emphasis added)."

Among other things, the PDPO provides for the establishment of a Privacy Commissioner for Personal Data who has various duties and powers including monitoring and supervising the provisions of the PDPO and promoting awareness and understanding of the PDPO, in particular the data protection principles. It should be noted that the Commissioner may issue an "enforcement notice" to data users if he or she (after investigation) is of the opinion that the relevant data users have contravened a requirement of the PDPO or have contravened such a requirement in circumstances that make it likely that the contravention will continue or be repeated. However, without a breach of an enforcement notice, the Commissioner cannot directly bring a criminal action against a data user, even if that user has transferred the personal data of its data subjects in contravention of the provisions of the PDPO.

Reading between the lines of the Octopus Privacy Policy and the PDPO, it is arguable that a data user, such as Octopus, may be able to transfer the personal data of its data subjects freely to third parties/business partners, provided that some sort of waiver or consent is obtained from the data subjects and that such use is clearly stated as one of the purposes for collecting the data.

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Octopus is not the only company in the spotlight regarding sale of personal data in Hong Kong. Since the revelation of the Octopus saga, it has been widely publicized in the media that certain banks and telecommunications providers may also have been selling customers' personal data to third parties for a profit.

In response, the Hong Kong government is set to review the PDPO in November this year, raising the possibility that the unauthorized use of personal data will be made a criminal offense. Whether or not the Hong Kong government will follow in the footsteps of the UK – which has made it a crime to obtain, disclose or sell personal data – will be determined after further consultation among members of the Legislative Council, stakeholders and relevant members of the public. Until a bill amending the PDPO is passed in Hong Kong, companies and businesses collecting personal data as part of their business in Hong Kong should examine their privacy policies and check their compliance with the provisions of the PDPO.

– Louise Lok Yee Ng

New Rules Released for Implementation of Decision for Examination of Concentration of Business Operators

Key Points:

- ***Implementation of the MOFCOM's decision on concentration of business operators has been specified***
- ***The process of assets or business divestiture is subject to the MOFCOM's review***

The Ministry of Commerce (MOFCOM) promulgated the Interim Regulations on the Assets or Business Divestiture by a Business Operator Participating in a Concentration (Interim Regulations) on 5 July 2010, which went into effect the same day.

According to the Anti-Monopoly Law of the People's Republic of China (effective as of 1 August 2008), when a business operator's concentration reaches the filing threshold, it should file an application for concentration to the Anti-Monopoly Bureau of the MOFCOM. In accordance with the Measures for Examination of Concentration of Business Operators promulgated by the MOFCOM in November 2009, when a proposed concentration is approved by the MOFCOM, it could impose three types of restriction conditions. One is assets or business divestiture by the business operator participating in the concentration. Therefore, the Interim Regulations stipulate the specific measures and procedures for implementation of the restriction conditions by the MOFCOM.

According to the Interim Regulations, "assets or business divestiture" (divestiture) refers to the divestiture of assets or business by the business operators participating in the concentration. Such operators have the responsibility to divest their assets or business (divestiture obligor) in accordance with the decision for examination

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onfconcentration of business operators (decision) issued by the MOFCOM.

The Interim Regulations stipulate two types of divestiture. One is a default divestiture, which means the divestiture obligor finds a proper buyer for its assets or business within the time prescribed by the decision; the other is a trusted divestiture, in which the divestiture obligor fails to find a proper buyer within the time prescribed by the decision and a divestiture trustee is engaged to find a proper buyer. According to the Interim Regulations, the following parties might be involved in a divestiture:

- Divestiture obligor
- Supervision trustee (engaged by the divestiture obligor to supervise the whole process of the divestiture; this could be a natural person, legal person or other entity)
- Divestiture trustee (appearing in a trusted divestiture, engaged by the divestiture obligor to find a buyer and conclude an assets or business transfer agreement; this could be a natural person, legal person or other entity, and could be the same person as the supervision trustee)
- Buyer

The MOFCOM's role during the whole process is to evaluate the candidates for the supervision trustee, the divestiture trustee and the buyer, as well as the trust agreements, sales agreement and other relevant agreements submitted by the divestiture obligor to determine whether he or she meet the requirements of the decision. The MOFCOM's evaluation time will not be counted in the time limit for divestiture. Without the approval of the MOFCOM, the divestiture obligor may not give instructions to the supervision trustee or the divestiture trustee.

The list of candidates for supervision trustee must be submitted to the MOFCOM within 15 days following the issuance of the decision, and the candidates for divestiture trustee must be submitted 30 days prior to the commencement of a trusted divestiture. After the supervision trustee or the divestiture trustee has been approved by the MOFCOM, the divestiture obligor shall not rescind or alter the trust agreement with the supervision trustee or divestiture trustee without the approval of the MOFCOM, and the supervision trustee and the divestiture trustee shall be remunerated by the divestiture obligor.

The Interim Regulations also clarify the obligations of each party involved in the divestiture, such as cooperation, reporting and confidentiality obligations. They also set out the requirements for the potential buyers, which shall:

- Be independent from the business operator participating in the concentration;
- Have the necessary resources, ability and willingness to maintain and develop the business being divested;
- Not lead to the exclusion or restriction of competition; and
- Obtain approval from other authorities when required by the divested business.

The Interim Regulations provide a clearer picture for the processing of a divestiture, which will be helpful for each party in implementing the decision issued by the MOFCOM. However, certain issues relating to the divestiture have not been addressed, such as the time limit for the MOFCOM's evaluation, and the criteria has not been specified. With these uncertainties remaining, the process might extend beyond three months.

– *Edison Chen*

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New Rules on Foreign Investment Disputes

Key Points:

- ***A transferee may request to terminate an equity transfer agreement (ETA) and claim for damages if the transferor fails to apply for approval for the ETA***
- ***The court may ascertain the status of an anonymous shareholder according to certain conditions***
- ***If the shareholder has not completed its obligation of capital contribution, the associated equity interest may be restricted***

The Supreme People's Court of the PRC (SPC) issued the Rules Concerning Several Issues of Judging Foreign Invested Enterprises' Disputes (the Rules) on 5 August 2010, which went into effect on 16 August 2010. The Rules focus on the application of laws for establishing and changing foreign-invested enterprises (FIEs) including issues related to the effectiveness and legal consequences of ETAs without administrative approval, equity transfer and equity pledge. In terms of issues related to the liquidation and dissolution of FIEs, the SPC plans to prepare another set of rules to interpret the application of laws on disputes involving these issues. Neither the Rules nor the rules to be drafted will cover disputes arising in mergers and acquisitions by foreign investment, as SPC stated that these disputes are more complicated and the legal basis is inadequate to map out judicial interpretations for them.

The main issues addressed in the Rules include the following.

Effectiveness of the ETA Without Administrative Approval

If the transferor does not perform its obligation of applying for the approval of the ETA with the relevant authorities after the ETA is executed by the parties, the transferee may (a) request to terminate the ETA and claim for damages or (b) request the transferor to perform its obligation of applying for approval of the ETA, and the court shall sustain such requests. The damages may cover the loss of the price difference of the equity interest, proceeds of the equity and other reasonable losses suffered by the transferee.

Status of the Anonymous Shareholder

According to the Rules, the court may ascertain the status of the shareholder whose name is not specified in the approval certificate of the FIE issued by the approval authority (i.e., an anonymous shareholder) provided that (a) the anonymous shareholder has actually made an investment in the FIE; (b) shareholders other than the nominal shareholder recognize the shareholder status of the anonymous shareholder; and (c) the court or the anonymous shareholder has obtained approval to change the status of the anonymous shareholder to shareholder. Regarding the entrustment agreement between the nominal shareholder and anonymous shareholder, the court will confirm the agreement is valid provided that the content of the agreement does not violate any PRC laws or regulations.

Responsibilities of Shareholders on Capital Contribution

In the case of capital contributed by properties such as land use rights and buildings, the shareholder neither delivers the properties to the FIE as capital contribution nor completes a title registration for the contribution. Such a contribution will be deemed as failure to complete the obligation of capital contribution, and the associated equity

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interest will be restricted. If the properties have been used for the FIE without completing title registration procedures, the court will deem that the shareholder has completed its capital contribution obligation provided that the shareholder completes the registration procedures within the time period required by the court.

– Olivia Zhan

Hong Kong Competition Bill Revealed

Key Points:

- ***Proposed legislation aims to prohibit conduct and mergers that impede competition in Hong Kong***
- ***New independent statutory Competition Commission will have broad investigative powers***
- ***New rules expected to have more of an impact on local businesses not yet familiar with competition rules***

Hong Kong's Competition Bill (Bill) was published on 2 July 2010. The Bill was tabled in Hong Kong's Legislative Council on 14 July 2010. When the Bill becomes law, it will be known as the Competition Ordinance (Ordinance).

The primary objectives of the Bill are twofold:

- To prohibit conduct that prevents, restricts or distorts competition in Hong Kong; and
- To prohibit mergers that substantially lessen competition in Hong Kong.

The Bill also provides for the establishment of an independent statutory Competition Commission, which will be charged with investigating complaints, bringing public enforcement actions in respect of anticompetitive conduct and promoting public understanding on competition matters. The Competition Commission may also conduct market studies into matters affecting competition in Hong Kong, which could lead to calls for it to examine (and press the government to make changes to) arrangements such as the land sales system in Hong Kong.

The Bill prohibits three categories of conduct:

- The First Conduct Rule prohibits undertakings (a broad term encapsulating any entity engaging in commercial or economic activities) from engaging in agreements, concerted practices or decisions with the object or effect of preventing, restricting or distorting competition in Hong Kong.
- The Second Conduct Rule prohibits undertakings with a substantial degree of market power from abusing that power by engaging in conduct that has the object or effect of preventing, restricting or distorting competition in Hong Kong.
- The Merger Rule prohibits undertakings from directly or indirectly carrying out a merger that has, or is likely to have, the effect of substantially lessening competition in Hong Kong. The Merger Rule will apply only to undertakings that are licensees in respect of the telecommunications industry. This is a continuation of the current merger regime applicable to telecommunications licensees in Hong Kong, although as the government has said, the Merger Rule has been "modernised."[1]

The First Conduct Rule and the Second Conduct Rule are known collectively as the Conduct Rules. The First Conduct Rule, the Second Conduct Rule and the Merger Rule are collectively known as the Competition Rules.

Currently, the Merger Rule will apply only to telecommunications licensees until such time as the

[1] The government has announced that there is a possibility that the Merger Rule will apply more broadly in the future.

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government may determine that it is appropriate to broaden the scope of the prohibition.

Notwithstanding the sector-specific nature of the Merger Rule, it seems that M&A agreements in other sectors may also be challenged on the basis of the First Conduct Rule. In this context, many business operators who previously lobbied to have the Merger Rule confined to the telecommunications sector may in time come to support its cross-sector application, as this would provide clearer procedural mechanisms for obtaining advance approval and certainty for M&A deals and would potentially subject M&A agreements to a less-stringent competition test (determining whether such agreements substantially lessen competition) than the test applied under the First Conduct Rule (determining whether such agreements prevent, restrict or distort competition).

The clauses that set out the two main Conduct Rules also include a non-exhaustive list of examples of the types of behavior that may breach the rules. For example, price-fixing and market-sharing are listed as examples of activities that may breach the First Conduct Rule, while predatory behavior towards competitors (which may in practice include such activities as below-cost predatory pricing) is listed as an example of an activity that may breach the Second Conduct Rule. Notably, while the government has previously indicated that only horizontal agreements (that is, agreements between competitors) may be targeted by the First Conduct Rule, and that is a focus of the examples provided, the relevant section of the Bill appears to be equally applicable to vertical agreements such as distribution or downstream supply agreements.

Enforcement

The Commission will be vested with a full range of investigative powers including the power to require production of documents and information, the power to require persons to attend an interview before the Commission and the power to enter and search premises under a court warrant. The Commission may conduct an investigation only if it has reasonable cause to suspect that a contravention of a Competition Rule has taken place, is taking place or is about to take place. There are criminal penalties for noncompliance with the Commission's investigative powers. In accordance with previous government statements, a judicial enforcement model is provided under the Bill. A Competition Tribunal will be established to hear and adjudicate on competition cases brought by the Competition Commission, and the Tribunal will be able to hear private actions, which can either follow a determination of the court or be standalone in nature.

In addition:

- The Commission may accept commitments from a person to take any action, or refrain from taking any action, that the Commission considers appropriate to address its concerns about a possible contravention of a Competition Rule. If the Commission accepts a commitment, it may agree:
  - Not to commence an investigation or, if it has already commenced an investigation, to terminate it; or
  - Not to bring proceedings in the Tribunal or, if it has already brought proceedings, to terminate them[2]; and
- The Commission may also enter into leniency agreements with individuals and corporations who have breached the Bill but wish to mitigate their penalties by cooperating with the Commission. The Commission cannot bring proceedings against a party that is the beneficiary of a leniency agreement (which could include employees of a

[2] If a person accepts an infringement notice, this could be done using the commitment framework.

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company that has made a disclosure to the Commission).

Penalties

The Competition Tribunal is empowered to apply a full range of remedies for contravention of the Conduct Rules and Merger Rule, including pecuniary penalties not exceeding 10 percent of the total turnover (including global turnover) for the year(s) in which a contravention occurs, award of damages to aggrieved parties, interim injunction orders, and termination or variation of an agreement.

Private Rights of Action

The Bill provides for private actions to be brought by persons who have suffered loss or damage as a result of a contravention of a Conduct Rule. Such private actions:

- Could be brought by a private party, following a Tribunal determination (i.e., a follow-on action); or
- Could be brought independently of a Tribunal determination by a private party (i.e., a standalone action).

In relation to follow-on actions, private parties do not need to prove that the breach of the Conduct Rule occurred, merely that they have suffered loss or damage as a result of the contravention of the Conduct Rule. In relation to standalone actions, private parties would need to prove that the contravention of the Conduct Rule occurred before any loss or damage assessment could be undertaken.

Exclusions and Exemptions

Various exclusions and exemptions are provided for in the Bill.

For example, the Commission can decide whether to grant immunity from the Conduct Rules to an agreement or conduct that, in its opinion, enhances economic efficiency (and satisfies related criteria set out in the Bill), is performed by an undertaking entrusted with the operation of services of general economic interest, or is made in compliance with a legal requirement. The Chief Executive in Council can also make exceptions if there are compelling reasons of public policy to do so.

Additionally, the Bill will not apply to the government or statutory bodies unless such bodies (or certain of their activities) are specified in relevant regulation(s) that may be made by the Chief Executive in Council. This is a departure from previous government indications that certain statutory bodies that will be subject to the law would be listed in a schedule to the Bill, and indicates that the government's protracted review of this issue is continuing.

Conclusion

The Bill is in many respects in line with international practice. It discusses the introduction of a cross-sector competition law prohibiting undertakings from participating in restrictive agreements or abusing their market power. However, the Bill also displays some unique features. The proposed merger control regime would apply only to the telecommunications sector. Also, statutory bodies would be exempt from the application of the competition law altogether unless subordinate legislation provides otherwise. Finally, the proposed sanctions for infringements appear to be more stringent than those found in most other jurisdictions. Directors and senior managers can face disqualification orders. In addition, under the draft Bill, fines can be imposed on any person, including natural persons, involved in a competition law infringement.

When adopted, the Competition Ordinance will require certain companies to change their market conduct. However, many multinational businesses already have experience complying with foreign competition laws. The Ordinance is therefore likely to have more of an impact on

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local businesses that are not yet familiar with competition rules.

One important change the Competition Bill might bring about, if enacted in its current form, relates to the type of protection senior management and board members will want to negotiate to limit their personal exposure to the far-reaching financial penalties the Bill contemplates for any person directly or indirectly involved in a competition law infringement.

The Bill will be discussed in the Legislative Council in September and is likely to pass into law in early to mid-2011. It will then go into effect on a date appointed by the Secretary for Commerce and Economic Development. The substantive provisions are not expected to go into effect before 2012.

For now, much of the public debate concerning the Bill is likely to focus on its broad range of exclusions and exemptions. Detailed discussion on the appropriate scope of the Conduct Rules, and where the Competition Commission's enforcement priorities should lie in respect of such rules, may have to wait until the Commission begins work on guidelines related to these matters. The government has previously committed to ensuring that a public consultation process is held in relation to the development of such guidelines.

– Deborah Cheng

Past Events

James M. Zimmerman, chief representative and partner in the Beijing office of Squire, Sanders & Dempsey L.L.P., led a Greater Tumen Initiative (GTI) delegation participating in the 6th Northeast Asia Expo (NEA Expo) 1-4 September 2010 in Changchun, Jilin Province. Mr. Zimmerman, who serves as chairman of GTI Business Advisory Council, discussed investment and trade development, opportunities and challenges in the NEA region.

Mr. Zimmerman joined Zhang Xuebing, president of the Beijing Lawyers Association, in an American Chamber of Commerce-China (AmCham-China) presentation on 26 August 2010 in Beijing. The program, "The Legal Profession in China: East-West Cooperation," discussed the present status and future opportunities for the legal profession in China. Mr. Xuebing gave an overview of the current and future prospects for China law firms and discussed the opportunities for cooperation between China-based and foreign law firms. Mr. Zimmerman, chairman emeritus of AmCham-China, spoke from the perspective of the foreign lawyer practicing in China.

Mr. Zimmerman moderated an AmCham-China program on 25 August 2010 in Beijing. The program, “Changing Landscape of China's Labor Laws and Practices,” focused on the challenges, trends and opportunities of China’s labor laws and practices in 2010. Mr. Zimmerman discussed labor standards, labor dispute arbitration and litigation in China.

Upcoming Events

The Squire Sanders Shanghai office will hold a complimentary session for China-based in-house counsel of multinational companies on the US Foreign Corrupt Practices Act (FCPA) and antibribery compliance in China on 15 September 2010. **Weiheng Jia** and **Lesley Li** will lead the discussion in Mandarin Chinese in the boardroom of the Shanghai office.

As part of the American Conference Institute’s 5th FCPA Boot Camp in California, **Amy L. Sommers** and **David A. Saltzman** will co-present the post-boot camp workshop “Overcoming FCPA Compliance Challenges in China” on 29 September. This workshop will address the FCPA landscape in China, local antibribery laws, the impact of recent FCPA decisions and compliance programs.

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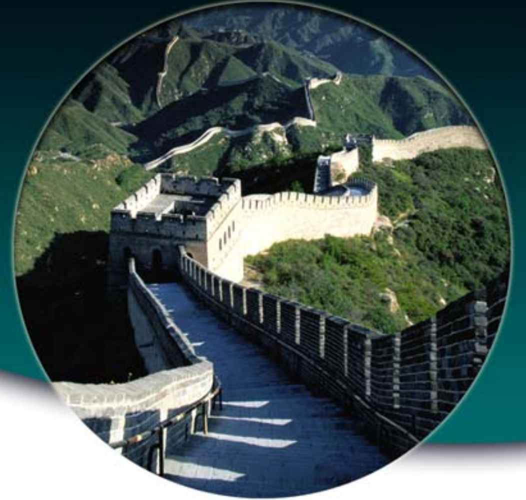

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The information in this bulletin was compiled by the China offices of Squire, Sanders & Dempsey L.L.P.

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