

INTRODUCTION TO THE ADMINISTRATIVE PENALTY LAW OF CHINA

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In March 1996, the Fourth Assembly of the Eighth National People's Congress of China passed the Administrative Penalty Law. It is another important piece of administrative legislation following the passage of the Administrative Litigation Law (April 1989) and the State Compensation Law (May 1994). The enactment of this law has a significant impact on compelling the administrative agencies to govern by law. Prior to this legislation, many Chinese laws and regulations had set forth provisions of administrative penalties. According to the statistics, over 100 types of administrative penalties were specified by various laws and regulations. Yet there were no unified legal provisions about the basic principles of administrative penalties. As a result, abusive impositions of penalties and fines existed in practice. In some instances, a single act was penalized by several agencies. There are several reasons for this situation: (1) the power to establish administrative penalties was not clearly defined and some agencies had set up administrative penalties as they pleased; (2) regulations were confusing as to who had the authority to enforce penalties and, as a result, many organizations or individuals imposed penalties when they did not have the authorities; and (3) lack of clear procedural requirements in enforcing administrative penalties had led to largely arbitrary enforcement. The promulgation of the Administrative Penalty Law was aimed at normalizing and restraining the government's manner of enforcing punishment so that arbitrary penalties and fines will be put to an end and the lawful rights of citizens, legal persons and other organizations will be protected.

The newly announced Administrative Penalty Law has the following major provisions:

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I. PROVISIONS FOR ESTABLISHING PENALTIES

The Law provides that administrative penalties shall follow the principle of legality, i.e., the act of citizens, legal persons or other organizations shall only be penalized according to written provisions of laws and such acts shall not be penalized without such provisions. Provisions imposing administrative penalties shall be announced in advance. Unreleased provisions may not serve as the basis of administrative penalties. Administrative penalties shall be established only by government agencies designated by laws or regulations, acting within their legal authorities. Administrative agencies should strictly follow the laws in establishing administrative penalties. The establishment of administrative penalties is specified by the current legislative framework in China. First, only laws promulgated by the National People's Congress or its Standing Committee, or administrative regulations promulgated by the State Council may designate authorities of administrative penalties. Penalties related to limiting the personal freedom of citizens may only be provided by the laws. Administrative regulations may stipulate to exclude administrative penalties limiting citizens' personal freedom. Secondly, local ordinances or rules (documents released by the ministries of the State Council or the local governments) may, within certain limits, provide supplemental or specific provisions to certain administrative penalties. But they may not go out of the limits set for the target act, the types or the extent of the administrative penalties as specified by the laws or administrative regulations. Local ordinances and rules may not establish administrative fines when such fines have not been provided by the laws or administrative regulations. Currently, rules may provide certain less severe administrative penalties for administrative management covered by the authorities of such rules. Aside from the laws, regulations and rules, no other normalizing documents may establish administrative penalties.

Types of administrative penalties are: warning, fine, confiscation of illegally obtained profits and properties, order to cease production and operation, suspension or revocation of business permit or license, administrative detention, and other administrative penalties provided by the laws or regulations.

II. PROVISIONS CONCERNING ENFORCING ADMINISTRATIVE PENALTIES

The Law provides that administrative penalties may only be enforced by an administrative agency acting within the boundaries of its legal

authority. The State Council or provincial level governments authorized by the State Council may designate some administrative agencies with authorities to enforce certain administrative penalties, except that the administrative penalties limiting personal freedom may only be enforced by police agencies. Organizations authorized by the laws or regulations with administrative functions for public affairs may enforce administrative penalties within their jurisdictions. In addition, administrative agencies may delegate the power to enforce administrative penalties to other organizations, but such delegations must meet certain legal requirements. Administrative agencies have the duty to supervise the delegated organizations and assume legal responsibilities for the acts of these organizations.

III. PROVISIONS ABOUT THE PRINCIPLES AND PROCEDURES OF ADMINISTRATIVE PENALTIES:

The Administrative Penalty Law provides 3 principles of administrative penalties: (1) The major objective for punishment is to correct illegal acts and to educate citizens to obey the laws, thus punishment should be combined with legal education; (2) Enforcement of administrative penalties must be based on the laws and must follow the legal procedures (the principle of legality); and (3) The administrative penalties imposed must be comparable to the social harm caused by the violations, provisions of administrative penalties should be released in advance, and enforcement of penalties should be published to facilitate public supervision (the principle of fairness and openness).

The Law provides two types of procedures for administrative penalties, i.e., a simplified procedure and a normal procedure. The simplified procedure, under which the enforcing officials make penalty decisions on spots, applies to illegal acts where the facts of violation are clear and the penalties are less severe. The normal procedure applies to illegal acts which require penalty decisions to be made only after careful investigations and evidence gatherings.

A system of hearing and defense applies to administrative penalties. Before an administrative agency imposes administrative penalties, it must notify the affected party of the facts of its violations, the reason and basis for imposing administrative penalties, and its rights provided by the law. The affected party has the rights to defend itself which includes the right to a hearing, as provided by the Law.

In order to increase the supervision and restraining of administrative penalties, to improve the quality of administrative penalties and to fight against corruption, the Law requires the enforcing officials to propose a disposition after verifying the facts when penalties are to be imposed. Less severe penalties shall be examined and approved by the chief of an administrative agency. Major administrative penalties with complex factual situations shall be collectively decided by the leadership of an administrative agency after deliberation. Agencies deciding fines are separated from those collecting fines. An agency which has decided to impose administrative penalties may not collect the fines itself. The affected party should pay the fines to a designated bank within a specified time.

IV. PROVISIONS ABOUT THE RIGHTS OF THE AFFECTED PARTIES AND THE LEGAL RESPONSIBILITIES OF THE ADMINISTRATIVE AGENCIES:

The major rights of an affected party provided by the Law include: (1) the right to defend, including presenting its case and request for a hearing; (2) the right to contest administrative penalties, to move for an administrative rehearing or to initiate administrative litigation; and (3) the right to request compensations from the administrative agency which has illegally imposed penalties.

In order to prevent administrative agencies from imposing arbitrary penalties and fines and to ensure the legal rights of citizens, legal persons and other organizations are not violated, the Law imposes strict penalties on administrative agencies and the enforcing officials who have abused their authority by: changing the types or severities of penalties without authorization or otherwise violating legally specified penalty procedures; failing to use receipts for fines or confiscation, or using receipts for fines or confiscation issued by unauthorized agencies; illegally collecting fines or retention, or embezzling fines collected or properties confiscated; failing to transfer to judicial agencies disposition cases when the transfer is required by the Law; or substituting administrative penalties for criminal penalties in order to generate profits for the agencies involved. The Law provides that the officials directly responsible for any of the above violations, as well as other directly responsible administrators, shall be subject to administrative penalties or criminal prosecutions according to the laws.