

China Update

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Precaution Necessary In Dealing with State Secrets When Doing Business in China

China's recent trials on Australian citizen Stern Hu and American citizen Feng Xue caught worldwide attention to China's State secrets protection regime. Although due to the political wrestling behind the scene, charge on Stern Hu, who was initially detained for infringing China's State secrets, was eventually "downgraded" to commercial secrets infringement, Feng Xue was sentenced to 8-year imprisonment on July 5, 2010 for infringing State secrets due to his involvement in purchasing a database on coordinates and volume of oil reserves in China on behalf of his US employer IHS Energy.

Both of these two cases involve accessing information relating to China's economic data and strategies held by state-owned enterprises ("SOEs"), government-sponsored industrial associations or "institutional units(事业单位)". The Chinese government usually deems this type of information as "affecting the security and interests of the State" and has been highly cautious with leaking of such information to international companies. However, although the PRC government recently published the *PRC Preservation of State Secrets Law* (the "State Secrets Law", coming into effect on October 1, 2010), it does not provide clear guidance for where the line should be drawn between "commercial secrets" and "State secrets" in China, despite that the penalties imposed for infringement of these two types of secrets are vastly different: a person who infringes State secrets may be sentenced to death, while infringement of commercial secrets is subject to maximum imprisonment term of seven years.

State secrets are defined in State Secrets Law as information that "affects the security and interests of the State, confirmed by appropriate proceedings and only known to certain persons within a certain period of time", the disclosure of which will "damage State security and State interests from a political, economic, national defense or diplomatic perspective". Confidential information relating to national economy and social development, as well as science and technology, which is usually considered to be "commercial" by international standard, is listed in the State Secrets Law as covered. This is particularly problematic when such information is held by SOEs etc., taking into account that under the *Interim Rules on Protection of Commercial Secrets of Central SOEs* (published on March 25, 2010), it was confirmed that commercial information relating to business and technology of central SOEs may also be State secrets. Further, while the State Secrets Law does provide that the characterization of information as State

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secrets should be confirmed by appropriate proceedings, in practice, the confirmation requirement has not prevented the prosecution of alleged offenses involving information not been officially "confirmed".

International companies doing business in China should pay close attention to guard against violation of the State Secrets Law. International companies should pursue a robust internal compliance system for the handling of classified information. It is advisable to procure the disclosing parties to represent and covenant that they will not disclose State secrets related information. In addition, foreign companies should conduct periodic training to their employees in respect of dealing with information that is not in the public domain and should maintain complete and accurate records of information exchange with counter-parties.

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This article is not intended to provide legal advice with respect to any particular situation and no legal or business decision should be based solely on its content. Questions concerning issues addressed in this article should be directed to any member of the Paul, Weiss China Practice Group, including:

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