LLINKS Law Offices
通力律师事务所

Shanghai
19F, ONE LUJIAZUI
68 Yin Cheng Road Middle
Shanghai 200120 P.R.China
Tel: (86 21) 3135 8666
Fax:(86 21) 3135 8600

Beijing
Units 902-903
Winland International Finance Centre
No.7 Finance Street, Xicheng District
Beijing 100033 P.R.China
Tel: (86 10) 6655 5050
Fax:(86 10) 6655 5060

上海
上海市银城中路68号
时代金融中心19楼
邮政编码: 200120
电话: (86 21) 3135 8666
传真: (86 21) 3135 8600

北京
北京市西城区金融大街7号
英蓝国际金融中心9楼02-03单元
邮政编码: 100033
电话: (86 10) 6655 5050
传真: (86 10) 6655 5060

www.llinkslaw.com
master@llinkslaw.com

Llinks Corporate Bulletin
December 2010

The State Council Promulgated the New Regulations on the Administration of Foreign Enterprises' Representative Offices in China

By David Yu, Nicholas Lou and Teddy Li

On 19 November 2010, The State Council promulgated the *Regulations on the Administration of Registration of Foreign Enterprises' Resident Representative Offices* (The State Council Order No. 584) (the "Regulations"), which will come into force on 1 March 2011. The Regulations provides for the administration of registration of foreign enterprises' resident representative offices (the "Representative Offices"), and accordingly, the *Regulations on the Administration of Registration of Foreign Enterprises' Resident Representative Offices* (the "Previous Regulations") issued by the State Administration for Industry and Commerce ("SAIC") on 15 March 1983 was repealed simultaneously.

On 4 January 2010, SAIC and the Ministry of Public Security jointly issued the *Circular on Further Strengthening the Administration of Registration of Foreign Enterprises' Resident Representative Offices* (the "Circular") (Gong Shang Wai Qi Zi [2010] No. 4), which expressly provided that the supervision of the registration of the Representative Offices and their business activities shall be strengthened. The Regulations promulgated recently further provides explicit and detailed regulations on the registration of the Representative Offices, their business activities and the relevant legal liabilities, as follows.

- **Expressly strengthening the supervision on the Representative Offices' engagement in profit generating activities**

  The Previous Regulations provided that a Representative Office shall only engage in activities which are not profit-generating unless otherwise stipulated by the agreement between China and the country in which the foreign enterprise resides. Article 15 of the Previous Regulations further expressly provided that, where a Representative Office violates Article 3 of the Previous

如果您需要本出版物的中文本，请与下列人员联系：

韩东红: (86 21) 3135 8709
Publication@llinkslaw.com

If you would like other Llinks publications, please contact:

Lily Han: (86 21) 3135 8709
Publication@llinkslaw.com

Llinks Law Offices
www.llinkslaw.com

This publication is for general guidance only and is not intended to provide legal advice in any specific case. We expressly disclaim any liability for the consequences of action or non-action based on this publication. All rights reserved.

Regulations and engages in profit-generating business activities, the registration authorities shall order them to cease those activities and impose a fine of no more than RMB 20,000. Moreover, the Circular issued in early 2010 explicitly indicated that there has been a prevalence of the Representative Offices engaging in illegal operations which violate laws and regulations in recent years. Therefore, the Circular provided that any Representative Office that engages in business operation by charging fees in various forms shall be penalized in accordance with rules against unlicensed operation. However, no explicit and detailed punishment or liability was further provided.

Therefore, the Regulations promulgated recently further provides the explicit rules on the Representative Offices. First, the Regulations expressly provides that a Representative Office may not engage in any profit-generating activity. Second, the Regulations expressly provides that activities related to the business of the foreign enterprises which a Representative Office may engage in includes (i) market investigation, display, promotional activities in connection with the products or services of foreign enterprises; and (ii) liaison activities in connection with products sales, services provision, domestic procurement and domestic investment of foreign enterprises. Where the business activities engaged by a Representative Office are required to be approved in accordance with the laws, regulations or provisions of the State Council, then such approval shall be obtained. Third, Article 35 of the Regulations expressly provides the legal liabilities for the engagement in profit-generating activities and increased the fine and legal liabilities for such violations, including ordering a Representative Office to correct and confiscate the illegal gains and the tools, equipments, raw materials, products (commodities) and other property that are specially used for engaging in profit-generating activities, and imposing a fine of no less than RMB50, 000 and no more than RMB500,000. In egregious cases, the registration certificate of a Representative Office shall be revoked. In addition, Article 39 of the Regulations further provides that where the Representative Office has its establishment registration cancelled, has its registration certificate revoked, or is ordered to close, the foreign enterprise which establishes such Representative Office may not establish another Representative Office within the territory of China within the five years after the date of revocation, cancellation or order.

The regulations mentioned above demonstrates the strengthening of supervision and punishment against Representative Offices' profit-generating activities. Therefore, the Representative Offices should take caution to such profit-generating activities throughout their business operations.

- **New annual report requirement for Representative Offices**

As another measure to strengthen the supervision of the Representative Office, a new requirement under the Regulations provides that a Representative Office shall provide annual reports. In accordance with Article 6 of the Regulations, a Representative Office shall provide annual reports to the registration authorities between March 1 and June 30. The content of such annual report shall include information regarding the legal existence and standing of the foreign enterprise, information of the business activities of the Representative Office and information of the expenses, expenditure and revenues audited by its accounting firms and other related information.

This publication is for general guidance only and is not intended to provide legal advice in any specific case. We expressly disclaim any liability for the consequences of action or non-action based on this publication. All rights reserved.

Moreover, the Regulations provides the relevant legal liabilities regarding the annual report requirement. In accordance with Chapter 6 of the Regulations, where a Representative Office fails to submit the annual report, the registration authorities shall order the Representative Office to make corrections. Where it fails to make corrections, a fine of no less than RMB10,000 and no more than RMB100,000 shall be imposed. Where the circumstances are egregious, the registration certificate of the Representative Office shall be revoked. Furthermore, where the Representative Office conceals true information or makes falsifications in the submitted annual report, the registration authorities shall order it to make corrections, and the Representative Office shall be punished with a fine of no less than RMB20,000 and no more than RMB200,000. Where the circumstances are egregious, the registration certificate of the Representative Office shall be revoked.

The annual report requirement mentioned above provides that a Representative Office shall submit true annual reports to the registration authorities subject to its requirements every year, which is a good way to inform the registration authorities of the business activities of the Representative Office. Meanwhile, the legal liabilities provisions in the Regulations also provide the legal basis for the punishment handed out by the registration authorities. For a Representative Office, the registration certificate may be revoked if it fails to submit the annual reports in due time, or conceals the true information or makes falsifications in the annual reports.

- **Clarify that the measures can be implemented by the registration authorities to investigate Representative Offices**

The Regulations provides that the specific measures can be exercised by the registration authorities to investigate a Representative Office that is suspected of infringing the Regulations. This also demonstrates that the Regulations strengthens the supervision of the Representative Offices. In accordance with Article 21 of the Regulations, when investigating the activities of the Representative Office that is suspected of violating the Regulations, the registration authorities may legally exercise its authority, which includes (i) investigating and understanding the situation from relevant entities and individuals; (ii) consulting, copying, sealing up and/or detaining the contracts, documents, accounting books and other materials in connection with the activities in violation of the laws; (iii) sealing up or detaining the tools, equipments, raw materials, products (commodities) and/or other property that are specially used for engaging in illegal activities; and (iv) checking the accounts and the accounting vouchers, accounting books and statements of accounts in connection with the savings of the Representative Office which engage in illegal activities.

Such measures provide the registration authorities with the legal basis for the authority to investigate the Representative Offices' illegal activities. Accordingly, such provisions brought alert that a Representative Office should conduct its business activities pursuant to the laws and regulations. Otherwise it may be subject to investigation or punishment to various extents.

- **Other new notable rules provided by the Regulations**

This publication is for general guidance only and is not intended to provide legal advice in any specific case. We expressly disclaim any liability for the consequences of action or non-action based on this publication. All rights reserved.

– The Regulations provides new requirements for the establishment registration and the resident period of the Representative Offices. Compared with the Previous Regulations, the Regulations provided two new requirements in respect of the necessary documents when undergoing establishment registration, which are (i) the certificate of domicile of the foreign enterprise and the certificate of legal operation for more than two years; and (ii) the articles of association or the organization agreement of the foreign enterprise. In addition, the Previous Regulations provided that the validity term of the registration certificate is one year, and the registration certificate shall be renewed every year. However, there are no such provisions in the Regulations. The Regulations only provides that the resident period of a Representative Office may not exceed the duration period of the foreign enterprise, without any explicit provisions with respect to the maximum resident period or the validity term of the registration certificate. Whether a foreign enterprise can freely apply for the resident period to the extent of the duration of the foreign enterprise needs to be further clarified by the registration authorities in practice.

– The Regulations clarifies the persons who may not act as chief representative or representatives. Article 12 of the Regulations provides the circumstances under which a person may not be chief representative or other representatives. Aside from the circumstance where a person is sentenced due to being detrimental to national security or social pubic benefits of the PRC, foreign enterprises should pay more attention to the fact that former chief representative or other representatives of the Representative Offices which had its establishment registration legally revoked or its registration certificate cancelled, or were ordered to close by the relevant authorities due to any infringing activity that was deemed detrimental to national security or social public benefits of the PRC cannot act as representatives or chief representative for five years from the date of such revocation, cancellation or order.

  Foreign enterprises, the Representative Offices and the representatives should pay attention to this article because the provisions with respect to legal liability in the Regulations add several circumstances where the registration certificate of a Representative Office may be revoked.

– The Regulations provides the new rules for the publication of the establishment registration. The Regulations provides that the registration authorities shall record the registration matters of a Representative Office in the registrars to be made available to or copied by the general public. Furthermore, the Regulations provides that foreign enterprises shall announce the establishment or change of the Representative Offices to the general public via media designated by the registration authorities. However, the specific procedures of such announcement and the definition of such "designated media" still need to be further clarified by the registration authorities in practice.

In conclusion, the promulgation and implementation of the Regulation demonstrate that the competent authorities intend to further strengthen the supervision on the Representative Office's registration and their business activities. Therefore, the Representative Office and the foreign enterprises who intend to establish a Representative Office in PRC shall pay particular notice to the Regulation.

This publication is for general guidance only and is not intended to provide legal advice in any specific case. We expressly disclaim any liability for the consequences of action or non-action based on this publication. All rights reserved.

Contact Details

If you would like to know more information about the subjects covered in this publication, please feel free to contact the following people or your usual Llinks contact.

Shanghai	Beijing
David Yu Tel: (86 21) 3135 8686 David.Yu@llinkslaw.com	**Wayne Chen** Tel: (86 10) 6655 5050 - 1022 Way.Chen@llinkslaw.com
Ming Zhang Tel: (86 21) 3135 8777 Ming.Zhang@llinkslaw.com	
Clare Lu Tel: (86 21) 3135 8667 Clare.Lu@llinkslaw.com	

© Llinks Law Offices 2010

This publication is for general guidance only and is not intended to provide legal advice in any specific case. We expressly disclaim any liability for the consequences of action or non-action based on this publication. All rights reserved.