

## New State Secrets Implementing Regulations: More of a Damp Fizzle than a Bang?

March 2014

### Overview

The *People's Republic of China State Secrets Protection Law Implementing Regulations* ("**New State Secrets Implementing Regulations**") were promulgated on 17 January 2014 and became effective on 1 March 2014. The *People's Republic of China State Secrets Protection Law Implementing Measures* - ratified by the State Council on 25 April 1990 ("**Old Implementing Measures**") and later published by the State Secrets Bureau ("**SSB**") on 25 May 1990 - were simultaneously repealed with effect from 1 March 2014.

### The Main Changes

The most significant change brought about by the New State Secrets Regulations, as compared to the Old Implementing Measures, is the removal of the "type of harm" definition in state secrets. Article 4 of the Old Implementing Measures had provided that any matter that if disclosed could result in specified types of harm should be considered as falling within the scope of state secrets.

The New State Secrets Implementing Regulations make no mention of what would constitute a state secret. The draft version of the New State Secrets Implementing Regulations ("**Draft Regulations**"), which was issued on 15 May 2012 for public comment, had provided for, among other things, the elaboration of what would constitute a state secret pursuant to the State Secrets Law. The Draft Regulations had set out nine areas, the divulgence of which may prejudice state security and national interests in the fields of political, economic, national defence and foreign affairs (and hence constitute a state secret) in Article 9; it is unfortunate, in this area of law where lack of precision and clarity are perhaps the defining features of the legislation that this article was not included in the New State Secrets Implementing Regulations.

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Interestingly, the only provision in the New State Secrets Implementation Regulations that touches on the definition of "state secrets" is the rather enigmatic statement in Article 5: "*State organs and units must not determine as state secrets matters that are to be made public in accordance with law, and must not make public any information involving state secrets*". This seems to be a reference to over-classification or hiding embarrassing information under the safety blanket of 'state secrets'.

Hence, the definition of "state secrets" is still somewhat nebulous and still a patchwork of broadly-worded provisions main drawn from the *People's Republic of China State Secrets Protection Law* (promulgated by the Fourteenth Session of the Standing Committee of the Eleventh National People's Congress and effective from 1 October 2010) ("**State Secrets Law**"), various provisions promulgated by the State Secrets Bureau, the *Circular on the Promulgation of the Interim Provisions on the Protection of the Trade Secrets of Centrally-administered Enterprises*<sup>1</sup>, and certain Supreme People's Court interpretations read together with the *People's Republic of China Criminal Law*<sup>2</sup> and the *People's Republic of China Criminal Procedure Law*<sup>3</sup>.

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<sup>1</sup> Promulgated by the State-Owned Assets Supervision and Administration Commission ("**SASAC**") of the State Council and effective as at 25 March 2010.

<sup>2</sup> Promulgated by the National People's Congress on 14 March 1997 and effective as at 1 October 1997 (revised 1999, 2001, 2002, 2005, 2009), which itself revised the 1979 law of the same name.

<sup>3</sup> Promulgated by the National People's Congress and as amended for the second time in accordance with the *Decision on Amending the People's Republic of China Criminal Procedure Law* and effective as at 1 January 2013.

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## The Main Provisions that have been Deleted

In addition, we note that the following provisions in the Old Implementing Measures have been 'removed' from the New State Secrets Regulations:

- detailed reward system for individuals or groups in government organs or bodies in their work in maintenance and protection of state secrets or improving technologies and methodologies for the protection of secrets (Articles 27 to 28 of the Old Implementing Measures) – the provisions have essentially been replaced by Article 8 of the State Secrets Law by a general statement that such work shall be rewarded; and
- details of circumstances where, while disclosure of a state secret is not serious enough to warrant criminal punishment, more severe administrative sanctions shall be imposed (Articles 29 to 33 of the Old Implementing Measures) – the provisions have been replaced by Articles 44 and 47 of the State Secrets Law which provide that administrative sanctions, rectifications or disciplinary action must be recommended for serious violations of stipulations relating to secrecy (but which are not serious enough for criminal punishment).

## Our Reading

The New State Secrets Implementing Regulations essentially read like the "internal guidelines" for State organs and units involving state secrets in administering state secrets. Most of the provisions of the New State Secrets Implementing Regulations essentially flesh out details to implement the State Secrets Law in areas such as:

- administration of state secret-bearing media;
- criteria that enterprises and public institutions must fulfill in order to engage in state secrets-related business;

- a 24 hour timeline in reporting state secret leaks;
- supervision, investigation and examination obligations and powers of the State Secrets Bureau;
- the destruction of state secret-bearing media;
- declassification of state secrets.

## Conclusion

So how will the New State Secrets Implementing Regulations impact on foreign companies? On the face of it, there will be limited or no impact as the New State Secrets Implementing Regulations do not provide further granularity on the definition of "state secrets". The only references to non-State organs and units are criteria that enterprises which engage in "state secrets-related businesses" must meet, and the punishments to be imposed on them should they assist State organs and units in evading or obstructing inspections or investigations into cases involving disclosure of state secrets.

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