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## China's Amended Administrative Penalty Law Took Effect on July 15

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In January 2021, China's National People's Congress Standing Committee amended the Administrative Penalty Law (the "**2021 APL**" or "**amended APL**") from its last amendment in 2017 (the "**2017 APL**"). The amended APL became effective July 15, 2021, and created more operational and compliance implications for foreign businesses operating in China. The law applies to all behavior violating administrative regulations and orders, and it makes it clear that the purpose is not merely to penalize, but also to educate by rectifying violating conducts so that individuals and businesses will follow the law voluntarily. Given the proliferation of administrative regulations in China, the coverage of the 2021 APL is extensive.

Below are notable changes to the APL with the newly effective amendment:

### 1. New Types of Administrative Penalties.

The 2021 APL introduces six (6) types of new penalties<sup>1</sup> for violations: (i) public reprimand, (ii) temporary suspension of permit or certificate, (iii) downgrading of qualification, or revocation of permit or certificate, (iv) restriction on conducting production and operational activities, (v) order to shut down, and (vi) restriction on practice.

Similar penalties have already been in use by various regulators scattered throughout isolated regulator departments. However, by formalizing these penalties in the 2021 APL, all administrative agencies now have more ammunition in their toolbox.

### 2. Substantially Longer Statute of Limitations for Certain Violations.

The 2017 APL provides for a general two-year statute of limitations (the "**SOL**") for all violations, and the amended APL now extends the SOL to five years if the violation concerns "life and health safety, financial security of citizens." The "life and health safety, financial security of citizens" is undefined in the law, which can potentially include a wide range of activities from food, pharmaceutical, chemical, transportation and environmental, to banking, insurance, securities, commodities, payment and lending services, etc.

Given this uncertain application of the five-year extended SOL, businesses may consider reviewing their existing documents and information retention policies – especially for those that are set to be disposed under five years – to see if an extended retention period would be appropriate.

### 3. Additional Flexibility to be Excused from Penalties.

Article 33 of the amended APL provides more leniency to first offenders, saying that such violators may be excused from penalty if the violation is promptly corrected, and the resulting damages are minor. The same

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<sup>1</sup> Administrative penalties provided in the 2017 APL are: (i) warning, (ii) fine, (iii) confiscation of illicit gains or properties, (iv) order to suspend production and operation, (v) administrative detention, and (vi) penalties as allowed in other laws and regulations.

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article also makes it clear that unless otherwise required by laws or regulations, the violator's fault is a required element before any penalty can be imposed. It is important to note that the burden of proof is on the violator to prove that it was not at fault as to the violation.

For businesses, having a well-established compliance program both on paper and in practice will be especially important in this context. Additionally, appropriate contingency plan(s) should be in place so that the organization can react promptly to rectify and/or control damages in the event a violation occurs.

## 4. More Procedural Due Process.

Article 63 of the amended APL expands the right to a hearing within the agency to include certain newly introduced types of penalties as described above<sup>2</sup>. Now a hearing is mandatory when requested by the violator if any of the following penalties is sought by the regulator: (i) impose a relatively large fine amount, (ii) confiscate illicit gains or properties of a relatively large amount/value, (iii) downgrade qualification or revoke permit or certificate, (iv) order to suspend production or operation, order to shut down, or restrict practice, (v) other burdensome administrative penalties, and (vi) circumstances as provided by other laws and regulations. What is considered "relatively large" is not defined and is to be determined by the agency imposing the penalty. The hearing will be at no cost to the applicant.

In addition, the amended APL requires that at least two (2) enforcement personnel be present when making an investigation or conducting an inspection, and they are obligated to identify themselves and show proper ID. Relevant personnel can refuse the investigation or inspection if no proper ID is shown to them after making such demand to the enforcement personnel. In conformity to the *Administrative Procedure Law (2017)*, also passed by the NPC, the amended APL confirms that evidence collected by illegal means cannot become the basis for ascertaining facts of the enforcement case.

## 5. Takeaways for Multi-Nationals Operating in China.

The 2021 APL took effect as of July 15, 2021. Businesses may consider doing the following:

- Properly and adequately document internal procedures so as to preserve the "no fault" argument. Identify the company's risk profile in business operations. Make sure to have effective compliance programs.
- Check the company's existing documents and information retention policies – especially for those that are set to be disposed of under five years, given the potential extended statute of limitation under the 2021 APL.
- Conduct internal training with employees regarding how to react when encountering onsite investigation or inspection from administrative agencies. These inspections sometimes come as a surprise. For example, always ask for and check for proper identification from the enforcement personnel, read carefully before signing anything required by the enforcement personnel, etc.

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<sup>2</sup> Except for the penalties of (i) public reprimand, and (ii) temporary suspension of permit or certificate, which do not result in automatic right to hearing.

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- Once an enforcement action is initiated against the company, do not bury your head in the sand. Communicate and respond actively to provide facts, reasonings and defenses to the agency. If a penalty is imposed and the company has reasonable grounds to challenge it, ask for a hearing. These steps will help build a stronger case if a hearing or even administrative lawsuit is needed.

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Additional questions? Please contact Haynes and Boone lawyers [Liza L.S. Mark](#) and [Tianyun Ji](#).