中国美国商会
The American Chamber of Commerce
People's Republic of China
China Resources Building, Suite 1903
No. 8 Jianguomenbei Avenue, Beijing 100005, P. R. China
中国北京市建国门北大街8号，华润大厦1903室 邮编：100005
Tel: (8610) 8519-1920 / Fax: (8610) 8519-1910
Website: www.amcham-china.org.cn

April 19th, 2006

2006年4月19日

Standing Committee of the National People's Congress，Law Committee，Financial and Economic Affairs Committee，Legislative Affairs Commission

全国人民代表大会常务委员会、法律委员会、财政经济委员会、法制工作委员会

Ladies and Gentlemen:

尊敬的先生和女士们：

Thank you for the opportunity to submit the attached comments with respect to the draft Labor Contract Law.

谢谢贵会给予我会提交本信件所附《劳动合同法（草案）》修改意见的机会。

The American Chamber of Commerce People's Republic of China (AmCham-China) represents U.S. companies and individuals doing business in China. AmCham-China's membership comprises more than 2,100 individuals from over 900 companies.

作为在华经营美国公司和个人的代表，中华人民共和国美国商会（中国美国商会）拥有来自 900 多家公司的 2100 多名个人会员。

The comments enclosed herewith represent the thoughts and insights of various member companies, including a number of large multinational enterprises in various industry sectors that employ thousands of Chinese citizens. Upon learning of the contents of the Draft Labor Contract Law (hereafter the "Draft"), AmCham-China has called several meetings of its members and formed a team to carefully study and discuss the draft. In general, we believe the draft has accomplished a great deal in incorporating the country's experience and lessons in implementing the Labor Law and attempting to resolve important issues such as the low formation rate of written labor contracts, the tendency to adopt short-term contracts, and the lack of protection of the interests of ordinary workers. The draft also made a commendable effort to clarify the respective rights and obligations of employers and employees, with a general goal of extending greater protection to the latter.

本信件所附修改意见代表了各会员公司包括各领域内雇用成千上万中国公民的大型跨国公司的理解和意见。在获悉《劳动合同法草案》（下称"草案"）的内容后，中国美国商会召开了几次会员会议，并成立了一个小组对该草案进行了仔细的研究和讨论。总体而言，我们认为，该草案已经融合并吸取了中国在执行劳动法方面的许多经验和教训，并在解决劳动合同书面签约比率低、劳动合同短期化趋势和普通劳动者利益得不到保护等重要问题方面做出了大量努力。值得称赞的是，为了对劳动者做出更大的保护，该草案还明确了用人单位和员工之间各自的权利和义务。

However, we also find certain flaws in the draft, which, if not cured through revision, will not only impede effective implementation of the law, but also adversely impact the country's economy. While the members of AmCham-China are foreign-invested companies, they are all registered under Chinese laws. As members of the Chinese business community, and with the sincere intention to promote a

"harmonious society," we make the following comments regarding the Draft and propose changes with respect to the following topics: (1) the regulation of dispatched employees (Art. 40); (2) the making of company rules, regulations, and policies concerning employees (Arts. 5, 51); (3) the rights of employers to terminate fixed-term labor contracts (Arts. 32, 26); (4) the payment of severance compensation upon the expiration of labor contracts (Art. 39, clause 3; Art. 37, clause 1); (5) the payment of compensation for obligations that restrict competition (Art. 16); (6) the regulation of probationary periods (Art. 13); (7) the interpretation of an employment relationship in the absence of a written labor contract (Arts. 9, 10); and (8) the restrictions on terminations based upon economic circumstances of the employer (Art. 33).

但是，在该草案中我们也看到了一些缺陷。如果这些缺陷不通过修改而加以补救，那该部法律不仅不能得到有效实施，而且还会给中国经济带来负面影响。尽管中国美国商会的会员都是外商投资公司，但它们都是依照中国法律注册登记的公司。作为中国商业界的成员，和出于推动建立"和谐社会"的真诚意愿，我们对该草案提出如下意见，并提议对下列问题做出相应修改：（1）有关被派遣劳动者的规定（第 40 条）；（2）公司对有关公司制度、规定或政策的制定（第 5 条和第 51 条）；（3）用人单位终止固定期限劳动合同的权利（第 32 条和第 26 条）；（4）劳动合同到期后的离职金（第 39 条第 3 款和第 37 条第 1 款）；（5）竞业限制补偿金（第 16 条）；（6）有关试用期的规定（第 13 条）；（7）在不存在书面劳动合同的情况下对劳动关系的解释（第 9 条和第 10 条）；和（8）对用人单位根据经济形势终止劳动合同的限制（第 33 条）。

If you have any questions or comments, please feel free to contact the undersigned.

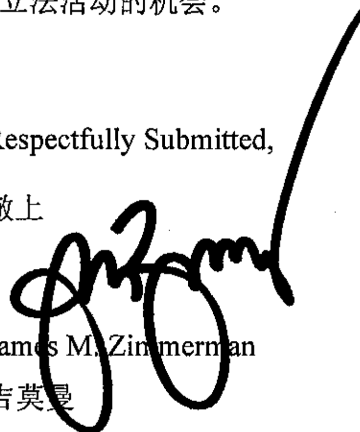
如果贵会有任何问题或意见，请直接联系下列人士。

Once again, thank you for this opportunity to participate in this important legislative endeavor.

再次感谢贵会给予我会参与此次重要立法活动的机会。

Respectfully Submitted,

敬上



James M. Zimmerman
吉莫曼
Vice Chairman
副会长
American Chamber of Commerce China
中国美国商会

Contact Person: James M. Zimmerman
联系人：James M. Zimmerman
Contact Phone: 86-10-8529-6998
联系电话：86-10-8529-6998
Email: JZimmerman@ssd.com
电子邮件：JZimmerman@ssd.com

中国美国商会
The American Chamber of Commerce
People's Republic of China
China Resources Building, Suite 1903
No. 8 Jianguomenbei Avenue, Beijing 100005, P. R. China
中国北京市建国门北大街8号，华润大厦1903室 邮编：100005
Tel: (8610) 8519-1920 / Fax: (8610) 8519-1910
Website: www.amcham-china.org.cn

The American Chamber of Commerce

People's Republic of China

中国美国商会

Comments on the Draft Labor Contract Law of the People's Republic of China

关于《中华人民共和国劳动合同法（草案）》的修改意见

Date: April 19th, 2006

日期：2006年4月19日

To: Standing Committee of the National People's Congress，Law Committee，Financial and Economic Affairs Committee，Legislative Affairs Commission

致：全国人民代表大会常务委员会、法律委员会、财政经济委员会、法制工作委员会

From: AmCham-China

自：中国美国商会

Table of Contents

I. Regulation of Dispatched Employees 2
1． 有关被派遣劳动者的规定 2
II. The Making of Company Rules 8
2．公司规章制度的制定 8
III. The Right of Employers to Terminate Fixed-Term Labor Contracts 11
3．用人单位终止固定期限劳动合同的权利 11
IV. Severance Pay Upon Expiration Of Labor Contracts 15
4．劳动合同到期后的离职金 15
V. Non-Compete Compensation and Damages for Breach 17
5． 竞业限制补偿金和违约金 17
VI. Probation Period 20
6． 试用期 20
VII. Interpretation of Contract 22
7．合同的解释 22
VIII. Distinction between Restrictions on Termination of Labor Contract and Restrictions on Economic Layoffs 26
8．劳动合同终止限制和经济裁员限制的区别 26
CONCLUSION 30
结论 30

Ladies and Gentlemen:

尊敬的先生和女士们：

The American Chamber of Commerce People's Republic of China (AmCham-China) represents U.S. companies and individuals doing business in China. AmCham-China's membership comprises more than 2,100 individuals from more than 900 companies. It has more than 20 industry- and issue-specific forums and committees, and meets with US and Chinese officials to discuss challenges facing US firms doing business in China.

作为在华经营美国公司和个人的代表，中华人民共和国美国商会（中国美国商会）拥有来自 900 多家公司的 2100 多名个人会员。中国美国商会还有 20 多个行业协会和专门委员会，经常与美国和中国官员会面并讨论在华经营美国公司所面临的一些挑战。

Upon learning of the contents of the Draft Labor Contract Law (hereafter the "Draft"), AmCham-China has called several meetings of its members and formed a team to carefully study and discuss the draft. In general, we believe the draft has accomplished a great deal in incorporating the country's experience and lessons in implementing the Labor Law and attempting to resolve important issues such as the low formation rate of written labor contracts, the tendency to form short-term contracts, and the lack of protection of the interests of ordinary workers. The draft also made a commendable effort to clarify the respective rights and obligations of employers and employees, with a general goal of extending greater protection to the latter.

在获悉《劳动合同法草案》（下称"草案"）的内容后，中国美国商会召开了几次会员会议，并成立了一个小组对该草案进行了仔细的研究和讨论。总体而言，我们认为，该草案已经融合并吸取了中国在执行劳动法方面的许多经验和教训，并在解决劳动合同书面签约比率低、劳动合同短期化趋势和劳动者

利益得不到保护等重要问题方面做出了大量努力。值得称赞的是，为了对劳动者做出更大的保护，该草案还明确了用人单位和员工之间各自的权利和义务。

However, we also find certain flaws in the draft, which, if not cured through revision, will not only impede effective implementation of the law, but also adversely impact the country's economy. While the members of AmCham-China are foreign-invested companies, they are all registered under Chinese laws. As members of the Chinese business community, and with the sincere intention to promote a "harmonious society," we make the following comments regarding the Draft and propose changes accordingly:

但是，在该草案中我们也看到了一些缺陷。如果这些缺陷不通过修改而加以补救，那该部法律不仅不能得到有效实施，而且还会给中国经济带来负面影响。尽管中国美国商会的会员都是外商投资公司，但它们都是依照中国法律注册登记的公司。作为中国商业界的成员，和出于推动建立“和谐社会”的真诚意愿，我们对该草案提出如下意见，并提议做出相应修改：

I. Regulation of Dispatched Employees

1. 有关被派遣劳动者的规定

Article 40 of the Draft provides,

草案第四十条规定：

If a dispatched employee assigned by a Labor Service Agent continues his/her employment after working for one year with the same labor receiving entity, the Labor Contract between the Labor Service Agent and the employee shall be terminated and a new Labor Contract shall be entered between the receiving entity

and the employee. If the accepting entity ceases the employment of such employee, it shall not be allowed to use any other dispatched employee to fill the same post.

劳动者被派遣到接受单位工作满 1 年，接受单位继续使用该劳动者的，劳动力派遣单位与劳动者订立的劳动合同终止，由接受单位与劳动者订立劳动合同。接受单位不再使用该劳动者的，该劳动者所在岗位不得以劳动力派遣方式使用其他劳动者。

Upon study, we believe that:

经过研究后，我们认为：

1. In a market economy, remaining competitive is one of the most basic prerequisites for the survival and growth of enterprises. The form of dispatched labor is a form of allocating human resources in a market economy. Practical experience has proven that outsourcing non-core duties and services (including routine work requiring no special skills) is a mature and flexible employment model that can effectively reduce costs. To the employer, it can increase the enterprise's competitiveness through reduction of HR management costs and increase of flexibility; to the dispatched workers, it can increase their job opportunities and provide better benefits and better training because the dispatching company representing them has greater bargaining power; to the dispatching companies, this is a new service for profit and growth; to the state, it helps strengthen social stability because concentrated labor management promotes more job opportunities and better protects the interests of workers.

1. 在市场经济中，持续性的竞争力是企业生存和发展的一项最基本的前提条件。派遣劳动力是市场经济中分配人力资源的一种方式。实践经验证明，外包非核心业务和服务（包括不需要特殊技能的日常工作）是一项成熟而灵活、并能有效降低成本的用人方式。对于用人单位来

说，降低人力资源管理成本和增加灵活性能增加企业的竞争力；而对于被派遣劳动者来说，这种用人方式能增加他们的就业机会，并能给他们提供更好的福利和培训，因为代表他们的派遣单位拥有更大的议价能力；对于派遣单位来说，这也是一种能给它带来利润和发展机会的新服务；对于国家来说，它也有助于增强社会的稳定，因为集中式的劳动力管理能带动更多的工作机会，并能更好地保护劳动者的利益。

2. Because dispatched labor has such positive values, the government should not ban it but guide and regulate it as a normal form of employment through laws and regulations so that it can better serve the needs of the socialist market economy. Just as government leaders have recently pointed out on many occasions, the problems arising in the reform can be solved only through further reforms. Banning dispatched labor would only lead enterprises back to the days of low efficiency where a company must have every function performed by its own employees. This would weaken the competitiveness of all Chinese enterprises, including foreign-invested enterprises and slow the country's growth.

2. 由于派遣劳动力具有以上这些积极因素，所以政府不应禁止它，而是应该将它当作一种正常的用人方式通过法律法规对它加以规范，以便它能更好地满足社会主义市场经济的需要。就像政府领导人最近在多个场合所指出的那样，改革中出现的问题只有通过进一步的改革才能加以解决。禁止派遣劳动力只能导致企业重回过去那种效力低下的境地：公司的各种职能只能由其自己的员工来执行。这会削弱中国所有企业（包括外商投资企业）的竞争力，并降低中国的发展速度。

3. Once this new rule is adopted, enterprises would have to make major changes to their current employment practices. With no other choice, they

would be inclined hire fewer people to economize on labor costs, thus causing a reduction of employment opportunities and higher unemployment. To avoid the restriction on dispatched labor in the same position after one year, employers would be inclined to keep changing the distinctions between positions, resulting in shorter tenures for dispatched workers and instability in the job market. Such serious impact on employment is inconsistent with the general goal of the 11th Five-Year Plan for expanding employment.

3. 一旦这部新的法律获得通过，那很多企业将会对它们目前实行的用人政策做出重大改变。它们除了雇用更少的人以节省劳动成本外，将别无选择，这样就造成就业机会的减少和失业率的上升。为了规避派遣劳动力在同一职位上工作一年后的限制性规定，很多企业会不停地改变不同职位之间的界限，这就会导致被派遣劳动者就业时间进一步缩短，并造成劳动市场的不稳定。该草案对目前就业制度的严重影响是与第 11 个五年计划扩大就业率的基本目标不一致的。

4. A uniform bonding requirement is a heavy burden on dispatching companies, causing a severe drain on their cash flow. Reinvestment of such bonds by the government would incur unnecessary financial risk. Except for the financial industry, there is no precedent for bonding in other PRC legislation.

4. 统一的保证金制度是派遣公司的一项沉重负担，因为这会严重地耗尽他们的现金流。政府对保证金的进一步投资也将导致形成不必要的金融风险。除了金融行业外，中华人民共和国的其它法律还没有出现过保证金的规定。

5. Suppressing the growth of dispatched labor would adversely impact workers as well because the Draft makes no exception for situations where the laborers themselves choose to work as dispatched workers. This will worsen

their weak positions on the job market, with no one strong enough to protect their interests when dealing with employers.

5. 抑制派遣劳动力 的增长也会给劳动者带来不利的影响，因为该项草案并没有对劳动者自己愿意成为被派遣劳动者的情形做出例外规定。这将会恶化他们在劳动市场上的弱势地位，在与用人单位谈判时，劳动者个人就没有足够大的力量来保护自己的利益。

6. If the major legislative intent of this Article is to prevent situations where a dispatched worker may find no one to recover unpaid wages or social security benefits, that problem is already resolved by Article 59 which provides that both the dispatching company and the receiving company shall be jointly liable for damages arising from a dispatched worker's injuries at a receiving company. As the legislative goal is achieved elsewhere, there is no need to impose an unreasonably heavy extra burden, as proposed in Article 40, on staffing agencies which would harm the local economy.

6. 尽管该条规定的主要立法目的是为了防止被派遣劳动者不能追回未付工资或福利，但这个问题还是可以通过草案第 59 条的规定来加以解决的。第 59 条规定，劳动者权益在被派遣的工作岗位受到损害的，由劳动力派遣单位和接受单位承担连带赔偿责任。既然该项规定的立法目的可通过其它方式达到，那也就没有必要如第 40 条所建议的那样，给用人单位增加额外的和不合理的沉重负担，进而影响当地的经济发展。

7. There are many ways to protect the interests of dispatched workers, such as raising qualification requirements for dispatching companies, regulating dispatching companies of different qualities with different levels of scrutiny, increasing the intensity and frequency of audits of dispatching companies,

blacklisting and revoking qualifications of violators of labor law, and periodically verifying compliance with minimum wage law.

7. 保护被派遣劳动者的利益有很多方式，如提高派遣单位的资质要求，用不同的审查级别规范不同资质的派遣单位，加大对派遣单位的审计力度和频率，把违反劳动法的单位列入黑名单，并取消其资质，定期检查单位对最低工资法律的执行情况等。

8. There is no clear definition of what constitutes "injured in respect of such assignment." This will increase the difficulty in compliance with and enforcement of this rule. For instance, if the Labor Service Agent fails to provide social insurance to an employee even though it has agreed to do so in its labor contract with the employee and in its service contract with the labor receiving entity, would this make the employee's rights "injured in respect of such assignment?" Furthermore, as the labor service agent is the party to the labor contract with the worker, it should be held primarily liable while the labor receiving entity should be only secondarily liable, i.e., it will be liable only when the worker is unable to obtain adequate compensation from the labor service agent.

8. 何为“派遣损害”并没有明确的定义。这会增加遵守和执行该部法律的难度。例如，如果劳动服务单位没有向劳动者提供社会保险，那即使其在和劳动者订立的劳动合同以及和劳动接收单位订立的服务合同中同意提供社会保险，被派遣劳动者也未必会有权利获得“派遣损害”的赔偿。而且，由于劳动服务单位是其与被派遣劳动者订立的劳动合同当事人，所以它应该承担主要责任，而劳动接收单位应该只承担次要责任，即只有在被派遣劳动者不能从劳动服务单位获得足够赔偿的情况之下，劳动接收单位才承担责任。

II. The Making of Company Rules

2．公司规章制度的制定

Article 5, Clause 2 of the Draft provides,

草案第 5 条第 2 款规定：

Regulations and policies made by Employers and having a direct relation to the vital interests of employees shall be adopted through discussion and approval by the trade union, workers' congress, or workers' representative assembly or by equal negotiation.

用人单位的规章制度直接涉及劳动者切身利益的，应当经工会、职工大会或者职工代表大会讨论通过，或者通过平等协商作出规定。

Article 51, Clause 1 of the Draft further provides,

草案第 51 条第 1 款进一步规定：

For matters that, pursuant to this Law, shall be adopted through discussion and approval by the trade union, workers' congress, or workers' representative assembly or by equal negotiation, unilateral decisions made by employers shall be invalid, and the matters shall be dealt with in the manner as proposed by the trade union, workers' congress, or workers' representative assembly.

依照本法应当经工会、职工大会或者职工代表大会讨论通过或者通过平等协商作出规定的事项，用人单位单方面作出规定的无效，该事项按照工会、职工大会或者职工代表大会提出的相应方案执行。

Upon study, we believe that:

经过研究后，我们认为：

1. The making of company rules is an autonomous right of employers and should be deemed valid so long as they do not violate laws, regulations, or collective contracts. These provisions are inconsistent with Article 18 of the new Company Law which gives the right of approval with respect to rules only to the trade union, not to the workers' congress or workers' representative assembly in the absence of a trade union, and only with respect to rules that are subject to a collective labor contract; for important issues relating to business operations or rules and systems generally, the company is required only to seek opinions, not to subject its decisions to trade union or employee approval.

1 公司制定自己的规章制度是公司作为用人单位的一项自治权利，所以只要公司制定的规章制度没有违反法律、法规或集体合同，就应当认为有效。草案中的这些规定与新《公司法》第 18 条的规定是不一致的，根据该第 18 条的规定对公司制度的批准权仅被赋予给工会，而没有规定在没有建立工会的情况下将此批准权赋予给职工团体或职工代表大会，并且该等权利仅限于对集体劳动合同的批准权；而对于与业务经营有关的重大问题或规章制度，一般而言，公司仅需就此征寻工会或员工的意见，而无需取得工会或员工的批准。

2. Furthermore, if all company rules must receive approval from all employees before becoming effective, then there will be no rule for extensive periods of time in the event management and employees cannot agree with each other. Disorder and interruption of production would follow.

2．而且，如果公司的规章制度在被实施前必须得到所有劳动者的批准，那在公司管理部门和劳动者不能互相协商一致的情况下，公司将在很长的时间内都没有规章制度。这会造成公司生产的混乱和中断。

3．The Draft gives no clear definition on what constitutes "vital interests of the employees," making this provision very difficult to enforce.

3 最后，何为"劳动者的切身利益"，草案也没有给出明确的定义，这会使该 条规定非常难以执行。

Of course, for the purpose of strengthening democratic participation by employees, it is necessary and reasonable to require employers to obtain the opinions of the union, employees' congress, or congress of employees' representatives.

当然，为了通过劳动者参与来加强公司的民主管理，用人单位必须合理地听取工会、职工大会或职工代表大会的意见。

Therefore, we propose to:

因此，我们提议：

1）delete Article 51, Clause 1 of the Draft, and

1）删除草案的第 51 条第 1 款；和

2）revise Article 5, Clause 2 as follows:

2）将第 5 条第 2 款修改如下：

"Regulations and policies made by Employers and having a direct relation to the vital interests of employees shall be adopted following solicitation of the opinions of the trade union, workers' congress, or workers' representative assembly."

“用人单位的规章制度直接涉及劳动者切身利益的，应当听取工会、职工大会或者职工代表大会的意见后通过。”

3）define in Article 5 what matters have direct relation to the vital interests of employees.

3）第 5 条还应该对何为“直接涉及劳动者切身利益”做出定义。

III. The Right of Employers to Terminate Fixed-Term Labor Contracts

3．用人单位终止固定期限劳动合同的权利

Article 32 of the Draft provides:

草案第 32 条规定：

A *non-fixed term* labor contract may be terminated by the Employer subject to a written notice thirty (30) days in advance or the extra payment of one (1) month's salary to the employee upon the occurrence of any of the circumstances set forth below:

有下列情形之一的，用人单位在提前 30 日以书面形式通知劳动者本人或者额外支付劳动者 1 个月工资后，可以解除无固定期限劳动合同：

(1) Where the employee has suffered from illness or non-work-related injury and is unable to perform the original job upon the conclusion of medical treatment, and a mutual agreement on changing jobs cannot be made between the Employer and the employee;

(1) 劳动者患病或者非因工负伤，在规定的医疗期满后不能从事原工作，且未能就变更劳动合同与用人单位协商一致的；

(2) The employee is incompetent in the job and remains so after receiving training or being transferred to another post;

(2) 劳动者被证明不能胜任工作，经过培训或者调整工作岗位， 仍不能胜任工作的；

(3) Where a major change in the objective circumstances under which the Labor Contract was made has rendered such Contract incapable of being carried out, and the parties thereto fail to reach an agreement on the amendment or suspension of such Contract after negotiation.

(3) 劳动合同订立时所依据的客观情况发生重大变化，致使劳动合同无法履行，经用人单位与劳动者协商，未能就变更劳动合同内容或者中止劳动合同达成协议的。

Upon study, we believe that:

经过研究，我们认为：

1. Under Article 26 of the Labor Law, the "no-fault"grounds covered by this article for terminating a labor contract should be applicable to all labor contracts, both non-fixed term contracts and fixed-term contracts.

1. 按照《劳动法》第 26 条的规定，该条规定的有关终止劳动合同的“无过错”理由应该适用所有的劳动合同，包括无固定期限合同和固定期限合同。

2. As most labor contracts now are fixed-term contracts, the actual consequence of this rule is to deprive employers of their right to terminate a labor contract where an employee is no longer able to continue work because of disability or incompetence. But giving an employee the right to forcibly continue his/her employment when the employer can no longer work with the employee creates labor disharmony and risks perpetuating disputes.

2. 由于现在的大多数劳动合同都是固定期限合同，所以这条规定的实际后果是，它在劳动者由于 残疾或不能胜任工作而不能继续从事工作的情况下，剥夺了用人单位终止其劳动合同的权利，但给予劳动者在用人单位不能再使用劳动者的情况下继续受到雇用的权利， 这将导致劳工关系不协调并导致形成争议无法解决的风险。

3. Apparently the intention of the drafters of this Article is to encourage enterprises into signing long-term or fixed-term contracts and thereby eliminate the tendency for employers to enter short-term contracts. However, a more basic question is: at this stage of China's economic development, can the country afford to make long-term (open-term) contracts mandatory? If employers are not allowed to remove unqualified employees, what is the outlook for the millions of more qualified people waiting to be employed at their doorsteps? Wouldn't they become an even heavier burden on the government than the support of discharged employees? The drafters of this

Article fail to recognize the reality that in today's China the supply of labor far exceeds demand and, with limited job positions, not discharging unqualified workers means depriving more qualified job-seekers of employment opportunities.

3. 显然，起草者起草该条规定的目的是，为了鼓励企业签订长期或固定期限合同，并消除用人单位订立短期合同的趋向性。但是，一个更根本的问题是，在中国目前的经济发展阶段，国家能够承受订立强制性的长期（无期限）合同吗？如果不允许用人单位解雇不能胜任工作的劳动者，那就能让更能胜任工作的人站在门口等待工作机会吗？难道他们就不会成为比被解雇劳动者更沉重的政府负担吗？该条规定的起草者没有意识到中国今日的现实：劳动供应远远超过劳动需求。在只有有限的工作岗位的情况下，不解除不能胜任工作的劳动者会意味着剥夺更能胜任工作的求职者的就业机会。

4. As workers are weak in comparison to employers in bargaining process, it may be appropriate to tilt the scale somewhat in favor of them in the Labor Contract Law. However, it is unrealistic to expect such "tilting" to correct the "imbalance" between insufficient demand and excess supply of labor in China. It is also unfair to allow employees to unilaterally terminate all labor contracts while prohibiting employers from terminating fixed-term contracts.

4. 由于在议价过程中，相对于用人单位而言，劳动者是一个弱势群体，所以在劳动合同法中使劳动者居于稍微有利的地位可能是合适的。但是，期望通过这种“利益倾斜”来纠正中国劳动力供应过剩和需求不足的“不平衡”是不现实的。而且，在禁止用人单位终止固定期限合同的同时，允许劳动者单方面终止所有的劳动合同也是不公平的。

IV. Severance Pay Upon Expiration Of Labor Contracts

4. 劳动合同到期后的离职金

Article 39, Clause 3 of the Draft provides,

草案第 39 条第 3 款规定;

Employers shall provide economic compensation to employees based on the term of employment by payment of one half-month's salary for every six (6) months, or one full month's salary for every one (1) year, of service rendered by such employee … in any one of the following circumstances:

有下列情形之一的，用人单位应当根据劳动者在本单位的工作年限，按满 6 个月支付半个月工资、满 1 年支付 1 个月工资的标准向劳动者支付经济补偿…：

1) In the event of any Art. 37 (1)(i) ….

1) 依照本发第 37 条第（1）款第（1）项

Article 37 (1)(i) of the Draft further provides,

草案第 37 条第（1）款第（1）项进一步规定：

(i) Where the labor contract expires, or where the conditions specified in the labor contract for termination arise;

(1) 劳动合同期满，或者劳动合同约定的终止条件出现的

Upon study, we believe that:

经过研究后，我们认为：

1. This rule should be deleted because it places an unreasonable burden on the employer, which is inconsistent with the current system of allowing short-term contracts.

1. 该条规定应该删除，因为它会给用人单位造成不合理的负担，而且也是与目前允许签订短期合同的制度相违背的。

2. It is especially unreasonable when an employee does not want to continue employment by renewing the contract after it expires.

2. 在用人单位在合同到期后不想续签继续用人时，这条规定就显得特别不合理。

3. Employers need to be able not to renew fixed term contracts when they expire and to be able to terminate non-fixed term contracts subject to paying reasonable compensation (this is generally one month's salary for every year of service in Asia), capped at a number of months.

3. 用人单位需要能够在固定期限合同到期时不用续签，并能终止无固定期限合同，即使要支付相当于几个月工资（在亚洲一般工作满一年支付一个月的工资）的合理补偿金。

Therefore, we propose to delete from Article 39, Clause 3 the reference to Art. 37 (1)(i)...

因此，我们提议删除第 39 条第 3 款中对第 37 第 1 款第（1）项得的引用。

V. Non-Compete Compensation and Damages for Breach

5. 竞业限制补偿金和违约金

Article 16 of the Draft provides:

草案第 16 条规定：

Where any agreement on competition restriction is reached between Employers and employees, additional agreements shall also be reached on the economic compensation to employees for such restriction due and payable upon the expiration or termination of the Labor Contract, which compensation shall be not less than the annual wages of such employees during their employment with the Employer. Any employee in violation of the provisions on competition restriction shall pay a penalty to his/her Employer; provided, however, that the maximum amount of the penalty shall be not more than three (3) times the economic compensation paid by the Employer to employees for their competition restriction.

用人单位与劳动者有竞业限制约定的，应当同时与劳动者约定在劳动合同终止或者解除时向劳动者支付的竞业限制经济补偿，其数额不得少于劳动者在该用人单位的年工资收入。劳动者违反竞业限制约定的，应当向用人单位支付违约金，其数额不得超过用人单位向劳动者支付的竞业限制经济补偿的 3 倍。

Upon study, we believe that:

经过研究后，我们认为：

1. Annual wages as the measure of compensation for non-competition is an unreasonable burden on the employer, as it exceeds the retirement pension in most cases. Such a rule would encourage a former employee not to actively seek a new, non-competitive job, but rather to remain idle during the non-competition period enjoying the compensation. It will force employers to make the hard choice between paying unreasonably high compensation (some "key employees" earn very high salaries) and giving up efforts to protect their trade secrets. The end result is discouragement of innovation.

1. 作为支付竞业限制经济补偿金的方法，支付年工资收入会给用人单位造成不合理的负担，在大多情况下，这种负担都会超过用人单位要支付的退休金。该条规定会鼓励离职的劳动者不去积极地寻找新的无竞业限制的工作，而在竞业限制期间懒散地享用这种经济补偿金。这也使用人单位会在支付不合理的高额补偿金（一些"关键"的职工能赚取高额薪水）和放弃努力来保护自己的商业秘密之间很难做出选择。其最终结果是抑制企业的创新努力。

2. The three times economic compensation cap on the penalty for breaching non-compete agreement is too low. The "trade secrets" of an enterprise are often worth many times the annual wages of the breaching employee.

2. 三倍于经济补偿金的竞业限制协议违反惩罚金额太低。通常，一个企业的"商业秘密"的价值会相当于违约职工年工资收入的许多倍。

3. The Draft fails to address instances where another enterprise knowingly hires former employees of its competitors to obtain access to proprietary information.

3．对企业故意招聘其竞争对手已离职的劳动者以获取专有信息的情况，草案也没有做出规定。

Therefore, we propose:

因此，我们提议：

1) Change Article 16, clause 3 to: "Where any agreement on competition restriction is reached between Employers and employees, additional agreements shall also be reached on the economic compensation to employees for such restriction due and payable upon the expiration or termination of the Labor Contract, which compensation shall not be less than 50% of the annual wages of such employees during their employment with the Employer. Any employee in violation of the provisions on competition restriction shall pay a penalty to his/her Employer of no more than three (3) times the non-competition compensation paid by the Employer to employee. Where such breach cause harm to the employer, the employee shall be responsible for economic damages."

1）将第 16 条第 3 款修改为："用人单位与劳动者有竞业限制约定的，应当同时与劳动者约定在劳动合同期满或终止时向劳动者支付的竞业限制经济补偿，其数额不得少于劳动者在该用人单位的年工资收入的 50％。劳动者违反竞业限制约定的，应当向用人单位支付违约金，其数额不得超过用人单位向劳动者支付的竞业限制经济补偿的 3 倍。如果劳动者的违约行为给用人单位造成损害的，则该劳动者应对用人单位的经济损失承担责任。"

2) At the end of Article 16, add the following clause:

2) 在第 16 条的后面，提议加上下列条款：

"Before entering into a labor contract; an employer shall make inquire of the job applicant to discover whether the job applicant has entered into a non-competition agreement with a prior employer and whether such agreement prohibits the job seeker from being employed by the current employer. Where an employer hires an employee who is prohibited by a currently effective non-competition agreement from being hired by this employer, and such conduct results in harm to the prior employer, the current employer shall be liable for economic damages."

"用人单位在订立劳动合同前，应该询问应聘人员以调查其是否已经与其前用人单位订立竞业限制协议，并查明该协议是否禁止该求职者被本单位雇佣。如果用人单位雇用了按照当前有效的竞业限制协议被禁止被该用人单位雇佣的劳动者，则该雇佣行为即给前用人单位造成了损害，该用人单位即应对前用人单位造成的经济损失承担责任。"

VI. Probation Period

6. 试用期

Article 13 of the Draft provides

草案第 13 条规定：

... The probation period shall be no more than *one (1) month* for non-technical personnel, no more than *two (2) months* for technical personnel and no more than *six (6) months* for senior technical professional personnel.

非技术性工作岗位的试用期不得超过 1 个月；技术性工作岗位 的试用期不得超过 2 个月；高级专业技术工作岗位的试用期不得超过 6 个月。

The same Employer can only set *one probation period* with the same employee.

同一用人单位与同一劳动者只能约定一次试用期。

Upon study, we believe that:

经过研究，我们认为：

1. The probation periods are too short, and insufficient for employers to evaluate the employee's qualifications for the job.

1．试用期太短，用人单位还不能足以判断劳动者是否能胜任工作。

2. The draft contains no clear definition of "technical personnel" and "senior technical personnel," making this provision very difficult to comply with and enforce at the operational level. In fact, broad categories like these are almost impossible to define.

2．对何为"技术工作岗位"和"高级专业技术岗位"，草案并没有做出明确的定义。从操作层面上来说，这使该条规定非常难以遵守和执行。事实上，像这样的广义分类是几乎不可能做出定义的。

3. Finally, the "one probation period per worker" rule fails to account for the possibility that the same employee may be promoted to a different job with the same employer warranting a fresh need to determine qualifications for the job.

3．最后，有关“同一劳动者只能约定一次试用期”的规定也没有考虑到这样一种可能性：即同一用人单位为了保证完成确定工作条件的新需要而可能会把同一劳动者调至不同的岗位。

Therefore, we propose to change this Article as follows:

因此，我们提议将该条做如下修改：

"1) A probation period may be agreed upon in a labor contract. The longest probation period may not exceed six months.

“1) 劳动合同可以约定试用期，但试用期不得超过六个月。

2) The same Employer may set only one probation period with the same employee for the same position. But where the Employer wishes to hire an employee for a new position after his employment terminates, and a new probation period is necessary, the Employer may set a new probation period with the consent of the employee."

2）同一用人单位只能就同一岗位与同一劳动者约定一次试用期。但如果在劳动者劳动合同终止后，用人单位要让劳动者就职于新岗位的，如有重新试用的必要，在获得劳动者的同意后，用人单位可以规定新的试用期。”

VII. Interpretation of Contract

7．合同的解释

Article 9 of the Draft provides:

草案第 9 条规定：

Where an actual labor relation has been formed between an Employer and any employee without conclusion of a Labor Contract in writing, they shall then be deemed to have concluded a non-fixed term Labor Contract, unless the employee suggests otherwise ....

已存在劳动关系，但是用人单位与劳动者未以书面形式订立劳动合同的，除劳动者有其他意思表示外，视为用人单位与劳动者已订立无固定期限劳动合同…

If an Employer and any employee have a different understanding of the existence of the labor relation between them, the employee's understanding shall prevail, unless any evidence to the contrary is otherwise provided.

用人单位和劳动者对是否存在劳动关系有不同理解的，除有相反证明的以外，以有利于劳动者的理解为准。

Article 10 of the Draft further provides:

草案第 10 条规定：

Where no written Labor Contract between an Employer and employee is concluded, the actual labor relation between them shall be deemed to have been established from the date on which the employee delivers labor service to the Employer.

未以书面形式订立劳动合同的，劳动关系自劳动者为用人单位提供劳动之日起成立。

Upon study, we believe that:

经过研究，我们认为：

1. Under certain circumstances, non-employees may provide temporary service to an enterprise for a short term (such as a few days) where neither party has intended to form a labor relation between them. Under other circumstances: during a short-term period after a labor contract expires, an employee may continue to work at his position because the parties intend to renew a fixed-term contract even though they have not yet done so. If Article 9 is read in connection with Article 10, there might be situations where a non-fixed term contract would be imposed on the parties against their intentions.

1 在某些情况下，如非雇员劳动者和用人单位都无意建立劳动关系，非雇员劳动者就可以向企业提供短期（如几天）的暂时性服务。在其它情况下，如在劳动合同到期后的短期内，劳动者可以继续从事他的工作，因为用人单位和劳动者都有意续签固定期限合同（即使他们尚未续签）。如果将第 9 条和第 10 条一并理解，那就有可能会出现用人单位和劳动者都要违背自己的意愿签订无固定期限合同的情况。

2. A labor contract has two sides: it concerns a labor relationship and therefore falls within the scope of state regulation; at the same time it is also a compact reflecting a civil relationship between the employer and the employee. In this respect the Labor Contract Law should be distinguished from the Labor Law. Therefore the tilt toward workers should reflect the freedom of contract and the balance of interests between the parties consistent with the Contract Law.

2. 劳动合同有双方当事人：由于它涉及到劳动关系，所以应受到国家规范的调整。同时它也是一种能反映用人单位和劳动者之间民事关系的和约。从这个方面来说，劳动合同法就应该不同于劳动法。因此，按照《劳动法》的规定，对劳动者的倾向性保护应该能反映合同自由和用人单位与劳动者双方之间的利益平衡。

Therefore, we propose to make the following changes to Article 9:

因此，我们提议对第 9 条做如下修改：

"Where an actual labor relation has been formed between an Employer and any employee without conclusion of a Labor Contract in writing within a reasonable time, they shall then be deemed to have concluded a non-fixed term Labor Contract, unless the employee suggests otherwise ...

已存在劳动关系，但是用人单位与劳动者未在合理时间内以书面形式订立劳动合同的，除劳动者有其他意思表示外，视为用人单位与劳动者已订立无固定期限劳动合同…

If an Employer and any employee have a different understanding of the existence of the labor relation between them and both understandings are consistent with the general principles of the PRC Contract Law, the employee's understanding shall prevail, unless any evidence to the contrary is otherwise provided."

用人单位和劳动者对是否存在劳动关系有不同理解，而且双方的理解都符合《中华人民共和国合同法》的基本原则的，除有相反证明的以外，以有利于劳动者的理解为准。

VIII. Distinction between Restrictions on Termination of Labor Contract and Restrictions on Economic Layoffs

8．劳动合同终止限制和经济裁员限制的区别

Article 33 of the Draft provides,

草案第 33 条规定：

In the event of any major change in the objective circumstances under which the Labor Contract was made has rendered such Contract incapable of being carried out, causing a need to lay off fifty (50) or more employees by the Employer, the Employer shall be responsible for explaining the situation to the trade union or all its staff and reach an agreement with the trade union or the workers' representatives through negotiation. When laying off employees, the Employer shall offer on a preferential basis to retain employees who have maintained a relatively longer term of service with the Employer under Labor Contracts which shall remain valid for a comparatively long fixed term or non-fixed term.

劳动合同订立时所依据的客观情况发生重大变化，致使劳动合同无法履行，需要裁减人员 50 人以上的，用人单位应当向本单位工会或者全体职工说明情况，并与工会或者职工代表协商一致。裁减人员时，应当优先留用在本单位工作时间较长、与本单位订立较长期限的有固定期限劳动合同以及订立无固定期限劳动合同的劳动者。

Upon study, we believe that:

经过研究后，我们认为：

1. Under Article 26 of the PRC Labor Law, an employer may terminate a labor contract, when the objective conditions taken as the basis for the conclusion of the contract have greatly changed so that the original labor contract can

no longer be carried out, an employer may terminate a labor contract with written notice 30 days in advance where no agreement on modification of the existing labor contract can be reached through consultation by the parties involved. Under Article 27 of the Labor Law, during a period of statutory consolidation when the employer comes to the brink of bankruptcy or runs into difficulties in production and management, and if reduction of its personnel becomes really necessary, the employer may make such reduction after it has explained the situation to the trade union or all of its staff and workers 30 days in advance, solicited opinions from them and reported to the labor administrative department.

1. 按照《中华人民共和国劳动法》第 26 条的规定，如果劳动合同订立时所依据的客观情况发生重大变化，致使原劳动合同无法履行的，则用人单位可以终止劳动合同，如果有关当事人协商不能就变更劳动合同达成协议的，则用人单位可以在提前 30 天发出书面通知后终止劳动合同。按照《劳动法》第 27 条的规定，如果用人单位濒临破产进行法定整顿期间或者生产经营状况发生严重困难，确需裁减人员的，应当提前三十日向工会或者全体职工说明情况，听取工会或者职工的意见，经向劳动行政部门报告后，可以裁减人员。

2. Article 33 of the Draft eliminates the boundary between the rights of the employer under Article 26 and Article 27 of the Labor Law. It requires employers not only to "explain[ing] the situation to the trade union or all its staffs," but also to "reach an agreement with the trade union or the workers' representatives through negotiation." This apparently conflicts with Article 26 of the Labor Law. Yet the Draft does not clarify whether it supersedes the provision in Article 26 of the Labor Law. This will complicate enforcement.

2. 草案第 33 条的规定模糊了用人单位依照《劳动法》第 26 条和第 27 条所享有的权利之间的界限。它不仅要求用人单位要向工会和其所有职

工做出解释，而且还要求用人单位和工会或职工代表大会通过协商达成协议。显然，这是和《劳动法》第 26 条的规定有冲突的。但是，草案并没有明确它是否可以取代《劳动法》第 26 条的规定。这将会使该部法律的执行进一步复杂化。

3. Large scale downsizing by an enterprise often results from poor performance and heavy losses. For the survival of the enterprise and the jobs of most employees, sometimes an enterprise may have to lay off some employees. This article sets the threshold at 50 employees for all enterprises regardless of their scale. In fact, fifty may be too high for an enterprise of one hundred but too low for an enterprise of ten thousand. Therefore, even if the provision in this article is kept, the proper threshold should not be fifty employees but a certain ratio, such as 30% of all employees.

3．企业大幅度地缩减规模通常是由于糟糕的业绩和严重的亏损所造成的。为了企业的生存和大多数劳动者的工作，企业有时可能不得不裁减一些员工。不论企业有多大规模，该条规定就对所有的企业规定了裁减人员不超过 50 个的上限限额。实际上，对有一百名职工的企业来说，50 个限额可能显得过高，而对于有一万名职工的企业来说，50 个裁减限额又可能会显得过低。因此，即使该条规定要保留下来，合适的上限人数不应该是 50 名职工，而是应该某种比例，如所有职工人数的 30%。

4. The decision whom to retain during layoffs must first be based on a consideration of how to improve the performance of the enterprise through downsizing so that the enterprise can survive and grow, not based on seniority of the employees and whether they have signed longer-term contracts or non-fixed term contracts. Otherwise the country will be return to the era of the “iron bowl.”As Chinese leaders have repeatedly stressed

recently, problems arising in reforms can only be solved through reforms, not by a retreat into the past.

4. 在裁减期间决定留用哪些职工时，应首先考虑是否能通过缩减规模来提高企业的经营业绩、以便能使企业生存和发展，而不应考虑企业职工的资历，以及他们是否已经和企业签订长期或无固定期限合同。否则，中国又会回到那个“铁饭碗”的时代。就像中国领导人近来多次强调的那样，改革中出现的问题只能通过进一步的改革而不是通过退回到过去来解决。

Therefore, we propose to make the following changes to Article 9:

因此，我们提议对第 9 条做如下变更：

1) Continue use of the clear concepts and provisions in Articles 26 and 27 of the PRC Labor Law.

1）继续使用《中华人民共和国劳动法》第 26 条和第 27 条中的明确概念和规定。

2) If the restriction on the right of employers to terminate labor contracts in Article 33 of the Draft is to be retained, then make the following change:

2）如果要保留草案第 33 条中对用人单位终止劳动合同的权利的限制，则该条规定应做如下变更：

"In the event of any major change in the objective circumstances under which the Labor Contract was made has rendered such Contract incapable of

being carried out, causing a need to terminate labor contracts with employees exceeding 30% of the total workforce of the enterprise, the Employer shall be responsible for explaining the situation to the trade union or all its staff and workers 30 days in advance, solicited opinions from them and reported to the labor administrative department."

“劳动合同订立时所依据的客观情况发生重大变化，致使劳动合同无法履行，需要终止劳动合同职工人数超过所有职工人数 30%的，用人单位应当提前 30 天向本单位工会或者全体职工说明情况，向其征求意见并向劳动管理部门报告。”

CONCLUSION
结论

The major labor problem in China is not the lack of laws and regulations to protect workers, but weak enforcement of existing laws. Because labor laws and regulations are poorly enforced, numerous enterprises blatantly and continuously violate minimum wage laws, make workers to work overtime beyond legal limitations, delay payment of wages and social security payments, and tolerate poor working conditions. To solve these overdue problems, the primary means is to establish an effective enforcement process and strengthen enforcement, not to impose additional and unrealistic obligations on employers. Otherwise, the situation of "the good guys get punished while the bad guys get away" will only continue and worsen.c

中国的主要劳动问题不是缺少保护劳动者的法律和法规，而是现有法律不能有力地得到执行。由于劳动法律合法规不能得到有力地执行，所以许多企业就毫不掩饰地违反有关最低工资的规定，延期支付工资和社会保险费用，并迫使劳动者超过法定时限超时工作和容忍糟糕的工作条件。解决这些早该解决的问题的主要方法是，应该确立有效的执行程序和加大执行力度，而不是给用人

单位增加额外的而且是不现实的负担。否则，这种“该受处罚的没有受到处罚，而不该受到处罚的却要受到处罚”的情况只会继续和恶化。

China is still a developing country and its main focus at this stage is still economic development, as correctly pointed out by Premier Wen Jiabao. In making and revising laws, the starting point should be the specific circumstances of China, not good intentions and hastily-set goals. As the ancient sage Lao Tzu once said, a big country must be governed as carefully as cooking a delicate fish. History has taught us that, in a country as vast and populous as China, there is great variation between different regions and different industries. Therefore a universal policy hastily made will often bring unanticipated disasters to the national economy, directly affecting the lives of millions of people. Therefore, national legislation should not be overly detailed but should leave enough latitude for local governments to make rules according to local needs. Laws should not be based on good intentions alone, but more on consideration of practical results, balancing adverse impacts against positive results.

温家宝曾经准确指出， 中国还是一个发展中国家，其在现阶段的主要目的还是为了发展经济。制定和修改法律的出发点在于中国的具体国情，而不在于良好的意愿和设定急促的目标。古代圣人老子曾经说过：治大国， 若烹小鲜。历史曾经告诉我们，像中国这样幅员辽阔而人口众多的国家，不同地区之间和不同行业之间有很大的不同。因此，急促地制定普遍政策通常会给国家经济带来意想不到的灾难，并直接会给成千上万人民的生活造成影响。因此，全国性的立法不应该过分详细，而应该给地方政府留出足够的空间按照地方需要制定具体的规定。法律不能只考虑良好愿望，而应该更多地考虑实际后果，并应在不利影响和和积极后果之间做出平衡。

In the highly competitive global economy of today, the welfare of Chinese workers depends not only on protections afforded by labor law, but also depends on the survival and steady growth of the enterprises in which they work. It is not wise to

kill the chicken to get the egg. The serious flaws in the Draft, if left uncured, would not help to resolve the problems in enforcement of the current Labor Law. On the contrary, they will bring chaos to the labor market, weaken the competitiveness of Chinese enterprises, and bring adverse consequences to the national economy. This would in turn reduce job opportunities and ultimately hurt the fundamental interest of the laborers.

在当今高度竞争的全球经济中，中国劳动者的幸福不仅依赖劳动法的保护，而且还依赖其所在工作单位的生存和稳定发展。杀鸡取卵并不聪明。如果草案中的严重缺陷不能得到纠正，不但将无助于解决当前劳动法执行过程中所出现的问题，相反，这些缺陷还会劳动市场带来混乱，削弱中国企业的竞争力，并给中国经济带来负面影响，进而减少就业机会并最终损害劳动者的根本利益。

As Chairman Wu Bangguo of the NPC Standing Committee correctly pointed out, legislative drafts should consider all important factors; where major controversies exist and legal issues are complex, the full text should be published and legislative hearings held so that opinions from all sectors of the population, especially the common people, can be heard."

全国人大常委会委员长吴邦国曾经正确指出：立法草案应该考虑所有的重要方面，如果意见分歧较大、法律问题比较复杂，那应向社会公布草案全文、举行立法听证会，广泛听取（特别是普通群众的）意见。

Finally, we hope that, after the revised draft is adopted into law but before it takes effect, enterprises be given sufficient time to prepare and make adjustment. This way the changes will not bring disruption to business operations and market order.

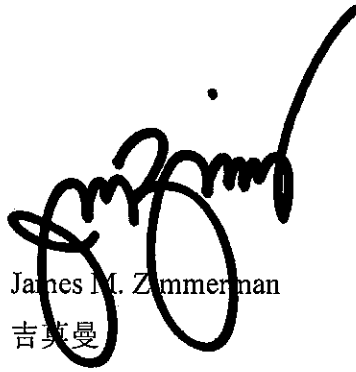
最后，我们希望在经过修改的草案被通过成为法律后被实施前，应该给予企业充足的时间去做准备和调整适应，这样才不会给企业经营和市场秩序带来混乱。

We greatly appreciate the precious opportunity given to AmCham-China by the NPC Commission of Legal Affairs to participate in the discussion of the Labor Contract Law. We hope to have more opportunities in the future to provide such input again.

我们非常感谢全国人大常委会法制工作委员会给予中国美国商会参与讨论制定《劳动合同法》的珍贵机会。我们也希望能在将来拥有更多的机会再次参与这样的讨论。

Dated: April 19th, 2006

日期：2006 年 4 月 19 日



James M. Zimmerman
吉莫曼
Vice Chairman
副会长
The American Chamber of Commerce in the People's Republic of China
中华人民共和国美国商会

Contact Person: James M. Zimmerman
联系人：James M. Zimmerman
Contact Phone: 86-10-8529-6998
联系电话：86-10-8529-6998
Email: JZimmerman@ssd.com
电子邮件：JZimmerman@ssd.com