

## China Revises Anti-Unfair Competition Law to Further Enhance Trade Secret Protection

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Late last month, the National People's Congress of China promulgated revisions to the Anti-Unfair Competition Law (AUCL) as it relates to trade secret protection. These revisions reflect further steps toward enhancing trade secret protection from a legislative perspective and highlight China's desire to demonstrate its commitment to improving intellectual property protections for multinational corporations doing business in China.

The revisions to the AUCL include three fundamentally important changes.

First, the scope of infringers was enlarged to include individuals and entities. The scope of infringers prescribed in the previous AUCL was limited to business operators—meaning individuals and entities conducting production or distribution of commodities or the provision of services. This revision effectively enlarged the scope of protection of the AUCL to cover misappropriation by non-business operators, such as employees and former employees.

Second, the amount of compensation under the AUCL was increased in two ways. First, the new revisions introduced punitive damages against trade secret infringement carried out with malicious intent, allowing plaintiffs to recover up to five times the loss suffered by the trade secret owner. Second, the revisions increased the maximum amount of statutory compensation from 3 million RMB to 5 million RMB where the loss suffered by the trade secret owner cannot be determined.

Third, new provisions lessen the substantial hurdle that has caused many trade secret cases in China to falter by creating a burden-shifting mechanism once a *prima facie* case has been made. In the past, in order to bring a claim of trade secret infringement, a trade secret owner had to prove: (1) that its information met the statutory requirements to qualify as a trade secret (including the specific protection measures adopted to safeguard the trade secret); (2) that the information of the infringer is similar or substantially similar to its trade secret, and (3) that the infringer has adopted illegal means.

According to the newly added Article 32 of the AUCL, the trade secret owner now is only required to provide *preliminary* evidence on the protection measures it took to protect the trade secret and is only required to show, to a *reasonable extent*, that its trade secret is infringed. If the plaintiff makes this showing, then the burden of proof shifts to the infringer to prove that the claimed trade secret is not a trade secret as defined under the AUCL.

Similarly, the revisions in Article 32 provide that if the trade secret owner provides preliminary evidence reasonably demonstrating that the trade secret has been infringed, then the burden shifts to the alleged infringer to prove that it did not commit infringement. Preliminary evidence of infringement can include: (1) evidence demonstrating that the alleged infringer had an opportunity to obtain the trade secret and the information used by the alleged infringer is substantively the same as the trade secret; (2) evidence demonstrating that the trade secret has been disclosed or used, or is at risk of being disclosed or used; or (3) other evidence demonstrating that the trade secret has been infringed by the alleged infringer.

As seen above, the revisions to the AUCL introduced major improvements in Chinese law on trade secret protection, which should be welcomed by companies doing business in China. It remains to be seen how Chinese courts will interpret these new revisions when applying the same in future trade secret infringement cases, but as written, these changes demonstrate a seismic shift to the trade secret landscape in China.

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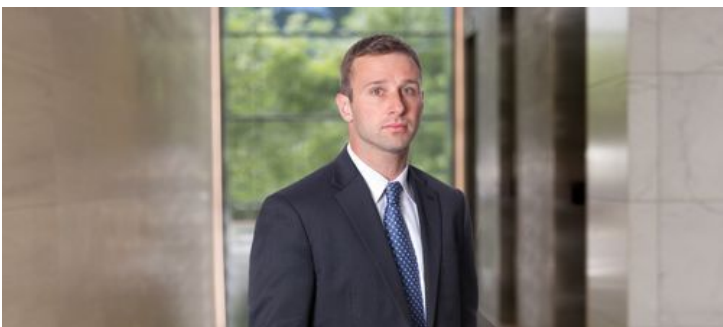
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