

This update highlights some key commercial and intellectual property developments across Mainland China, Hong Kong and the United States.

We are happy to discuss any of the developments in more detail. Please feel free to call any of the individuals named below.

China

Enterprises Producing and Assembling Specialized Appliances for the Disabled Exempted from Income Tax

October 24, 2016: Three departments including the State Administration of Taxation have issued the Circular on Enterprise Income Tax Exemption for Enterprises Producing and Assembling Specialized Appliances for Disabled People (the "Circular").

The Circular specifies that from January 1, 2016 to December 31, 2020, resident enterprises that meet six conditions, including "producing and assembling specialized appliances for disabled people which are included in the scope of the Category of Specialized Appliances for Disabled People of China issued by the Ministry of Civil Affairs" and "selling specialized appliances for disabled people produced or assembled by themselves as their main business, with the annual income derived from the sale of specialized appliances for disabled people (excluding income derived from the export) accounting for no less than 60% of their total revenue", are exempted from the enterprise income tax. According to the Circular, enterprises entitled to the above preferential tax policy shall file a record with tax authorities according to the Announcement of the State Administration of Taxation on Promulgating the Measures for Handling Corporate Income Tax Preferences and properly maintain related documents for future reference. The Category of Specialized Appliances for Disabled People of China is also issued under the Circular.

三部门：生产装配伤残人员专门用品企业免征所得税

2016年10月24日，国税总局等三部门发布《关于生产和装配伤残人员专门用品企业免征企业所得税的通知》（下称《通知》）。

《通知》明确，自2016年1月1日至2020年12月31日期间，对符合“生产和装配伤残人员专门用品，且在民政部发布的《中国伤残人员专门用品目录》范围之内”、“以销售本企业生产或者装配的伤残人员专门用品为主，其所取得的年度伤残人员专门用品销售收入（不含出口取得的收入）占企业收入总额60%以上”等6项条件的居民企业，免征企业所得税。根据《通知》，享受上述税收优惠的企业，应当按照《国家税务总局关于发布〈企业所得税优惠政策事项办理办法〉的公告》规定向税务机关履行备案手续，妥善保管留存备查资料。《通知》同时下发《中国伤残人员专门用品目录》。

MEP Clarifies Issues on Identifying Illegal Discharge of Pollutants by Avoiding Regulation

October 27, 2016: The Ministry of Environmental Protection ("MEP") has issued the Official Reply to Relevant Issues on Identifying the Illegal Discharge of Pollutants by Avoiding Regulation (the "Reply").

The Reply responds to the Request of the Guangdong Provincial Department of Environmental Protection on Identifying the Illegal Discharge of Pollutants by Avoiding Regulation as follows:

- First, any enterprises, public institutions, and other producers and

operators that are found to have illegally discharged pollutants by avoiding regulation such as through concealed conduits, seepage wells, seepage pits, or perfusion, or abnormal operation of pollution prevention and control facilities shall be investigated and punished. Whether a construction project used for discharging pollutants has passed through the environmental impact assessment examination and the acceptance inspection for environmental protection or not does not affect the identification of the illegal discharge of pollutants by avoiding regulation, but it may be taken into consideration as a factor based on which the seriousness of such illegal act is determined;

- Second, if an enterprise, public institution or other producer or operator discharges pollutants directly without building up a supporting pollution prevention and control facility, such circumstance shall not be deemed as illegal discharge of pollutants by avoiding regulation through abnormal operation of pollution prevention and control facilities.

环保部明确逃避监管违法排污情形认定问题

2016年10月27日，环保部发布《关于逃避监管违法排污情形认定有关问题的复函》（下称《复函》）。

《复函》对广东省环保厅《关于逃避监管非法排放污染物情形认定有关问题的请示》作出答复：一、企业事业单位和其他生产经营者通过暗管、渗井、渗坑、灌注或者不正常运行防治污染设施等逃避监管的方式违法排放污染物，均应依法查处。排放污染物的建设项目是否通过环境影响评价审批和竣工环境保护验收，不影响对逃

避监管违法排污行为性质的认定，但可作为判定违法情节轻重的因素予以考虑。二、企业事业单位和其他生产经营者未配套建设防治污染设施，直接排放污染物的，不属于“通过不正常运行防治污染设施逃避监管的方式违法排放污染物”的情形。

Network Security Law Adopted with Effect from June 2017

November 7, 2016: The Network Security Law of the People's Republic of China (the "Network Security Law") has been adopted by vote at the 24th Session of the Standing Committee of 12th National People's Congress, and is issued upon approval under the Order of the President No.53 and shall come into force as of June 1, 2017.

The Network Security Law is comprised of seven chapters with a total of 79 articles, specifying the security obligations for both providers of network products and services and network operators. It provides that:

- providers of those network products or services that collect users' information shall expressly inform users of such collection and obtain their consent;
- network operators shall not reveal, falsify, or destroy any personal information they have collected; and
- no individual or entity may steal any personal information or access such information by other illegal means, or illegally trade or unlawfully provide any personal information to others.

The Network Security Law establishes a security protection system for core information infrastructures, ascertains rules to export important data across borders through core infrastructures, and clarifies the possibility of taking measures to control network communications in case of any major emergencies.

网络安全法获通过 明年6月起施行

2016年11月7日，第十二届全国人民代表大会常务委员会第二十四次会议表决通过《中华人民共和国网络安全法》（下称《网络安全法》），经第五十三号主席令签署公布，自2017年6月1日起施行。

《网络安全法》共7章79条，明确了网络产品和服务提供者以及网络运营者的安全义务。《网络安全法》规定，网络产品、服务具有收集用户信息功能的，其提供者应当向用户明示并取得同意；网络运营者不得泄露、篡改、毁损其收集的个人信息；任何个人和组织不得窃取或者以其他非法方式获取个人信息，不得非法出售或者非法向他人提供个人信息。《网络安全法》建立了关键信息基础设施安全保护制度，确立了关键信息基础设施重要数据跨境传输的规则，明确重大突发事件可采取“网络通信管制”。

National Discharge Permit Management Information Platform to Be Basically Established by 2017

November 10, 2016: The General Office of the State Council has released the Implementing Plan for the Permit System for Controlling the Discharge of Pollutants (the "Plan").

The Plan sets out that by 2020:

- the issuance of pollutant discharge permits that cover all stationary pollution sources will be accomplished;
- responsibilities of enterprises and public institutions as subjects for environmental protection will be put in place; and
- stationary pollution sources will be under administration throughout the whole process while multi-pollutants will be controlled in a coordinated way.

The Plan also proposes the need for instituting a system for enterprises and public institutions to control their respective total amounts of pollutants discharged which will be measures per enterprise or public institution instead of per administrative region as before, and be connected with the environmental impact assessment system organically. The Plan also considers it necessary to regulate the orderly issuance of pollutant discharge permits, make a name list to manage the permission of pollutant discharge, promote the administration of such permission system per industry, and impose stricter administration and control over enterprises and public institutions located at such places where environment quality fails to reach relevant standards.

Furthermore, the Plan requires that enterprises and public institutions will be guided to reduce the discharge of pollutants actively and a national pollutant discharge permit management information platform will be established by 2017 to redouble efforts for information disclosure and social supervision.

国办：明年基本建成全国排污许可证管理信息平台

2016年11月10日，国务院办公厅印发《控制污染物排放许可制实施方案》（下称《方案》）。

《方案》提出，到2020年，完成覆盖所有固定污染源的排污许可证核发工作，企事业单位环保主体责任得到落实，对固定污染源实施全过程管理和多污染物协同控制。《方案》指出，要实行企事业单位污染物排放总量控制制度，实现由行政区域向企事业单位转变，有机衔接环境影响评价制度；要规范有序发放排污许可证，制定排污许可管理名录，分行业推进排污许可管理，环境质量不达标地区要对企事业单位排放污染物实施更加严格的管理和控制。《方案》还要求引导企事业单位主动削

减污染物排放，2017年基本建成全国排污许可证管理信息平台，强化信息公开和社会监管。

Hong Kong

Claim of offshore profits denied

In Board of Review Case D28/14, the taxpayer was a Hong Kong incorporated company with “trading garments and investment holding” as its principal business activities. It claimed that it bought garments manufactured by its wholly owned subsidiary in the PRC (the “PRC subsidiary”) and on-sold them to its overseas customers.

In support of the claim that its trading profits were derived outside Hong Kong and should not be chargeable to profits tax, the taxpayer asserted that the negotiation and conclusion of all sale and purchase transactions were conducted by its subsidiary in the PRC. It also claimed that, as part of the trading activities, it engaged the legal representatives of the PRC subsidiary who travelled overseas to maintain the network of customers and suppliers on its behalf and the staff of the PRC subsidiary were responsible for sourcing suppliers, processing purchase sale orders and contracts, preparing shipping documents, inspecting and testing the quality of goods and issuing sales invoices.

The questions were, whether (i) the taxpayer was “carrying on a trade, profession or business in Hong Kong” and (ii) the trading profits were ‘profits arising in or derived from Hong Kong’ for the purpose of Section 14(1) of the Inland Revenue Ordinance.

It was held by the Board that the taxpayer did carry on business activities in Hong Kong and that the trading profits derived by the taxpayer were sourced in Hong Kong and hence, taxable, on the following bases:

- (a) The Board rejected the taxpayer’s claim that it did not employ any person in its office in Hong Kong because items of expense such as “staff salaries”, “staff messing”, “recruitment fees” and “staff training” were included in its audited financial statements and the taxpayer failed to provide a meaningful explanation for the booking of these employee-related expenses in its accounts;
- (b) The profit and loss accounts of the taxpayer showed that a sum of around HK\$1M was written off as bad debt and booked as an expense, which illustrated the bearing of commercial risk by the taxpayer in its sales. Such accounting treatment was done in Hong Kong as part of the taxpayer’s trading activities;
- (c) The profit and loss accounts of the taxpayer also disclosed substantial transportation and communication expenses on a year by year basis. This showed that the communication between the taxpayer and the PRC subsidiary as well as the transportation of goods, which formed part of the taxpayer’s trading activities, were performed in Hong Kong;
- (d) The taxpayer’s operations in Hong Kong, albeit covering not all the steps of a trading operation, were not only in the nature of the carrying on of its business in Hong Kong but also instrumental and

essential to the success of its commercial objective of trading in garments manufactured in the PRC to customers overseas and the earning of profits from the accomplishing of that commercial objective; and

- (e) The effective cause giving rise to the taxpayer's profits from its trading business was the bringing together of the complementary needs of the manufacturer in PRC and the overseas customers. The PRC subsidiary by selling goods to the taxpayer instead of the overseas customers directly stood to be buffered by any risk of non-payment by the ultimate buyer. Such risk would be borne and was indeed borne on one occasion by the taxpayer. The overseas customers wanted their goods to be shipped from Hong Kong due to time efficiencies. Also, effecting payments in Hong Kong was obviously more convenient and efficient. The bringing together was done in Hong Kong.

This case demonstrates that the Board may not take the traditional approach of focusing on the location(s) where the sale and purchase contracts were effected in determining the source of trading profits. The Board seems to take a more stringent approach by taking into account all the relevant facts and surrounding circumstances, in particular the roles (including the purposes of setting up the company in Hong Kong) and trade-related activities of the taxpayers in Hong Kong.

Standard working hours

According to UBS' annual prices and earnings study, Hong Kong employees toil for an average of 50.1 hours per week and only take 17 days of annual paid holiday, putting us in last place compared to 71 global cities. The city's workforce works 38 percent longer than the global average, 50 percent longer than Londoners, and 62 percent longer than Parisians. Much of this stems from the fact that Hong Kong still does not have any standard working hours legislation despite repeated lobbying by unions and activists. Hong Kong's labour laws have long lagged behind its European and other South-East Asia counterparts, for example the city only adopted minimum wage legislation in 2011. Many unions and lobbyists have expressed support for regulating standard working hours at 44 hours per week with the overtime hourly rate set at 1.5 times the normal rate, drawing it in line with Singapore's current employment legislation. They say that the tough work ethic has contributed to an inflated rate of stress among employees with surveys finding that one quarter of the city's employees showed levels of depression and anxiety.

The Standard Working Hours Committee was set up in 2013. It is tasked with the important missions of promoting public understanding and in-depth discussion of this complex subject, and advising the Government on the working hours policy, including whether a statutory standard working hours regime or any other alternatives should be considered. The second-stage public consultation has recently been completed and the Committee is analysing the comments received to prepare a report to be submitted to the Government. In short, the second-stage consultation looks into the following matters:

- "Big frame" – a legislative approach to mandatorily require employers and employees to enter into written employment contracts, which shall include the specified working hours

terms, such as overtime compensation arrangements;

- “Small frame” – on the premise of the “big frame”, introduction of other suitable measures such as setting a working hours standard and an overtime pay rate to further protect grassroots employees with lower income, lower skills and less bargaining power; and
- Whether an across-the-board uniform standard of working hours should not be imposed on all industries so as to provide the necessary flexibility in view of the varied work nature and requirements of different sectors and occupations.

The working hours policy closely concerns employees and employers of various trades and occupations, and will bring about far-reaching implications. The community at large should undergo critical examination and deliberation of the subject, taking into account the local social and economic situation before deciding the way forward. At least six key issues should be considered:

- a. the objective of a working hours policy in Hong Kong;
- b. how regulation of working hours will affect labour flexibility and Hong Kong’s competitiveness;
- c. employers may reduce full-time jobs of longer working hours, resulting in an increase in part-time jobs and fragmentation of work;
- d. the affordability of the business sector particularly small and medium enterprises (SMEs) in complying with the statutory Standard Working Hours;
- e. whether working hours regulation should be imposed across-the-board, or whether it should be introduced to industries or occupations with particularly long working hours; and

- f. whether legislation is the best way forward.

United States

Update: Fair Labor Standard Act Overtime Rule – Federal Rule

On November 22, 2016, Judge Mazzant of the Eastern District of Texas granted a preliminary injunction delaying the implementation of the U.S. Department of Labor’s (“DOL”) Fair Labor Standards Act (“FLSA”) Overtime Rule. Finalized in May, the Overtime Rule doubled the salary threshold for exempt employees from \$455 per week (\$23,660 annually) to \$921 per week (\$47,892 annually). Exempt employees receive time-and-a-half pay for any time worked above 40 hours in a given week. The Overtime Rule was set to take effect on December 1, 2016.

In September of 2016, 21 state attorneys general, joined by over 50 business organizations, filed suit challenging the Overtime Rule and requesting preliminary and permanent injunctions. In granting the preliminary injunction, Judge Mazzant stated the DOL “exceeds its delegated authority and ignores Congress’s intent by raising the minimum salary threshold such that it supplants the duties test.” Under the FLSA, an employee is exempt from overtime pay if the earned wages are in excess of the salary threshold and the employee’s duties are administrative, executive or professional. The injunction applies nationwide and prevents the DOL from implementing the Overtime Rule pending further order of the court.

United States v. Spectrum Brands – Federal Caselaw

On November 20, 2016, a [Wisconsin federal district court ruled in favor of the Government](#) and held that Spectrum Brands Inc. (“Spectrum”) failed to timely report defective coffee pots to the Consumer Product Safety Commission (“Commission”).

The case, filed in June 2015, stems from a complaint filed by the U.S. Department of Justice on behalf of the Commission against Spectrum alleging that the company and its former subsidiary, Applica Consumer Products, failed to timely report a hazardous defect involving handles that suddenly detach from coffee pots, resulting in burns to consumers. The suit alleged that approximately 1600 reports were filed by consumers about the detaching handles from early 2009 through April 2012, before Applica notified the Commission about the defect and agreed to a recall. The complaint charged that the companies knowingly violated the reporting requirements of the Consumer Product Safety Act (“CPSA”) and sought civil penalties and permanent injunctive relief. The complaint also alleged that, in addition to failing to notify the Commission immediately, a small number of the defective coffeemakers were still distributed to retailers after announcement of the recall in June 2012.

In rejecting Spectrum’s procedural and substantive arguments, the court held the Commission’s claims were not time barred, the CPSA’s reporting requirements are not unconstitutionally vague, and the Government’s imposition of a civil penalty pursuant to the CPSA was not in violation of Spectrum’s statutory or constitutional due process rights.

The Government and Spectrum will next litigate the parameters of the civil penalty to be imposed.

The decision may have future ramifications in the product safety industry, particularly as it relates to the Commission’s reporting requirement and enforcement authority. Companies cannot afford to wait to report until a product defect causes a serious injury, but rather must report when the company first appreciates that a product may contain a defect that could injure consumers.

United States v. Nosal – Federal Caselaw

The 9th Circuit Court of Appeals has [affirmed convictions](#) for knowingly and with intent to defraud accessing a protected computer without authorization, in violation of the Computer Fraud and Abuse Act, and for trade secret theft, in violation of the Economic Espionage Act (“EEA”).

David Nosal was employed by Korn/Ferry International, an executive search firm, and subsequently resigned in order to start a competing firm. Nosal was convicted of violating the EEA by using login credentials of current Korn/Ferry employees to access the company’s database in order to obtain trade secrets and then delivering information related to potential executive candidates back to Nosal. Nosal was sentenced to one year and one day in prison, three years of supervised release, a \$60,000 fine, and \$600 special assessment, and was ordered to pay approximately \$828,000 in restitution to his former employer.

Nosal appealed his conviction on the ground that the government failed to prove that the information obtained constituted a trade secret as the search information was derived from public sources. The court rejected Nosal’s argument, noting that data containing information from public sources does not necessarily preclude trade secrets. Further, the scope of the EEA is not limited to proprietary formulas, technical drawings, or scientific data and the EEA includes financial and business information. The court recognized that while some or all of the components of a trade secret are public information this does not preclude protection for a secret compilation or integration of the individual elements.

This decision follows the judicial development of finding financial and business lists, that are the customized product of a massive database and not merely a record of public information, are protectable trade secrets.

Non-disclosure Agreements – Federal Caselaw

Below are two cases providing insight into how courts are interpreting non-disclosure agreements: one which cautions on the perils of ambiguous wording and one which reaffirms employers' ability to protect confidential information going beyond trade secrets. The permissible scope of non-disclosure agreements extends only to reasonable limitations of time and geography.

In Loftness Specialized Farm Equipment Inc. v. Twiestmeyer, 818 F.3d 356 (8th Cir. 2016), the plaintiff brought a declaratory judgment action against the defendants, sales representatives for equipment manufactured by the plaintiff, involving contracts associated with the development, manufacture, and sale of the equipment. The defendants asserted counterclaims against the plaintiff for, among other things, breach of a non-disclosure agreement. The district court granted the plaintiff's motion for summary judgment on the breach of contract counterclaims and entered judgment for the plaintiff on its claim for declaratory judgment. On appeal, the 8th Circuit Court of Appeals affirmed the summary judgment grant to the plaintiff but vacated and remanded the grant of summary judgment on the counterclaim for breach of the NDA. On remand, the district court again granted the plaintiff's motion for summary judgment on the claim for breach of the non-disclosure agreement. The defendants again appealed to the 8th Circuit.

On appeal, the plaintiff argued that the parties intended under the terms of the non-disclosure agreement that the non-disclosure obligations of the plaintiff would terminate earlier than the 20-year term if the defendants' equipment was developed for sale, thereby ending the equipment's status as confidential information. However, the court found ambiguity on whether the parties intended to protect the defendants' confidential information only so long as it remained confidential or through the 20-year term. Faced with the inability to determine the parties' intentions through surrounding

circumstances and the parties' own subsequent conduct, the court determined that the agreement was ambiguous as to the application of the 20-year term, vacated the lower court's grant of summary judgment and remanded for further proceedings.

In Orthofix, Inc. v. Hunter, 630 Fed. Appx. 566 (6th Cir. 2015), the plaintiff filed suit against the defendant for the misappropriation of the plaintiff's trade secrets and the use and disclosure of "confidential information" covered by the non-disclosure provision in the defendant's employment agreement. The defendant had left the plaintiff for a competitor and immediately started selling to former customers the same medical device made by the defendant's new employer. The district court held that the defendant was not liable because (1) the plaintiff did not protect its trade secrets with measures "that are reasonable under the circumstances"; and (2) the non-disclosure provision in the defendant's employment agreement prohibited the defendant from using his general skills and knowledge and, therefore, formed an unenforceable non-compete agreement.

On appeal, the 6th Circuit Court of Appeals reversed the district court and held in favor of the plaintiff's breach of contract claim. The court noted there are two types of confidential information that can be protected: (1) trade secrets; and (2) information that does not rise to the level of a trade secret but still shares some characteristics of trade secret information. Further, confidential information is generally defined by the parties, and not by achieving trade secret status, so long as it does not encompass publically available information or an employee's general knowledge and skill. As such, an employer may expand the scope of protected information through the use of well-drafted non-compete agreements to include confidential information in addition to trade secrets. The court concluded that the defendant had breached the parties' non-disclosure agreement by providing the

plaintiff's confidential information to his new employer.

For more information on any of the items included for the US, please feel free to call [Huu Nguyen](#) or [Sarah Rathke](#).

The contents of this update are not intended to serve as legal advice related to individuals situations or as legal opinions concerning such situations nor should they be considered a substitute for taking legal advice.