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

China

MOF and SAT Clarify Tax Supporting Policies for Reducing Leverage Ratio of Enterprises

On November 22, 2016, the Ministry of Finance ("MOF") and the State Administration of Taxation ("SAT") jointly issued the Circular on Implementing Tax Supporting Policies for Reducing the Leverage Ratio of Enterprises (the "Circular").

The Circular expressly states that for any equity (assets) acquisition, merger, debt restructuring and other reorganization behaviours that satisfy conditions stipulated by tax laws, enterprises may be entitled to the preferential policy on deferred payment of enterprise income tax in accordance with provisions of the tax laws. Enterprises that make investment with non-monetary assets may be entitled to the policy of paying enterprise income tax by instalments within five years according to provisions. Where an enterprise goes bankrupt or is deregistered and thus shall settle the enterprise income tax, it may deduct the liquidation expenses, salaries for employees, social insurance contributions, statutory compensations etc. before the enterprise income tax according to provisions. According to the Circular, for losses from creditor's rights that meet certain conditions provided in tax laws, such losses are deductible according to provisions when the enterprise calculates the taxable income for the enterprise income tax purpose. The loan-loss reserves withheld by a financial enterprise according to provisions may also be deductible before the enterprise income tax. Moreover, the Circular sets out those relevant preferential policies that shall apply to the land appreciation tax, deed tax and stamp tax involved in the restructuring and reform of an enterprise.

关于落实降低企业杠杆率税收支持政策的通知

2016年11月22日，财政部、国税总局联合发布《关于落实降低企业杠杆率税收支持政策的通知》（下称《通知》）。

《通知》明确，企业符合税法规定条件的股权（资产）收购、合并、债务重组等重组行为，可按税法规定享受企业所得税递延纳税优惠政策。企业以非货币性资产投资，可按规定享受5年内分期缴纳企业所得税政策。企业破产、注销，清算企业所得税时，可按规定在税前扣除有关清算费用及职工工资、社会保险费用、法定补偿金。根据《通知》，企业符合税法规定条件的债权损失可按规定在计算企业所得税应纳税所得额时扣除。金融企业按照规定提取的贷款损失准备金，可以在企业所得税税前扣除。《通知》还提出，企业重组改制涉及的土地增值税、契税、印花税，可享受相关优惠政策。

SIPO Proposes to Tighten Patent Right Protection Comprehensively

On November 29, 2016, the State Intellectual Property Office ("SIPO") issued the Several Opinions on Tightening Patent Right Protection Comprehensively (the "Opinions").

The Opinions set out that by 2020, efforts will be made to basically perfect the system of policies and regulations and the working system and mechanism concerning the tightened protection of patent rights, to enhance the intensity, efficiency and level of patent enforcement in an all-round way, and to ensure the effective operation of the coordinated mechanism for patent protection. The Opinions expressly state the need of fully fulfilling the regulatory duties of the government and cracking down on patent infringements and counterfeits in a more severe manner. The Opinions also propose to enhance the regulation of online trading

platforms, put forward explicit requirements on the safeguarding and protection of patents during the examination and approval of operators' network access and various stages of their daily operations, and guide network trading platforms to establish the internal mechanisms for handling complaints against patent infringements and counterfeits. Moreover, the Opinions require that social forces will be guided to involve in the governance and jointly develop a mechanism for patent protection under social governance, and also call for increased efforts to disclose the case-related information, improve the dishonesty punishment mechanism, improve the rules for the mediation and arbitration of intellectual property right disputes, guide innovation-oriented enterprises to join the key contact mechanism of patent protection and unbar the channels for protection of enterprises' patents.

关于印发《关于严格专利保护的若干意见》的通知

2016年11月29日，国家知识产权局印发《关于严格专利保护的若干意见》（下称《意见》）。

《意见》提出，到2020年，严格专利保护的政策法规体系与工作体制机制基本健全，专利执法办案力度、效率和水平全面提升，专利保护协作机制有效运行。《意见》明确充分履行政府监管职责，加大打击专利侵权假冒力度。加强网络交易平台监管，对经营者入网审核、日常经营各环节的专利维权保护提出明确要求，引导网络交易平台建立针对侵权假冒行为的内部投诉处理机制。《意见》要求引导社会力量参与治理，共建专利保护社会治理机制。加大案件信息公开力度，完善失信惩戒机制，健全知识产权调解、仲裁规则，引导创新型企业加入专利保护重点联系机制，畅通企业专利保护通道。

Inclusion of Social Insurance and Statistical Matters in Corporate Annual Reports Clarified

On November 17, 2016, three departments including the State Administration for Industry and Commerce issued the Circular on Relevant Issues concerning the Inclusion of Social Insurance and Statistical Matters in Corporate Annual Reports (the "Circular").

The Circular sets out that, starting from the annual report of 2016, the following matters shall be newly included therein by an enterprise when it submits its annual report through the enterprise credit information publicity system. The first relates to social insurance related matters, including the type of insurance the enterprise has participated in, number of employees covered by the related insurance, its payment base, total amount actually paid for the current period, and outstanding amounts accrued by such enterprise; the enterprise must disclose the first and second indicators to the public while the remaining three indicators may be published to the public at its own discretion. The next relates to statistical matters, including the main business activities, female employees, particulars on its shareholding (not applicable to branches), uniform social credit code of the parent company to which a branch is affiliated (only applicable to branches); the first and fourth indicators must be announced to the public while the second and third ones may or may not be disclosed at the enterprise's own discretion.

工商总局 人力资源社会保障部 统计局关于在企业年报中增加社保和统计事项有关问题的通知

2016年11月17日，工商总局等三部委发出《关于在企业年报中增加社保和统计事项有关问题的通知》（下称《通知》）。

《通知》指出，从2016年度年报开始，企业通过企业信用信息公示系统报送年报信息时，增加以下内容。一是社保事项，包括：参保险种类型、单位参保人数、单位

缴费基数、本期实际缴费金额、单位累计欠缴金额。其中第一项、第二项信息应当向社会公示；第三项至第五项信息由企业选择是否向社会公示。二是统计事项，包含：主营业务活动、女性从业人员、企业控股情况（分支机构不填报）、分支机构隶属母公司的统一社会信用代码（仅分支机构填报）。其中第一项、第四项信息应当向社会公示；第二项、第三项信息由企业选择是否公示。

Comments Sought on National Standards concerning a Series of Corporate Standard Systems

Recently, the Standardization Administration of China revised and issued five national standards, including the Corporate Standard System-Requirements (Draft for Approval) (the "Draft for Approval"), and sought public comments before December 15, 2016.

The Draft for Approval provides for models of corporate standard systems and methods on how to build up standard systems by enterprises, serving as the programmatic requirements on a series of corporate standard systems. Compared to the previous national standards, the Draft for Approval pays more attention to endogenous demands of enterprises, and requires them to establish demand-oriented standard systems. Also, the Draft for Approval revises the structure of standard systems and no longer emphasizes the dominant position of technical standards, as the standard systems are now comprised of the standard system for product realization, the standard system for security, and the standard system for posts, instead of the standard system for technologies, the standard system for management, and the working standard system as in the past. In particular, the standard system for fundamental security includes the financial fund and auditing standard, quality security standard, safety and occupational health standard, environmental protection and energy conservation standard, legal affairs and risk management standard, knowledge management and information standard, and other sub-systems.

关于征求《企业标准体系》系列国家标准（报批稿）意见的通知

近日，国家标准委修订发布《企业标准体系 要求（报批稿）》（下称《报批稿》）等5项国家标准，现公开征求意见，意见反馈截止于12月15日。

《报批稿》给出了企业标准体系模型和企业建立标准体系的方法，是企业标准体系系列标准的纲领性要求。对比旧版国标，《报批稿》更关注企业内生性需求，以需求为导向建立标准体系。《报批稿》对标准体系结构进行了修改，不再强调以技术标准为主体，标准体系的结构由原技术标准体系、管理标准体系、工作标准体系变更为产品实现标准体系、保障标准体系和岗位标准体系。其中，基础保障标准体系包括财务资金与审计标准、质量保障标准、安全与职业健康标准、环境保护与节能标准、法务与风险管理标准、知识管理与信息标准等子体系。

NDRC Seeks Comments on Administrative Measures for Approval and Record-Filing of Enterprise Invested Projects

Recently, the National Development and Reform Commission ("NDRC") revised and formed the Administrative Measures for the Approval and Record-filing of Enterprise Invested Projects (Draft for Comment) (the "Draft for Comment") for public comments before January 13, 2017.

The Draft for Comment, comprised of eight chapters with 66 articles, shall apply to the fixed-asset investment projects invested and constructed by various enterprises within the territory of China. According to the Draft for Comment, enterprise invested projects are subject to an approval system or record-filing system respectively depending on different

situations of the projects. Enterprise invested projects related to national security, involving the national layout of major productivities, development of strategic resources, and significant public interest shall be subject to the approval system, while other projects shall be subject to the record-filing system. The Draft for Comment specifies that for enterprise investment projects' market prospects, economic benefits, sources of funds, and product technical solutions, enterprises shall make their own decisions and undertake risks independently. Project approval and record-filing authorities and other administrative organs shall not illegally interfere with the autonomy of enterprises in investment.

国家发改委对企业投资项目核准和备案管理办法征意

国家发展改革委投资司
2016年12月14日

近日，国家发改委修订形成了《企业投资项目核准和备案管理办法（征求意见稿）》（下称《征求意见稿》），现向社会公开征求意见，意见反馈截止于2017年1月13日。

《征求意见稿》共8章66条，适用于各类企业在中国境内投资建设的固定资产投资项目。根据《征求意见稿》，企业投资项目根据项目不同情况，分别实行核准制或备案制。对关系国家安全、涉及全国重大生产力布局、战略性资源开发和重大公共利益等项目，实行核准管理。其他项目实行备案制。《征求意见稿》明确，企业投资项目的市场前景、经济效益、资金来源和产品技术方案等，应当依法由企业自主决策、自担风险，项目核准、备案机关及其他行政机关不得非法干预企业的投资自主权。

Hong Kong

Minimum Wage Rise in Hong Kong

Over the years, Hong Kong workers have been fighting for an increase in the minimum wage to financially sustain their high daily expenditure given Hong Kong's high cost of living. Workers are pushing for an increase from HK$32.5 (established in May 2015) to HK$36 – $41 per hour (approx. £3.79 - £4.32). However, employers have expressed opposition to anything more than a HK$0.5 (£0.05) rise, which subsequently raised a dispute between both parties.

Recently, the Minimum Wage Commission made a decision to raise the minimum wage by HK$2 (£0.21) to HK$34.5 (£3.63) beginning from May 2017. It is expected to affect about 154,500 semi-autonomous workers who currently earn below HK$34.5.

Cyber and Identity Fraud

There has been a dramatic increase in email scams and other online business frauds lately in Hong Kong, with the total financial losses caused by computer crime cases amounting to GBP192.52 million in 2015.

Some common practices of cyber fraud are hacking, phishing, spear-phishing and business email compromise ("BEC"). In most cases of hacking and BEC, criminals illegally hack into the email system of enterprises or even banks. They will search for email conversations regarding the company's or the individual's financial transactions. As soon as the transaction is recognized, the fraudster may pretend to be banks, lawyers, accountants, customers or even the senior management officers of the victim companies, asking for the transfers of funds into a specific bank account; a common reason being that there is a "problem" occurring to the relevant bank.

In some cases of phishing and spear-phishing, the fraudsters pose as either the customers, or the senior management officers of the company, and give instructions by using an email address with a highly similar domain name of the company. The fraudulent instructions are always accompanied by forged invoices and other "documentary support" to deceive the employees executing the instructions.

Hong Kong has also become the top destination of fraudulent wire transfer, followed by China, Malaysia, Taiwan, South Korea, Nigeria, the UAE, Japan and Indonesia. There had been a 38 per cent rise in hacking incident reports this year according to Hong Kong's cybersecurity watchdog. Experts in cybersecurity suggest that a general lack in awareness of cybercrime in Hong Kong contributes to the surge in the occurrence of related crimes in the region.

The Cyber Security and Technology Crime Bureau ("CSTCB") was established in 2015 by the Hong Kong Police Force to carry out technology crime investigations as well as to raise public awareness of the risks associated with social media. CSTCB suggests the following measures for corporations to enhance cyber security:

- Set and change personal passwords regularly;
- Keep personal information safe. Encrypt files to lessen the risk of leakage if the information has to be saved in file format;
- Install and activate a firewall programme;
- Adopt the latest update file or software security patches of the computer operating system;
- Install anti-virus software and update the virus definition file frequently;
- Run anti-virus scans on computers regularly to lessen the risk of infection by virus;
- Don't use the same set of login passwords for different online accounts;
- Verify unknown email identities; and
- Provide a cyber security and computer use policy and regular training to the staff to enhance their awareness of cyber fraud.

Agency Relationship & Disclosure of Interest

In *HKSAR v. Luk Kin Peter Joseph and Another* (FACC 6/2016), the 1st Defendant (D1) and the 2nd Defendant (D2) were the directors of China Mining Limited, a listed company which carried on a blood cord banking business through its subsidiary, Cell Therapy. China Mining wholly owned Biogrowth, which subsequently held Cell Therapy. D1 and D2 later resigned as directors of China Mining but remained as the only directors of Biogrowth and Cell Therapy. China Mining changed its business plans later and decided to sell the blood cord business to United Easy Investments, where D1 was the beneficial owner. Intending to conceal the true state of facts, D1 and D2 signed the minutes of Biogrowth which contained a declaration stating that none of the directors was interested in the sale of the blood cord banking business ("Note").

D1 and D2 were convicted for using the Note which to their knowledge was intended to mislead China Mining in breach of s.9(3) of the Prevention of Bribery Ordinance ("POBO") and for the offering and accepting respectively of 1.5 million shares in China Mining for this act. The main issues on appeal are: (i) whether D1 and D2 were agents of China Mining for the purpose of s.9 POBO in acting to look for a purchaser of its blood cord banking business; and (ii) whether the shares offered to D2 amounted to a bribe.

The Court of Final Appeal ("CFA") held that D1 and D2 were agents of China Mining under s.9 POBO, and that no pre-existing duty is required notwithstanding the fact they were not contractually the directors of China Mining (they were merely directors of the subsidiaries), following the ratio of *R v Chong Chui Ha* [1997] 4 HKC 518. As D1 and D2 had assumed responsibility to find a buyer on behalf of China Mining for its blood cord banking business, they were deemed an agent of China Mining and under a duty to do so in good faith and honestly. The lack of any pre-existing obligation between China Mining and them did not preclude them from being agents of China Mining. They were therefore held liable for deceiving China Mining by failing to properly disclose their interests in the business transaction.

This case provides an opportunity for the CFA to reinforce the principles of agency and rules governing the attribution of knowledge of directors to the company. The CFA confirmed that if a person is in a position to act on behalf of another company even without any pre-existing obligations, he can be considered to be an agent and have fiduciary duties towards that principal in the context of the POBO. In light of this CFA decision, it is advisable for corporates, especially listed companies, to pay more attention to the proper disclosure of interests in order to prevent committing the bribery offences. To accomplish this, we suggest that companies provide comprehensive guidelines to their management and employees across the entire corporate group on proper disclosure of interests as well as unwarranted acceptance or offering of advantages.

United States

Challenge to EPA Rule on NAAQS – Federal Regulation

The Court of Appeals for the District of Columbia Circuit will hear oral arguments on February 16, 2017 in a challenge to the Environmental Protection Agency's ("EPA") rule regarding ground-level ozone limits.

Under the authority of the Clean Air Act (42 U.S.C. §7401 et seq.) ("CAA"), the EPA is authorized to establish National Ambient Air Quality Standards ("NAAQS") to regulate emissions of hazardous air pollutants. In October 2015, the EPA announced a rule reducing the NAAQS for ground-level ozone limits from 75 parts per billion ("ppb") down to 70 ppb. Ground-level ozone is created by emissions released into the air by manufacturing plants, utilities and vehicles.

Initially businesses were relieved the EPA did not lower the limit to the originally proposed limit of 65 ppb, a standard businesses claimed would have been unattainable for anyone in the manufacturing industry. Subsequently, however, an industry coalition, including the U.S. Chamber of Commerce and the National Association of Manufacturers, challenged the rule, claiming the regulation goes too far and violates the Clean Air Act. The coalition states the rule did not properly account for background ozone that cannot be controlled or for various economic, social and other impacts from lowering the ozone limit.

The EPA claims that the regulation is in line with the CAA – which requires that ozone levels are calculated based only on public health and environmental standards, not the costs of compliance.

Further, a coalition of environmental and health groups, including the Sierra Club and Physicians for Social Responsibility, sued the EPA claiming that the regulation is not strict enough. The group will argue at the hearing that while the new limit offers greater protection than the previous standard, it does not reflect what is necessary to protect public health.

Department of Labor Persuader Rule – Federal Regulation

On November 16, 2016, a Texas federal judge permanently blocked the U.S. Department of Labor ("DOL") from enforcing a new rule expanding employers' disclosure requirements related to union-organizing campaigns.

The DOL's Labor-Management Reporting and Disclosure Act ("LMRDA") of 1959, 29 U.S.C. § 433, requires employers and labor relations consultants to file reports with the DOL concerning agreements or arrangements to (i) directly persuade employees concerning their rights to organize and bargain collectively or (ii) supply the employer with certain information concerning the activities of employees or a labor organization in connection with the labor dispute involving the employer. The LMRDA reporting requirements are subject to certain exceptions, which provide, in part, that no report is required when hiring law firms to provide advice, provided there is no direct contact with the employee.

In March 2016, the DOL published the Persuader Advice Exemption Rule ("Persuader Rule"), 81 Fed. Reg. 15,924, et seq. which broadened the scope of reportable activity to include indirect persuasive activities, effectively eliminating the "advice" exemption. Employers and law firms would be required to file a report, even if there was no direct contact with employees, if the attorney was engaged in indirect activities such as the development of policies for employers intended to persuade employees or advice related to employer communications with employees in matters involving unions.

Businesses, state attorneys general and attorneys challenged the Persuader Rule in multiple states, claiming the rule was too broad, violated the duty to protect client confidentiality and the attorney-client privilege, and blurred the LMRDA's clear "advice" exemption. A federal judge in Texas agreed and held the Persuader Rule unlawful and ordered the court's previous preliminary injunction preventing the implementation of the rule to be converted into a permanent injunction with nationwide effect.

One month later, a federal judge in Arkansas ordered a case challenging the Persuader Rule should be stayed pending appeal of Texas federal judge's November decision blocking the rule. In Minnesota, a federal judge denied summary judgment motions stating that: "there is significant reason to believe that the new administration will withdraw the Persuader Rule – or at least decline to defend the validity of the Persuader Rule in its current form."

The interpretation of the Persuader Rule requiring employers to report indirect contact with employees will most likely remain blocked and it is expected that the Trump administration will not appeal the decision.

TSCA Chemicals Under Review – Federal Regulation update

The Environmental Protection Agency ("EPA") has named ten chemicals for review under the new Toxic Substances Control Act ("TSCA") legislation. The TSCA requires the EPA to complete risk assessments for chemicals manufactured, distributed and imported to the United States. The chemicals will be taken from the EPA's 2014 TSCA Work Plan of 90 chemicals selected based on their potential for high hazard and exposure. The statutory deadline to complete the risk evaluations for potential risks to human health and the environment is three years.

The first ten chemicals to be evaluated are: 1,4-Dioxane; 1-Bromopropane; Asbestos; Carbon; Tetrachloride; Cyclic Aliphatic Bromide Cluster; Methylene Chloride; N-methylpyrrolidone; Pigment; Violet 29; Tetrachloroethylene, also known as perchloroethylene; and Trichloroethylene.

Notable in this list is asbestos – which was initially banned in 1989 but then overturned in 1991 after a federal court found that the EPA had failed to demonstrate the ban was the least burdensome alternative for eliminating the risk of exposure, as required by the TSCA. Currently the EPA only bans certain products and uses of asbestos.

The EPA will release a scoping document for each chemical within six months, detailing the hazards, exposures, conditions of use, and the potentially exposed or susceptible subpopulations the agency plans to consider for the evaluation. Any identified risk must be mitigated with restrictions on use, up to and including, a ban on the chemical or specific use. The public, industry members, environmental and public health groups, and non-governmental organizations may submit comments and information for consideration during the EPA's risk evaluation process. For each risk evaluation the EPA completes, the TSCA requires the start of another until the remaining chemicals from the 2014 TSCA Work Plan are reviewed for their potential hazard and exposure. By the end of 2019, the EPA must have at least 20 chemical risk evaluations ongoing at any time.

Government Contractor Defense – California caselaw

A California appellate court recently held the "government contractor" defense, which provides a complete defense for federal government contractors against certain product liability claims, may apply to products that are made available to commercial markets.

In Kase v. Metalclad Insulation Corporation (No. A143590, Cal. Ct. App., 1st Dist; Nov. 22, 2016), the plaintiff filed suit against a supplier of asbestos insulation alleging exposure to the asbestos during his employment with the U.S. Navy. The defendant supplier asserted the government contractor defense precluded the plaintiff's defective design claim.

The government contractor defense bars certain product liability claims against manufacturers and suppliers of government equipment and is intended to protect the federal government's exercise of discretion and judgment when contracting out its design requirements. To establish the government contractor defense, a contractor generally must show: (1) the U.S. government approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the government about the dangers in the use of the equipment that were known to the supplier but not to the government. If the defense is successfully established, liability pursuant to state law is displaced and cannot be imposed.

The plaintiff argued the asbestos insulation fell under an exception to the defense, as it was readily available to commercial users in a substantially similar form as those ordered by the government. The court rejected the plaintiff's attempt to use the exception, holding that the product's commercial availability does not necessarily preclude the government contractor defense, but rather the selection of a particular design may reflect a significant policy judgment by government officials whether or not the contractor, rather than the government, developed the design. The court focused on whether the government, with due deliberation, selected the design feature at issue, and not on whether the government or the contractor developed that feature in the first instance. The defendant supplier was held to have sufficiently proved that the government understood the risks associated with using the insulation product and nonetheless selected the product anyway, thus allowing the supplier to claim it was contractually obligated to supply the product and assert the government contractor defense.

California's interpretation of the government contractor defense broadens its applicability to manufacturers and suppliers of widely

available commercial products provided the government's required specifications for the products are reasonably precise. Further, this case illustrates that while still limited in its applicability, the government contractor defense is a powerful tool that can provide for a complete affirmative defense. The case may be appealed to the Supreme Court of California.