SQUIRE PATTON BOGGS

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

China

First-time Amendments to the Anti-Unfair Competition Law Issued

On November 4, 2017, the revised Anti-Unfair Competition Law of the People's Republic of China was adopted at the 30th Session of the Standing Committee of the 12th National People's Congress and will enter into force as of January 1, 2018.

Amendments launched this time focus on regulating acts of unfair competition in the internet field. The amendments clearly state that business operators shall neither give false or misleading publicity for a commercial purpose to certain aspects of their commodities (such as "sales performance" and "user evaluation"), nor organize false deals or take other approaches to help other business operators give deceptive and misleading publicity for the same purpose. If they do, they will be fined up to two million yuan.

In addition, these amendments provide further clarity on the concept of "confusing practices", place limitations on the unauthorized use of others' signs and require that the signs at issue shall be influential to some extent in certain fields. They also clearly specify the range of individuals to which bribes are offered, and stipulate that the practice of offering bribes by any employee of a business operator shall be deemed as one by such business operator. Furthermore, the announced amendments clarify acts of unfair competition in the internet field, such as "taking malicious actions to make online products or services legally supplied by other business operators incompatible".

NDRC Seeks Public Comments on the Administrative Measures for Outbound Investment of Enterprises

On November 3, 2017, the National Development and Reform Commission ("NDRC") issued the Administrative Measures for Outbound Investment of Enterprises (Draft for Comment) (the "Draft for Comment") for public consultation by December 3, 2017.

The Draft for Comment expressly states that outbound investment activities as mentioned herein include, but are not limited to, eight circumstances, such as "setting up or becoming the shareholder of an overseas equity investment fund". The Draft for Comment states that, to make outbound investment, investment subjects shall undergo the examination and approval or record-filing formalities for outbound investment projects. Projects subject to approval administration are sensitive projects implemented by investment subjects either directly or through overseas enterprises under their control, including those involving sensitive industries, such as the cross-border exploitation and utilization of water resources and news media. In addition, the Draft for Comment prescribes that non-sensitive projects directly implemented by investment subjects shall be subject to record-filing administration. In particular, for a project invested by an enterprise under the administration of the Central Government, or a project invested by a local enterprise and for which the amount of investment made by Chinese investors amounts to USD300 million or above, the enterprise shall file the project for a record with the NDRC.

Work Safety Commission of the State Council Calls for More Efforts in the All-staff Work Safety Responsibility System of Enterprises

On October 10, 2017, the Office of the Work Safety Commission of the State Council distributed the Circular on Fully Strengthening the All-staff Work Safety Responsibility System of Enterprises (the "Circular").

The Circular maps out arrangements in three aspects, to be specific, attaching great importance to the all-staff work safety responsibility system (WSRS) of enterprises, establishing and improving the WSRS, and reinforcing supervision and inspection over the WSRS of enterprises. Further, the Circular clearly states that the WSRS of enterprises should be designed and improved under laws and regulations, and that the persons mainly in charge of an enterprise should be responsible for establishing and optimizing the WSRS. Additionally, it is required that the work safety responsibility system shall cover all divisions and positions of an enterprise, with the responsibilities, scope and assessment criteria therein being concise, unambiguous, easy to be operated, and able to be updated in good time. Furthermore, the Circular stresses efforts to tighten supervision and inspection, impose penalties according to the law, and improve the "blacklist" system to include adverse records of work safety events. Any party that causes serious consequences as a result of its refusal to put into place the WSRS of enterprises should be subject to punishments, and such party should be announced to the general public regularly.

AQSIQ Streamlines Inspection and Quarantine Formalities for Higher Customs Clearance Efficiency

On October 24, 2017, the General Administration of Quality Supervision, Inspection and Quarantine ("AQSIQ") issued the Announcement on Streamlining Inspection and Quarantine Formalities to Enhance Customs Clearance Efficiency (the "Announcement"), effective from November 1, 2017.

The Announcement states that an inspection applicant, while handling formalities for applying for customs inspection and quarantine, is required to provide the assurance of conformity issued by the consigner of outbound goods or the consignee of inbound goods. The assurance of conformity should cover the commitment of observing laws, guarantee for conformity, responsibilities for quality safety, and voluntary measures to recall products in question when problems in connection with products arise.

Additionally, the Announcement clearly specifies that goods imported into China for the first time and imported goods required to have inspection and quarantine certificates should undergo tests for the inspection and quarantine purposes on the spot and/or in the laboratories in accordance with applicable provisions. Work to examine documents includes, but is not limited to, the review of the registration, certification, approval, evaluation, verification, and assurance of conformity, and other processes to ascertain the conformity. Furthermore, the Announcement stipulates that, where goods fail to pass inspections and quarantine tests or there is evidence that these goods are associated with higher level of risks, or the consignee, consigner or inspection applicant is rated as Level C or below in terms of its exit-entry inspection and quarantine credit, the sampling percentage could be heightened up to 100% against such party, after the risk assessment.

MEP Includes Laundry Projects for Medical Institutions under the Administration by Environmental Impact Registration Forms

On October 24, 2017, the General Office of the Ministry of Environmental Protection

("MEP") distributed the Reply of Opinions on the Category-based Administration of Environmental Impact Assessment for Construction Projects of Enterprises Specialized in Laundry Services for Hotels, Restaurants and Medical Institutions (the "Reply").

The Reply states that the service sector, where some enterprises are specialized in offering laundry services to hotels, restaurants and medical institutions, in a few places has been developed to a certain scale. They construct an increasing number of production plants or lease houses used for industrial purposes and build professionalized workshops for washing, drying and folding up clothes, thus consuming a huge amount of water and discharging too much sewage that relates to major pollution factors, such as the Chemical Oxygen Demand (COD), Biochemical Oxygen Demand (BOD5) and Suspended Solids (SS). According to the provisions set forth in Article 6 of the Category-based Administration Catalogue for the Environmental Impact Assessment of Construction Projects ("Catalogue"), it is agreed to bring projects involving laundry services offered to hotels, restaurants and medical institutions under the administration by environmental impact registration forms. Where these projects involve the utilization and disposal of medical wastes, treatment of industrial sewage, etc., their category of environmental impact assessment should be determined according to the relevant provisions of the Catalogue.

For more information on any of the items included for PRC, please feel free to call Nicholas Chan.

Hong Kong

Hong Kong Court upheld an independent contractor agreement

In the recent judgment of *Lee Wai Kei Wicky v. World Family Ltd.* [2017] HKEC 2109, the Plaintiff who was an education consultant of the Defendant company, argued that he was an "employee" instead of an "independent contractor". The Court of First Instance rejected the Plaintiff's appeal on the decision from the Labour Tribunal.

The Court held that, due to the fact that (1) the Plaintiff enjoyed high degree of flexibility on his working hours, methods of promotion and sales target; (2) the Plaintiff needed to share advertising costs; (3) the Plaintiff needed to shoulder the expense of secretary salary, gifts for clients and uniforms etc., and (4) the Plaintiff's commission payment was heavily related to his performance, the arrangement between the parties was an independent contractor one.

It can be seen as a rare case that the court finds an employment arrangement to be an independent contractor one, but it also shows that the court is ready to take into account the overall picture and circumstances when deciding a case. Employers are advised to review the whole employment arrangement with care in order to fit the designated label.

Hong Kong Exchange's proposal to change Listing Rules in several areas

The Stock Exchange of Hong Kong ("HKEX") released two consultation papers proposing changes to (1) the Corporate Governance Code and related parts in the Listing Rules; and (2) documentary requirements relating to listed issuers.

With regards corporate governance, the major proposed change would be related to the independence criteria of non-executive

directors (Rule 3.13). HKEX intends to strengthen the assessment criteria on the independence of non-executive directors, including extending the cooling off period for proposed non-executive directors who have been a director, partner, principal or an employee of a professional adviser providing services to the issuer and related entities from one year to three years. Also, non-executive directors would need to provide an explanation if they hold more than seven offices of directorship.

There are also more minor changes towards the Listing Rules. It can be seen as a positive move for the HKEX to further improve corporate governance of the listed companies. The proposed changes, if implemented fully, are welcomed by the industry because it enhances the stability and resilience of the whole ecosystem.

Shareholder's right to inspect company documents

Under s.740 of the Companies Ordinance of Hong Kong, a court has the power to order production of company documents on an application by a shareholder in a company, provided that the requirements of "good faith" and "proper purpose" are satisfied.

In the two recent cases of *Wong Sau Man, Samuel v Wong Kan Po, Wilson and Others* [2017] HKCU 2052 and *Fung Chuen v Sandmartin International Holdings Ltd* [2017] HKCU 2618, the court held differently in the two s.740 application cases. In the *Wong* case, the applicant requested to inspect a very wide scope of documents, encompassing almost all the company documents since 1992 and also failed to relate the purpose to the requested documents. In the *Fung* case, the court found that the applicant had "acted out of a genuine and legitimate concern to protect his interests as a shareholder of the company".

In conclusion, the court does not welcome "fishing" practice when it comes to s.740 application. It is important to limit the scope of documents requested and link the request to a proper purpose as well.

For more information on any of the items included for Hong Kong, please feel free to call Nicholas Chan.

United States

US Consumer Product Safety Commission – Final Rule

On October 27, 2017, the U.S. Consumer Product Safety Commission ("CPSC") issued a final rule prohibiting children's toys and child care articles that contain concentrations of more than 0.1 percent of certain phthalates.

The final rule states children's toys and child care articles containing concentrations of more than 0.1 percent of diisononyl phthalate ("DINP"), diisobutyl phthalate ("DIBP"), di-n-pentyl phthalate ("DPENP"), di-n-hexyl phthalate ("DHEXP"), and dischyclohexyl phthalate ("DCHP") are prohibited.

Section 108 of the Consumer Product Safety Improvement Act ("CPSIA") prohibits the manufacture for sale, offer for sale, distribution in commerce, or importation into the U.S. of any children's toy or child care article that contains these concentrations of certain phthalates. Children's toys include consumer products designed or intended by the manufacturer for a child 12 years or younger for use by the child when the child plays. A child care article is a consumer product designed or intended by the manufacturer to facilitate sleep or the feeding of children age 3 and younger, or to help such children with sucking or teething.

The final rule expanded the interim rule concerning DINP to cover all children's toys, not just those that can be placed in a child's

mouth. Children's toys that can be placed in a child's mouth and child care articles containing more than 0.1 percent of DINP have been prohibited since 2009. Manufacturers will not have to reformulate products in these categories. Only manufacturers of children's toys that cannot be placed in a child's mouth will be affected by the final rule.

DINP is added to some plastics to make them flexible and is commonly found in automobile interiors, wire and cable insulation, gloves, tubing, garden hoses, and shoes. DINP is also found in flexible vinyl materials that are used in the production of bedding, garments, outdoor products such as tents, and book binders. Non-PVC or vinyl products include inks, adhesives, sealants, paints and lacquers. DINP is also a listed substance known to cause cancer under California's Proposition 65 and products must provide a warning about exposure.

The CPSC determined that because DIBP, DPENP, DHEXP, and DCHP are not widely used, few manufacturers will be impacted and need to reformulate their products. Examples of products containing these phthalates are coating products, fillers, plasters, binding agents, paints and adhesives,

The final rule applies to both domestic manufacturers and importers and will not be a barrier to international trade. The prohibition involving DINP applies regardless of the origin of the DINP or the phthalate formulation used. Children's toys and child care articles containing DINP in concentrations greater than 0.1 percent are prohibited even if DINP was not intentionally added.

Final rule becomes effective April 25, 2018 and applies to products manufactured or imported on or after that date.

Standing in Data Breach Class Actions – 8th Circuit

Two cases from the Eighth Circuit Court of Appeals found allegation of a present injury-in-fact is required to establish standing in data breach lawsuits.

Decided on August 1, 2017, *In re: SuperValue, Inc., Customer Data Security Breach Litigation* involved a data breach where hackers installed software on SuperValue's network to gain access to credit and debit card information. Plaintiffs, customers from various states affected by the breach, filed suit alleging violations of state consumer protection statutes, violations of state data breach notification statutes, negligence, breach of implied contract, negligence per se, and unjust enrichment.

The district court granted SuperValue's motion to dismiss, finding that none of the plaintiffs had alleged an injury-in-fact and therefore did not have standing. The Eight Circuit Court of Appeals agreed, finding the plaintiffs failed to allege a substantial risk of future identify theft, and efforts to mitigate their risk (time spent reviewing information about the breach and monitoring their account information) did not create an injury.

However, the appellate court did find the district court erred in holding that one of the named plaintiff's standing was dependent on the standing of other named plaintiffs and unnamed class members. The plaintiff's allegation of misuse of his card information was sufficient to demonstrate he had standing and that was all that was required for the court to have subject matter jurisdiction over the action. The court concluded that because the complaint contained sufficient allegations to demonstrate one of the plaintiffs suffered an injury in fact, fairly traceable to the defendants' security practices, and likely to be redressed by a favorable judgment, the named plaintiff had standing under Article III's case or controversy requirement.

Decided several weeks later on August 21, 2017, *Kuhns v. Scottrade, Inc*., No. 16-3426, — F.3d —, 2017 WL 3584046, also involved a security breach, this time at Scottrade, a securities brokerage firm. Plaintiff Kuhns and other customers affected by the data breach brought a putative class action against Scottrade asserting claims of breach of contract, breach of implied contract, unjust enrichment, declaratory judgment, and violation of state consumer protection statutes.

The district court found the plaintiff lacked standing because he had not suffered an injury in fact and dismissed the matter for lack of subject matter jurisdiction with prejudice. While the Eight Circuit Court of Appeals ultimately affirmed the dismissal because the plaintiff failed to state a claim, the court also held that the plaintiff had standing regarding the breach of contract and contract-related claims based on allegations the full benefit of bargain was not received. The appellate court examined whether the plaintiff suffered an injury in fact, that is fairly traceable to the challenged conduct of the defendant, and that is likely to be redressed by a favorable judicial decision. The court found that a party to a breached contract has a judicially cognizable interest for standing purposes, regardless of the merits of the breach alleged.

Looking at these cases together, it appears the bar for establishing standing in data breach cases in the Eight Circuit is met when there is an allegation of a present injury in fact, not a future injury, that is fairly traceable to the defendant's conduct, and likely to be redressed by a favorable judgment. Here, the allegation of misuse of card information and not receiving the value of a contract (Scotttrade allegedly misrepresented its promise to provide security) were sufficient to establish standing.

Other circuits (including the D.C. and Seventh Circuit) have recently held that the bar to establish standing at the pleading stage is met when plaintiffs assert there is a substantial risk that their personal information could be misused, even if it has not happened yet. This current circuit split will undoubtedly reach the Supreme Court for resolution, however, in the interim, plaintiffs in data breach matters will be looking to file in more favorable jurisdictions while defendants in the Eighth Circuit will have a powerful tool for dismissal.

Arbitration Agreements – 9th Circuit

On May 8, 2017, the Ninth Circuit found that purchase orders must be read together with the distribution agreement. The case, *Sunvalley Solar, Inc. v. CEEG (Shanghai) Solar Science & Technology Co., Ltd.,* 2017 WL 1952036 (9th Cir. 2017), involved a distribution contract that was silent as to arbitration. The contract established that individual transactions were to be governed by the purchase order, and where there are any instances of contradiction of the purchase order, the terms of the distribution contract applies.

The purchase order at issue contained an arbitration clause. The plaintiffs argued the distribution contract was the only contract implicated by the dispute and specific purchase orders' arbitration clauses did not apply. The appellate court disagreed and held the "distribution contract cannot be read in isolation, as it specifically called for individual purchase orders for each transaction. The terms of the specific purchase orders did not conflict with the distribution contract, and thus the arbitration clauses contained therein apply to the dispute between [plaintiff] and [d]efendants." The appellate court affirmed granting the defendants' motion to compel arbitration and dismiss the case.

The very brief decision was notated by the court as not for publication and not precedent.

OFAC Penalty – D.C. Circuit

On May 26, 2017, the D.C. Circuit upheld a fine imposed by the U.S. Department of the Treasury Office of Foreign Assets Control ("OFAC") for violation of the Iran Transaction and Sanctions Regulations ("ITSR") because the company had "reason to know" the third-country recipient intended to reexport goods to Iran.

In *Epsilon Electronics, Inc. v. United States Department of the Treasury, Office of Foreign Assets Control,* 857 F.3d 913 (D.C. Cir. 2017), Epsilon filed a challenge seeking declaratory and injunctive relief against the enforcement of OFAC's penalty. Epsilon was fined USD 4,073,000 in 2014 based on evidence it had reason to know shipments of its products to its Dubai-based distributor were intended for reexport to Iran in violation of the ITSR.

Epsilon argued that the U.S. was required to demonstrate that the goods ended up in Iran. The district court granted summary judgment in favor of OFAC, relying in part on the distributor's website that indicated the distributor sold goods exclusively to Iran. The appellate court affirmed and also held that OFAC did not need to prove whether the goods actually ended up in Iran.

The appellate court noted that the Administrative Procedure Act requires a "highly deferential" review and the court can only set aside OFAC's action "if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The appellate court did, however, find that OFAC did not adequately justify its determination for some of the shipments as evidence showed those goods actually ended up in Dubai. The appellate court remanded the matter to recalculate the penalty.

"Reason to know" can be established through course of dealing, general knowledge of the industry or customer preferences, working relationships between parties, or other criteria. In this case, the distributor's website clearly noted that it was an affiliate of an Iranian company, had locations only in Dubai and Iran, the distributor had been shipping their products to Iran for at least ten years, and the distributor implied that it only served Iran as no other countries were mentioned on its page. In addition to the page being public, there was evidence Epsilon had actual knowledge of the website because Epsilon used images found on the website on an internal gallery labeled "Iran." There was also evidence of knowledge because a freight manifest showed a shipment from Epsilon's address directly to the distributor's address in Tehran, Iran.

The takeaway from this matter is that a company has "reason to know" if their goods will end up in a sanctioned country if there is information (such as a public website) that illustrate as much.

Healthcare – Executive Order

On October 12, 2017, President Trump signed an executive order modifying the Patient Protection and Affordable Care Act ("PPACA"), which the administration deemed as having limited the choice of healthcare options and produced an increase in premiums.

The Trump administration intends to prioritize three areas for improvement: association health plans ("AHPs"), short-term, limited-duration insurance ("STLDI"), and health reimbursement arrangements ("HRAs"). The order states expanding access to AHPs will assist small businesses to group together to self-insure or purchase large group health insurance and avoid certain costly requirements in the PPACA. STLDIs will be exempt from certain insurance mandates and regulations in the PPACA which is intended to make it available as an alternative to government-run exchanges. HRAs will also be expanded and employees will purportedly receive more flexibility with how to use them.

AHP: Within sixty days of the order, the Secretary of Labor will consider proposing regulations or revising guidance to allow more employers to form AHPs. The Secretary will consider expanding conditions that satisfy the commonality-of-interest requirements under the current Department of Labor advisory opinions interpreting the definition of an "employer" under the Employee Retirement Income Security Act ("ERISA").

STLDI: Within sixty days of the order, the Secretaries of Treasury, Labor, and Health and Human Services will consider proposing regulations or revising guidance to expand availability of STLDI. The Secretaries are to consider allowing such insurance to cover longer periods and be renewed by the consumer.

HRA: Within 120 days of the order, the Secretaries of the Treasury, Labor, and Health and Human Services will consider proposing regulations or revising guidance to increase the usability of HRAs, to expand employers' ability to offer HRAs to employees, and to allow HRAs to be used in conjunction with nongroup coverage.

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