

# PRC: NEW TRADE SECRETS PROTECTION

## 中国：保护商业秘密的新发展

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On March 2, 2022, the State Administration for Market Regulation of the People's Republic of China issued the "*Notice of the National Trade Secret Protection Innovation Pilot Work Plan*" (**Notice**). On March 16, 2022, the Supreme People's Court issued the "*Interpretation on Several Issues Concerning the Application of the Anti-Unfair Competition Law of the People's Republic of China*" (**Judicial Interpretation**), which took effect on March 20, 2022. Together, the Notice and the Judicial Interpretation strengthen the protection of trade secrets in the PRC.

2022 年 3 月 2 日中国市场监管总局发布了《全国商业秘密保护创新试点工作方案的通知》（“《通知》”）。于 2022 年 3 月 16 日，最高人民法院出台《关于适用〈中华人民共和国反不正当竞争法〉若干问题的解释》（“《司法解释》”），已在 2022 年 3 月 20 日开始实施。《通知》和《司法解释》共同加强了中国对商业秘密的保护。

The Notice sets out the need to strengthen the protection of trade secrets as an important part of strengthening anti-unfair competition and intellectual property rights. These new protections are significant and are intended to enable innovation and increase the overall competitiveness of the country.

《通知》将加强商业秘密保护作为加强反不正当竞争和知识产权保护的重要内容。这些新的保护措施意义重大，旨在促进创新并提高国家的整体竞争力。

### Damages

The Judicial Interpretation does not provide further explanation for the trade secret clause, and the penalties under the Anti-Unfair Competition Law still apply; that is the compensation for a business operator who suffers damages due to unfair competition will be determined in accordance with the actual losses suffered as a result of the infringement. Where it is hard to ascertain the actual losses, the compensation will be determined in accordance with the gains made by the infringer from the infringement. Where business operators infringe on commercial secrets maliciously and if the case is serious, the compensation amount may be increased by between one to five times.

### 损害赔偿

《司法解释》没有针对商业秘密条款给出更多的解释，仍适用《反不正当竞争法》中的处罚措施，即因不正当竞争行为受到损害的经营者的赔偿数额，按照其因被侵权所受到的实际损失确定；实际损失难以计算的，按照侵权人因侵权所获得的利益确定。经营者恶意实施侵犯商业秘密行为，情节严重的，可以在按照上述方法确定数额的一倍以上五倍以下确定赔偿数额。

### Judicial Discretion

The compensation amount includes reasonable expenses paid by the business operator to stop the infringement. Where a business operator violates the trade secret rules, and it is hard to ascertain the actual losses suffered by the rights holder due to the infringement or to ascertain the gains made by the infringer from the infringement, the People's Court can, taking into

account the extent of the infringement, award compensation of up to RMB5 million to the rights holder.

## 司法裁量权

赔偿数额还应当包括经营者为制止侵权行为所支付的合理开支。经营者违反商业秘密规则的，权利人因被侵权所受到的实际损失、侵权人因侵权所获得的利益难以确定的，由人民法院根据侵权行为的情节判决给予权利人五百万元以下的赔偿。

## Applications and Pilot Plans

The Notice requires local governments to submit applications and pilot plans. The State Administration for Market Regulation will select the most suitable for the pilot projects. It is hoped that in three years (i.e. from June 2022 to June 2025), the system for protecting trade secrets will be continuously improved through pilot projects, and guidelines will be published. The administrative, judicial and civil systems will work together and consolidate their work. The main tasks are divided into the following categories:

### 申请和试点计划

《通知》要求地方政府提交申请和试点方案。国家市场监督管理总局将选择最适合试点的项目。希望在三年内（即 2022 年 6 月至 2025 年 6 月），通过试点不断完善商业秘密保护制度，形成一批指南指引。充分发挥行政、司法、民事多维保护制度优势，形成部门联动、优势互补的工作机制。主要任务分为以下几类：

#### 1 ) strengthen the innovation of trade secret protection system

加强商业秘密保护制度创新

At the government level, the Notice requires regions to establish their own rules. Protection is based on industries, and new economic forms. Based on the experience of the various pilot projects, a national unified guideline for the protection of trade secrets will eventually be established.

在政府层面，通知要求各地区建立各自的制度规则。根据行业、新型经济形态做出保护。根据各地的经验和试点，最终要形成全国统一的商业秘密保护指南指引。

At the enterprise level in the pilot cities, the Notice requires enterprises to strengthen their awareness of the responsibility for trade secret protection, and to improve the ability of enterprises to protect themselves. Guide enterprises are asked to establish internal management systems that meet industry characteristics and their own technical requirements, improve the organizational structure of enterprise trade secret protection management, and establish their own compliance systems.

在试点城市企业层面，通知要求加强商业秘密保护的企业主体责任意识，提升企业自我保护能力。指导企业建立符合行业特点和自身技术要求的内部管理制度，完善企业商业秘密保护管理的组织架构，建立自身合规体系。

Through the means of internet or intranet network or digital platform, enterprises should strengthen the management of the whole process of production and operation of enterprises, and enhance the education and management of employees' confidentiality obligations.

通过网络信息化手段，加强企业生产经营全过程管理，强化对员工保密责任和义务的教育与管理。

2) improve the working mechanism of trade secret protection

健全商业秘密保护工作机制

At the government level, various authorities are required to establish a consolidated working mechanism and law enforcement for the protection of trade secrets, including administrative, criminal, civil and industrial protection.

在政府层面，要求各部门形成联动的工作机制。要建立商业秘密保护执法规范，包含行政、刑事、民事和行业保护。

Industry associations are required to build a bridge of communication between enterprises and the government, formulate industry rules together, and strengthen the legal system of trade secrets and publicity of business ethics.

要求行业协会搭建企业和政府的沟通桥梁，一同制定行业规范，加强商业秘密法制和商业道德宣传。

3) strengthen the supervision and enforcement of trade secret protection

加强商业秘密保护监管执法

The Notice requires the government to actively respond to the demands of enterprises to safeguard their rights, crack down on infringements and illegal acts, and establish a social deterrent force of strong protection and supervision. The government will establish a sound law enforcement process, enhance the standardization of law enforcement, and improve the safeguarding of legitimate rights and interests of enterprises. Enhanced training in scientific and technological transformation, economic development, and enterprise innovation will also be conducted. This will accelerate the number of professional law enforcement teams who understand law, economy, and technology.

通知要求政府应积极响应企业维权诉求，打击各类侵权违法行为，形成强保护、强监管的社会震慑力。建立完善的执法办案流程，增强执法办案的规范性，提高执法办案和维护企业合法权益的针对性有效性。针对商业秘密保护专业性、技术性、复杂性特点，不断提升执法办案能力和水平。加强科技变革、经济发展、企业创新等方面的培训。加快培养一批懂法律、懂经济、懂技术的专业化执法队伍。

We expect that in the next three years, there will be a significant increase in trade secret litigation cases, and innovative rules or guidelines to protect enterprises will be introduced.

我们预计，在未来三年商业秘密诉讼案件将明显增加，并将有创新的保护企业的规则或指南出台。

4) improve the trade secret protection system

健全商业秘密保护服务保障体系

The government, third parties and experts can come together to improve the protection of trade secrets. For example, the government has established a trade secret

protection service network in each economic development zone, provided professional consulting services on trade secret protection, accepted infringement complaint materials, and introduced regulation interpretation. Third-party institutions are encouraged to further enrich their functions, increase professional staff, expand professional coverage, and provide convenient and professional identification, risk management and control and other business secret protection services. Relying on professional institutions such as universities, scientific research institutes, and law firms will help establish multi-field, high-level trade secret protection professionals.

联合政府、社会第三方和专家学者各方的力量，为了健全商业秘密保护提供保障。例如政府在各经济开发区建立商业秘密保护服务网络、提供商业秘密保护专业咨询服务，受理侵权投诉材料，开展政策法规宣讲解读。鼓励第三方机构进一步充实职能，增加专业人员，扩大专业覆盖面，为社会提供便捷专业的鉴定、风险管控等商业秘密保护服务。依托高校、科研院所、律师事务所等专业机构，组建多领域、高层次、高水平的商业秘密保护专业人士。

5) to establish economic and trade rules in line with the standardize international economic and trade rules

对标高标准国际经贸规则

The Notice recognises that it is necessary to provide legal protection for the enterprises which have outbound needs. Based on the characteristics of various regions, the government will conduct research and establish a database of protections overseas and strengthen case analysis and research. The intention is to establish a trade secret protection system that is in line with international rules.

《通知》认可要为出境企业提供涉外维权法律保障。结合各地经济发展特点，研究建立海外维权案例数据库，加强案例分析研究。目的是建立与国际规则相衔接的商业秘密保护制度体系。

6) create a good atmosphere for trade secret protection

营造商业秘密保护良好氛围

Case studies will be conducted for the majority of enterprises, institutions and government departments, to strengthen the training of legal knowledge and professional skills related to trade secrets. This will help enterprises to cultivate specialized talents for the protection related to trade secrets, enhance awareness and ability of enterprises to protect themselves, and operate in compliance, and improve the responsibility awareness and service level of government departments and institutions for the protection of trade secrets.

要求面向广大企业、事业单位和政府部门，开展典型案例讲解，加强商业秘密法律知识、专业技能培训。帮助企业培养商业秘密保护专门人才，提升企业自我保护、合规经营的意识和能力，提高政府部门、事业单位商业秘密保护责任意识和服务水平。