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China's Indigenous **INNOVATION** Policy

In the hope of transforming China's economy known as the "World's Factory" into an innovative and more competitive one, Chinese policymakers formally introduced a policy promoting indigenous innovations—The Medium and Long-Term National Plan for Science and Technology Development (2006–2020).

In addition to encouraging Chinese companies to develop new technologies, this policy also resulted in several Chinese ministries and agencies joining forces to provide guidance, tax incentives, financial support, and technological investments to make the policy work. Numerous implementing measures have since been issued or drafted.

Many foreign and multinational companies (MNCs) feared the policy was another hurdle the Chinese government set up in order to shut them out of the huge Chinese market in favor of domestic companies. Their main concerns arose from their potential inability to win Chinese procurement contracts which give preference in both product selection and price. Such fears appeared justified by the initial versions of some draft measures issued by the Chinese government. However, under intense pressure from foreign governments and businesses, the Chinese government has revised the measures and improved the outlook for MNCs doing business in China.

In April of this year, the Chinese government issued the 2010 Notification Regarding the Certification of Domestic Indigenous Innovative Products (Draft Version for Comments). This Notification provides relief to MNCs doing business in China and hoping to get a share of the Chinese government's procurement market. Despite its draft status, the Notification provides guidance that can be relied on by provincial or local governments. Based on the Notification, several provinces and municipalities have created their catalogs of certified domestic indigenous innovative products.

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The Notification identifies six industries subject to the domestic indigenous innovation product certification: computer and application equipment; telecommunication products; modern office equipment; software; new energy; and highly efficient energy-saving products. Any manufacturer in China with the legal person status can apply to certify its product as a domestic indigenous innovative product if:

- the product is in compliance with Chinese laws and regulations and with China's national industrial and technological policies
- the applicant owns Chinese patents or a license to the patents for the product and there is no dispute on its ownership of or license to the Chinese patents
- the applicant owns the registered trademark or right to use it for the product
- the product is technologically advanced
- the product has reliable quality, and
- the product is already in the marketplace or has potential economic benefits



A foreign-invested enterprise (FIE) in China, either as a wholly foreign-owned enterprise or a joint venture, has the legal person status. In making its products certifiable as domestic indigenous innovative products and thus eligible for the preferential treatment for government procurement contracts, the only hurdles seem to be the requirements that the FIE own relevant Chinese patents and trademark or a license to use them (items 2 and 3 above). In order to have the FIE's products meet these requirements, the foreign parent company should consider assigning or granting a license to its Chinese patents and trademark that protect or cover the products to its FIE in China. Additionally, with the ownership or a license to Chinese patents covering the products, an FIE may even be eligible to be certified as a High and New Technology Enterprise, which enjoys a preferential tax rate of 15%, compared to the regular 25%.

In essence, China's Indigenous Innovation Policy isn't as bad as originally feared. With appropriate arrangements, an FIE in China can in fact benefit from it. Call us if you'd like some help.

HIGH-STAKES SLEUTHING

What You Should Know About Protecting Your Trade Secrets

Our global economy has entered the Information Age. Now, technological innovation and information is the “currency of the new millennium.” But with the stroke of a computer key, technology that took years and millions of dollars to develop can be stolen and sent to commercial and political competitors around the globe.

Recognizing the national economic benefits of the technology trade secrets of U.S.-based companies, and the ease with which these secrets can be stolen, the U.S. Congress enacted the Economic Espionage Act of 1996.

Though some argue the government has not used the Act often enough, the U.S. government’s recent prosecutions of two Chinese automotive engineers have highlighted the subject’s renewed importance. The charges take on extra weight as the engineers were accused of stealing GM and Ford’s trade secrets to send to Chinese competitors at a time when the U.S. government has a vested interest in domestic auto companies, and business commentators are likening theft of U.S. trade secrets to a “kind of warfare.”

In each case, the defendants were preparing to leave GM and Ford for jobs with companies in China. The government alleges the engineers attempted to convert confidential trade secrets to the economic benefit of their new employers, knowing that it could economically injure GM and Ford.

These cases underscore the complexity of laws surrounding intellectual property theft—particularly as companies cooperate, trade, and compete on an ever-expanding international field. At stake, too, are hot-button social and political issues like pre-trial detention and immigration.

These issues were recently exacerbated by news that the Chinese government may compel foreign auto makers that want to produce electric vehicles in China to share cutting-edge electric-vehicle technology in joint ventures with Chinese companies where the foreign auto maker has only a minority stake. Couple this with the currency valuation issues roiling between the U.S. and China, and Sino-American economic relations stand at a volatile crossroad.

If your company does business internationally, it’s time to take a closer look at how trade secret litigation affects you.

WHAT’S A TRADE SECRET?

The law defining trade secrets is broad. Unlike other forms of U.S. intellectual property protection—patent, copyright, and trademark—trade secret jurisprudence is a creature of state law. Most states have some variation of the Uniform Trade Secrets Act. Included in the definition of trade secrets are various forms of financial, scientific, technical, economic, or engineering information—whether tangible or intangible. Plans, patterns, program devices, formulas, designs, prototypes, codes, processes, methods, and techniques can be classified as trade secrets. “Negative know-how”—time and money spent learning what does not work—can be a trade secret.

It doesn’t matter whether or how this information is compiled, recorded, or stored if it meets these conditions:

1. The information derives actual or potential economic value from not being known nor readily ascertainable by the public.
2. The owner uses reasonable efforts to maintain the information’s secrecy.

WHAT’S NOT A TRADE SECRET

Though not exhaustive, and subject to the facts of a particular dispute, the following are generally not recognized by courts as trade secrets:

- General information or knowledge an employee obtains over his career
- General information or knowledge in a certain industry
- Independent development of an idea
- “Reverse engineering” a publicly available product to discover a design or method
- Publicly available information or information that the owner does not exercise reasonable efforts to keep secret

WHAT DOES THE LAW SAY?

While trade secret laws are addressed by individual state law, the Economic Espionage Act is a federal statute that criminalizes misappropriation of a trade secret if the government proves the following four elements beyond a reasonable doubt:



1. The defendant obtains, conveys, or receives a trade secret (or attempts or conspires to do so)
2. The trade secret relates to a product that is produced for or placed in interstate or foreign commerce
3. The defendant intends for the trade secret to economically benefit anyone other than the owner
4. The defendant intended or knew that his conduct would injure the owner

Individuals found guilty can be fined and imprisoned for up to 10 years; companies may receive fines up to \$5 million.

HOW SHOULD YOU PROTECT YOUR VALUABLE COMPANY TRADE SECRETS?

If your company relies on research and development of protected information; purchases, licenses, enters joint ventures that do; or uses vendors to help create protected information, there are several proactive steps you can take to lessen the risk of becoming the victim of trade secret theft or espionage.

- Develop non-compete agreements compliant with state laws to prevent an employee from working with a competitor for a period of time.
- Implement non-disclosure agreements to prevent employees, vendors, and partners from disclosing protected information.
- Require non-solicitation agreements to prevent employees, vendors, and partners from hiring your employees.
- Utilize assignment-of-inventions agreements that state any inventions or trade secrets developed by an employee, vendor, or partner while working for or with your company remain the property of the company.
- Restrict access to R&D networks, work spaces, and environments for your valuable trade secrets to help maintain their security; develop systems that guard access to development or computer source code repositories; monitor details of changes to product, source code, formulas, and equations; and keep clearly defined versions of a developing product, source code, formula, equation, or algorithm in a secure place.
- Understand the pros and cons of patent versus trade secret protection for your proprietary information, including applicable court decisions and any proposed legislation.
- Create policies clearly addressing the use of and rights to company-issued computers and networks.
- Conduct extensive exit interviews of departing employees, especially those in sensitive positions vis-à-vis trade secret development.

INTERNATIONAL PROTECTION OF TRADE SECRETS AND INTELLECTUAL PROPERTY

Protecting your trade secret and other intellectual property in the U.S. does not mean that it's protected in other countries. Indeed, most nations—including China—have their own trade secret and IP laws and filing requirements before those assets can be protected. Many nations (including the U.S. and China) are members of various treaties or world organizations that provide forums to resolve IP and trade secret issues. In the U.S., there's been an increase in U.S. companies filing complaints with the U.S. International Trade Commission seeking to exclude importation of foreign products that infringe IP rights in violation of Section 337 of the Tariff Act of 1930.

One thing is certain: in today's global market, invention, innovation, and information are your most valuable assets. Our firm can guide you through the intricacies of international law and make sure your intellectual property is safe. Call us if you'd like assistance.

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Shusheng Wang Joins Firm

Miller Canfield's International Business practice has gained a seasoned lawyer with the addition of Shusheng Wang. Wang, who serves as co-director of the international practice in our Troy, Michigan, office, brings 13 years of experience helping Chinese companies expand to North America.

Over the years, he has helped global clients establish automotive, engineering, and R&D centers here, as well as those U.S. companies looking to invest in emerging foreign enterprises or outsource products and services abroad.

At Miller Canfield, Wang's focus is on global corporate transactions, mergers and acquisitions, dispute resolution, China business counseling, and U.S. taxation of international operations.

A former member of General Motors' legal staff who is fluent in Mandarin Chinese, Wang received his J.D. from Washington University School of Law in S. Louis, Missouri. He also holds degrees from the People's University of China in Beijing, and Shandong University in Jinan, China.

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The EB-5 Visa: A WIN-WIN INVESTMENT



Foreign national entrepreneurs can provide significant economic benefits to the United States while obtaining a U.S. green card.

The EB-5 program is for immigrant investors who want to obtain a green card and may not have another avenue available to them. EB-5 visas are obtained by investing in either an individual business or a Regional Center.

Generally, obtaining an EB-5 visa requires a \$1 million investment in either an individual business or a Regional Center. However, if the business or Regional Center is in a rural population (less than 20,000) or in a Targeted Employment Area (TEA), the investment threshold is \$500,000. A TEA is a state-designated area that averages over 150% of the national unemployment rate. There are two methods for obtaining an EB-5 visa.

INDIVIDUAL BUSINESS

A foreign national can invest in a new, commercial enterprise or, in limited circumstances, in an existing, troubled business. The investment must be "at risk." There can be no guarantees, buy-back arrangements, unsecured promissory notes, or other agreements/arrangements which appear to structure the investment for appearances sake only.

The individual must prove that the investment money came from a lawful source and the investment must create at least 10 new jobs for U.S. workers. Additionally, the investor must engage in the business through day-to-day management and/or policy formation.

REGIONAL CENTER

The EB-5 Regional Center program was created in 1993. The program currently runs through September 30, 2012.

A Regional Center can be public or private and must be approved by the U.S. Citizenship and Immigration Services (USCIS). It must be engaged in the promotion of economic growth, improved regional productivity, job creation, and increased domestic capital investment.

The investment must be made into a USCIS-approved Regional Center and must be used for a qualified commercial enterprise within an approved geographic area. The investment must also create 10 new jobs for U.S. workers.

Once a Regional Center is established, foreign nationals may invest money in the Center.

Investors are essentially pooling their funds. The Regional Center itself makes the larger investments that result in the new jobs.

Before investing, foreign nationals should carefully consider which program works best for them.

Investing in a Regional Center vs Individual Business

Individual

- Wants to start and manage own business
- Creates employment opportunities up front
- Investment is driving force behind wanting to come to the U.S.
- Wants control over his/her own investment
- Wants to maximize profits from his/her own investment

Regional Center

- Not interested in starting own business
- May want to start business but won't create enough jobs
- Wants to be geographically mobile
- May be retired
- Green card is driving force behind investment



THE GREEN CARD PROCESS

After making the investment in either a Regional Center or an individual business, the foreign national will file the appropriate forms with the USCIS to initially obtain conditional U.S. residency. The foreign national will be a conditional resident for two years after which the foreign national must file forms to have the conditions removed. If the conditions are removed, the individual becomes a permanent resident (green card holder) of the U.S.

Both avenues of the EB-5 program have tax implications (obtaining a U.S. green card results in tax on worldwide income) as well as securities law compliance requirements. Investors need to consult with their tax advisors and attorneys for advice and counsel.

The EB-5 process could be a great avenue for qualified foreign nationals to invest in the U.S. and to obtain their green card—while simultaneously having a positive impact on local economic development and U.S. job creation.

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