

本期内容 Contents

1. 中国颁布中央企业商业秘密保护暂行规定
China issues Interim Regulations on the Protection of the Commercial Secrets of Central SOEs

新法规 New Regulations

标题: 中央企业商业秘密保护暂行规定

发行部门: 国务院国资委

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2010年03月25日, 国务院国有资产监督管理委员会印发关于《中央企业商业秘密保护暂行规定》(“《规定》”)的通知。据相关媒体报道称, 该《规定》的出台有部分原因是为了回应公众高度关注的“力拓胡士泰”一案。该《规定》条款引起了中央企业和涉及与中央企业交易的相关第三方(包括外资企业及个人)的极大兴趣。

《规定》第十条定义了“中央企业商业秘密”的可能保护范围, 以枚举方式列明, 并由中央企业自行确定具体范围; 主要包括战略规划、管理方法、商业模式、改制上市、并购重组、产权交易、财务信息、投融资决策、产购销策略、资源储备、客户信息、招投标事项等经营信息; 设计、程序、产品配方、制作工艺、制作方法、技术诀窍等技术信息。

《规定》第十一条进一步明确, 因国家秘密范围调整, 中央企业商业秘密需要变更为国家秘密, 必须依法定程序将其确定为国家秘密。至于这条规定的主旨是希望中央企业不得不经法定程序随意无限扩张“国家秘密”的范围, 还是希望中央企业定要按时依照最新规定将其所拥有的商业秘密确定成国家机密而不得有所遗漏? 并不是十分的清楚。

《规定》第二十一条明确要求中央企业涉及商业秘密的咨询、谈判、技术评审、成果鉴定、合作开发、技术转让、合资入股、外部审计、尽职调查、资产清核等活动, 应当与相关方签订保密协议。《规定》第二十二条要求中央企业在涉及境内外发行证券、上市及上市公司信息披露过程中, 要建立和完善商业秘密保密审查程序, 规定相关部门、机构、人员的保密义务。《规定》第二十三条进一步就中央企业涉及国家秘密的重点工程、重要谈判、重大项目建立所谓国家安全部门“保密工作先期进入机制”。这些规定显然会对中央企业与第三方之间就重点工程、重要谈判或重大项目的工作方式产生影响。

在第三方(非中央企业员工)违反规定侵害中央企业商业秘密的情况下, 《规定》仅要求中央企业应当对侵犯本单位商业秘密的行为, 依法主张权利, 要求停止侵权, 消除影响, 赔偿损失(亦即民事求偿)。但需要注意的是, 根据中国刑事相关法律, 如果侵犯中央企业的商业秘密对权利人造成重大影响、或中央企业商业秘密已被确定为国家秘密的, 前述侵权行为可能引起刑事责任, 引起更为严重的法律后果。因此, 与中

央企业交易的相关第三方，应当在交易中尽力建立适当的书面记录（或邮件记录）以证明其获得的中方披露的任何信息、文件均是在合法范围内提供的。

Statute Title: Interim Regulations regarding Protection of Commercial Secrets of Central SOEs

Issuing Department: SASAC

Category: State-Owned Enterprises

Date Issued: 25 March 2010

Date Effective: 25 March 2010

On 25 March 2010, the State Owned Assets Supervision and Administration Commission (**SASAC**) issued the Notice on Distributing Interim Regulations regarding Protection of Commercial Secrets of central level State owned enterprises (“**CSOEs**”) (hereinafter referred to as the “**Regulations**”). According to press reports these Regulations were issued in part in response to the highly-publicized Stern Hu/Rio Tinto case. As such these regulations are of interest to CSOEs and other relevant parties (including foreign enterprises and individuals) who deal with CSOEs.

Article 10 of the Regulations enumerates the potential scope of commercial secrets of CSOEs (subject to the CSOEs’ own defined scope), including but not limited to daily operation information with respect to strategic plans, management methods and business modes; reform and listing activities, mergers, acquisitions and restructurings; transactions involving property rights; financial information; investment and financing decisions; manufacturing, purchasing and sales strategies; resource storage, client information, tendering and bidding; technical information concerning design, process, product formulae, processing technology, production methods, knowhow, etc.

Under Article 11 of the Regulations, it is further provided that in case the scope of state secret changes, commercial secret of CSOEs shall be upgraded to a state secret pursuant to lawful procedures. It is unclear whether the main intention of this article is to prevent CSOEs from expanding the scope of “state secret” on their own whim without having first gone through proper procedures, or to ensure that CSOEs always timely upgrade their commercial secrets to state secrets in accordance with the latest definitions.

Article 21 of the Regulations provides that confidentiality agreements should be signed between CSOEs and relevant third party where consultation, negotiation, evaluation of technology and work results, joint development, technology transfer, joint venture investment, outside audit, due diligence or asset and capital verification involving such commercial secrets is to be carried out. Article 22 of the Regulations requires CSOEs to impose confidentiality requirements on all entities and personnel involved in domestic and overseas listings process and disclosures. Furthermore, it is provided under Article 23 of the Regulations that key project(s) or crucial negotiation(s) of CSOEs are to require “early involvement” by state secret protection agencies in case anything in relation to national interest or security is involved. Clearly these could potentially have an impact on the dynamics of any major transaction(s) between CSOEs and third parties.

When a third party infringes upon commercial secrets of a CSOE: the Regulations merely specify in this

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instance that the CSOE may initial legal actions against any infringement of its commercial secrets, and ask for cease and desist, specific performance to repair damages, and compensation (i.e., civil liabilities). But readers should be reminded that according to relevant provisions in China's Criminal Law and other statutes providing for criminal penalties, if any infringement to the commercial secrets causes severe consequences, or if the subject commercial secrets of such CSOE are actually classified as state secrets, criminal liabilities would result and the legal consequences would therefore be much more severe. Consequently, third parties dealing with CSOEs should endeavor to establish a proper paper trail (or email trail) to show that any information/documents disclosed by the Chinese party have all been provided within the proper scope of authority.

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