

# 君合专题研究报告



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## 中国显著提升对商业秘密的法律保护力度——金融机构客户常见问题

互联网时代，如何防范信息泄露和确保数据安全愈发成为金融机构客户关注的重点。在这一背景下，原《民法总则》和《民法典》已相继将“商业秘密”这一传统竞争法下的概念明确提升到“知识产权客体”这一前所未有的高度，使得“商业秘密”获得了与“作品、发明、实用新型、外观设计、商标”等传统知识产权客体相同水准的法律保护。同时，近年来，中国将严重侵犯商业秘密行为的刑事责任追究起刑点降低、犯罪构成标准放宽、刑罚上限提高。此外，中国还增加了侵犯商业秘密的惩罚性赔偿机制，并对与“商业秘密”孪生的“保密商务信息”概念提供法律保护。我们的众多金融机构客户，特别是量化基金管理人及交易机构，大量依赖于计算机软件和息数据等商业秘密，尤其关注相关商业秘密保护问题。我们整理了如下常见问题，与金融机构客户分享。

### 一、商业秘密作为一种知识产权客体的法律依据是什么？金融机构客户应当注意什么？

2021年1月1日正式生效的《民法典》总则编第123条第(五)项明确将“商业秘密”定义为知识产权客体之一，这一规定保留了2017年10月1日生效的《民法总则》的相同规定，根据该条规定，商业秘密被正式归入了知识产权保护体系，为权利人提供了除竞争法外的另外一个强有力的法律救济途径。除此之外，《民法典》合同编第501条明确扩充了合同当事人履行保密义务的范围，除商业秘密外，增加了“其他应当保密的信息”这一兜底性描述，将“保密商务信息”等其他应当保密的信息全部纳入了法律保护范围。我们建议，金融机构客户应藉此机会建立和完善企业内部的商业秘密

保护合规体系，以稳固和保障商业秘密作为“知识产权客体”的价值的稳定性和安全性。除此之外，我们也建议金融机构客户在员工招募和经营管理过程中采取适当措施防止有意或无意造成对他人商业秘密和保密商务信息的侵犯，以免卷入法律纠纷。

### 二、《民法典》及相关司法解释如何确立侵犯商业秘密的惩罚性赔偿制度？

《民法典》侵权责任编第1185条规定了“故意侵害他人知识产权，情节严重的，被侵权人有权请求相应的惩罚性赔偿”。为使该条规定更具有可操作性，2021年3月3日，《最高人民法院关于审理侵害知识产权民事案件适用惩罚性赔偿的解释》正式实施，从惩罚性赔偿的适用范围，故意、情节严重的认定，惩罚性赔偿额计算基数、惩罚倍数的确定等方面进行了详细规定。

### 三、保密信息的范围有哪些？

根据现有中国法的规定，保密信息可以分为两大类：第一类是商业秘密。根据《反不正当竞争法》的定义，商业秘密是指不为公众所知悉、具有商业价值并经权利人采取相应保密措施的技术信息、经营信息等商业信息。即其认定涉及三个要件：(1)不为公众所知悉；(2)具有商业价值；(3)采取相应保密措施。第二类是其他应当保密的信息。虽然《民法典》暂未对其具体范围做出规定，但大致可参照2020年1月15日中美两国签订的《中华人民共和国政府和美利坚合众国政府经济贸易协议》中对于保密商务信息的定义，即是指涉及或与如下情况相关的信息：任何自然人或法人的商业秘密、流程、经营、作品风格或设备，或生产、商业交易，或物

流、客户信息、库存，或收入、利润、损失或费用的金额或来源，或其他具备商业价值的信息，且披露上述信息可能对持有该信息的自然人或法人的竞争地位造成极大损害。

#### 四、刑法对侵犯商业秘密罪的最新修改意味着什么？

在刑事领域，2021年1月31日正式生效的《刑法修正案(十一)》对《刑法》第219条关于侵犯商业秘密罪的规定进行了修订，主要变化有两点：**第一**，降低了侵犯商业秘密行为的入罪门槛，判断是否适用刑罚的标准由原来的“造成重大损失”、“造成特别严重后果”修改为“情节严重”、“情节特别严重”，换言之，侵犯商业秘密罪由原来的“结果犯”改为了现在的“情节犯”。即只要侵犯商业秘密的行为具有严重或特别严重情节(如多次侵权、主要以侵权为业、侵权行为持续时间长、侵权行为涉及区域范围广、侵权人获利数额巨大、侵权行为造成知识产权权利人重大经济损失、侵权行为可能危害人身安全或者严重损害公共利益等)，即可被

追究侵犯商业秘密罪的刑事责任；**第二**，提高了刑罚力度，将侵犯商业秘密罪的最高刑从原来的“七年”提高到现在的“十年”，增强了法律惩罚力度和威慑力。

#### 五、我们的观察

由此可见，通过民事和刑事立法和执法共同发力，中国正显著提升对商业秘密的系统性法律保护以维护商业秘密权利人的正当权益。我们建议金融机构客户密切关注这一领域立法和执法的发展，从以下几个方面完善内部的商业秘密保护体系：**第一**，指定内部部门或人员负责商业秘密保护工作；**第二**，从定密、隐秘、解密、销毁四个层次对商业秘密进行管理；**第三**，从人员管理、涉密信息管理、涉密区域管理、商务活动管理等方面进行系统化管理；**第四**，当商业秘密被侵犯时，及时采取措施进行维权，包括应急处置及证据搜集等。

我们将持续关注并及时与我们的客户分享最新的进展。

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## China Improves Laws to Enhance Trade Secret Protection

### —FAQs for Financial Institutional Clients

In an Internet era, the financial institution community is increasingly concerned with the prevention of information leakage and data security. The General Provisions of Civil Law of People's Republic of China (the "General Provisions of Civil Law") and the Civil Code of People's Republic of China (the "Civil Code"), to adapt to changes in the demand of intellectual property protection, have successively embedded trade secrets (previously only protected by the competition law) into the civil law protection legal system as one of the major subjects of intellectual property, which has promoted the protection of trade secrets to unprecedented levels, on par with protections for traditional intellectual property subjects such as works, inventions, utility models, design models, trademarks etc.. Meanwhile, China has taken measures for strengthening criminal penalties on serious trade secret infringements. In recent years, for example, the threshold for initiating criminal prosecution has been lowered, relaxing the determining factors for conviction and increasing the ceiling on criminal penalties. In addition, China introduced a punitive compensation mechanism for trade secret infringements and provided legal protection for "confidential business information", a concept closely associated with "trade secrets". For many of our financial institutional clients, particularly quantitative fund managers and trading firms relying heavily on trade secrets in the form of computer software and information data, we have prepared the FAQs below to provide a general picture on the recent legislative changes of trade secret protection in China.

#### **Q1: What Is the Legal Basis for Trade Secrets Being Protected as One of the Major Subjects of Intellectual Property? What Are the Key Takeaways for Financial Institutional Clients?**

Item (5), Article 123 of the "General Provisions" in the Civil Code, coming into force on January 1, 2021, explicitly defines trade secrets as one of the subjects of intellectual property, consistent with the General Provisions of Civil Law of October 1, 2017:

*Article 123 of the Civil Code stipulates that parties to civil legal relations have intellectual property rights in accordance with laws. Intellectual property rights are exclusively enjoyed by owners of the following subjects in accordance with laws: (1) works; (2) inventions, utility models and design models; (3) trademarks; (4) geographical indications; (5) trade secrets; (6) layout design of integrated circuits; (7) new plant varieties; (8) other subjects prescribed by laws.*

This provision officially recognizes trade secrets as one of the intellectual property subjects, thus providing an additional legal remedy aside from existing remedies under the competition law. In addition, Article 501 of the "Contract" in the Civil Code explicitly expands the scope of confidentiality stipulated for the contractual parties, that is, apart from trade secrets, it adds a general description of "other information that should be kept confidential" and therefore include "confidential business information" and other information that should be kept confidential into

the scope of legal protection:

*Article 501 of the Civil Code stipulates that where parties learn trade secrets or other information that should be kept confidential during contractual arrangements, they shall not divulge or improperly use such information, regardless of whether the contract is established or not; whoever divulges or improperly uses such trade secrets or information, thereby causing losses to the other party, shall be liable for compensation.*

In this regard, financial institutional clients are advised to establish and improve their internal compliance system for trade secret protection, safeguarding the safety and stability of the economic value of trade secrets. In addition, financial institutional clients are also advised to take appropriate measures in staff recruitment and business dealings to prevent infringement of the confidentiality of trade secrets and confidential business information owned by others to avoid any disputes.

## **Q2: What is the Punitive Compensation Mechanism for Trade Secret Infringement under the Civil Code and Relevant Judicial Interpretations?**

Article 1185 of the “Tort Liability Provisions” in the Civil Code stipulates that “if a person willfully infringes another person's intellectual property rights and the circumstances of the case are serious, the infringed person shall have the right to claim for corresponding punitive damages”. To make this provision more enforceable, on March 3, 2021, the Interpretation of the Supreme People's Court on the Application of Punitive Damages in the Trial of Civil Cases Involving Infringement of Intellectual Property Rights was officially implemented, which provides detailed provisions on the scope of application, the determining factors for “willfulness” and “seriousness”, the calculation of punitive

damages, the determination for multiple punishments, etc..

## **Q3: What is the Scope of Confidential Information?**

Under the current laws, confidential information can be divided into two categories:

I. *Trade Secrets. According to the Anti-Unfair Competition Law of the People's Republic of China*, trade secrets refer to any piece of commercial information, such as technical information and business information, that have economic value by not being generally known and the owner of which is taking corresponding measures to keep them secret. Namely, trade secrets have three characteristics: (i) not being generally known; (ii) having economic value, and (iii) being subject to corresponding confidentiality measures.

II. *Other Information That Should Be Kept Confidential. Although the Civil Code has not specified its scope, it can be determined based on the definition of “confidential business information” in the Economic and Trade Agreement between the Government of the People's Republic of China and the Government of the United States of America entered between China and the US on January 15, 2020, which defines confidential business information as any information that concerns or relates to the trade secrets, processes, operations, style of works, or apparatuses; the production, business transactions, or logistics; customer information, inventories, or amount or source of any income, profits, losses, expenditures of any person, natural or legal; or other information of commercial value, the disclosure of which is likely to have an effect of causing substantial harm to the competitive position of such person from which the information was obtained.*

#### **Q4: What are the Implications of the Latest Amendments to the Trade Secret Infringement Crime in the Criminal Law?**

As for criminal penalties, the Criminal Law Amendment Act XI, which officially came into force on January 31, 2021, amends Article 219 of the Criminal Law on trade secret infringement, with two major changes. Firstly, it lowers the threshold for initiating criminal prosecution of trade secret infringement. The standard for determining whether to apply criminal penalties to trade secret infringement has been changed from "causing huge losses" and "causing extremely serious consequences" to "if the circumstances are serious" and "if the circumstances are extremely serious". In other words, determining whether the consequences of a trade secret infringement are serious is no longer a specific factor for imposing criminal penalties. Instead, the severity of circumstances of each trade secret infringement becomes the decisive factor to determine whether such an offense constitutes a crime. Hence, as long as the circumstances relating to the trade secret infringement are serious or extremely serious (such as repeated infringements, taking trade secret infringement as a major business, long-lasting infringements, the wide range of influence, making huge profit from an infringement, causing significant economic losses to the intellectual property right holders, or the infringement may endanger personal safety or seriously threaten public interest, etc.), then the offender shall be held criminal liable for trade secret infringement. Secondly, it increases the

criminal punishment. The maximum prison term for the trade secret infringement has been increased from seven years to ten, which is a more severe legal punishment and strengthens deterrence.

#### **Our Observations**

Through improvement of civil and criminal legislation as well as law enforcement practice, China has been significantly enhancing the overall legal protection for trade secrets so as to effectively protect the legitimate rights and interests of trade secret owners. We recommend that financial institutional clients pay close attention to the emerging legislation and law enforcement practices, and it is advisable to improve your internal trade secret protection mechanisms by: (i) designating specific internal departments or personnel to be responsible for trade secret protection; (ii) managing the process of identifying trade secrets, maintaining secrecy, limiting access to trade secrets, and destroying materials related to trade secrets; (iii) establishing a comprehensive system in terms of the administration of employees, mediums that contain or reflect trade secret information, areas that are highly relevant to trade secret information and business activities, and (iv) taking timely measures for asserting your rights in a case of trade secret infringement, including emergency measures and evidence collection.

We will continue to monitor the situation and keep our clients apprised of any important developments.

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