

The PRC's State Administration for Market Regulation to Establish List of Dishonest Entities That Have Intentionally Infringed Intellectual Property 市场监管总局出台《市场监督管理严重违法失信名单管理办法》

Recently, the State Administration for Market Regulation (“**SAMR**”) 国家市场监督管理总局 issued Order No 44 on “Administrative Measures for the List of Seriously Illegal & Dishonest Acts subject to Market Regulation 市场监督管理严重违法失信名单管理办法” (“**Measures 办法**”), comprising of 26 Articles, to be effective on 1 Sep 2021 – the full text (in Chinese) is available here:

http://gkml.samr.gov.cn/nsjg/fgs/202108/t20210801_333255.html

The Measures 办法 entitle the SAMR to establish a list of dishonest entities that have intentionally infringed intellectual property; misappropriated trade secrets; committed unfair competition acts (a frequent cause of action in the PRC trademark infringement cases); filed abnormal / irregular patent applications, bad faith trademark applications (eg for squatting); and engaged in illegal patent and trademark agency activities (eg filing patent applications without a patent agency licence).

Article 9 reads, in relevant part:

Anyone who commits the following illegal acts that undermine the order of fair competition and disrupt the order of the market, and falls under the circumstances specified in Article 2 of the Measures 办法, shall be included in the List of Seriously Illegal & Dishonest Acts:

- (1) Infringement of trade secrets, commercial slander, organization of false transactions, and other acts of unfair competition that seriously disrupt the order of fair competition;
- (2) Intentionally infringing on intellectual property rights; submitting irregular patent applications or bad faith trademark applications harming the public interest; engaging in illegal patent and trademark agency activities; ...

(Chinese Text:

第九条 实施下列破坏公平竞争秩序和扰乱市场秩序的违法行为，且属于本办法第二条规定情形的，列入严重违法失信名单：

（一）侵犯商业秘密、商业诋毁、组织虚假交易等严重破坏公平竞争秩序的不正当竞争行为；

（二）故意侵犯知识产权；提交非正常专利申请、恶意商标注册申请损害社会公共利益；从事严重违法专利、商标代理行为；...)

Article 2 referenced above states:

Where any party concerned violates any law or administrative regulation, concerning a serious nature, serious circumstance or relatively serious social harm, and is given a heavier administrative punishment by the SAMR, the SAMR shall, in accordance with the provisions of the Measures, list the party concerned in the List of Seriously Illegal & Dishonest Acts, and publicize the same via the National Enterprise Credit Information Publication System, and then implement corresponding management measures.

The term “heavier administrative punishment” as mentioned in the preceding paragraph includes:

- (1) Imposing a fine on the basis of the administrative penalty judgment standard in accordance with the principle of heavier punishment;
- (2) Lowering its qualification level, and revoking its permit or business licence;
- (3) Restricting its production and business operation activities, ordering it to suspend production or business, ordering it to close down, or restricting its practice;
- (4) Other heavier administrative punishments as prescribed by laws, administrative regulations and departmental rules.

(Chinese Text:

第二条 当事人违反法律、行政法规，性质恶劣、情节严重、社会危害较大，受到市场监督管理部门较重行政处罚的，由市场监督管理部门依照本办法规定列入严重违法失信名单，通过国家企业信用信息公示系统公示，并实施相应管理措施。

前款所称较重行政处罚包括：

- (一) 依照行政处罚裁量基准，按照从重处罚原则处以罚款；*
- (二) 降低资质等级，吊销许可证件、营业执照；*
- (三) 限制开展生产经营活动、责令停产停业、责令关闭、限制从业；*
- (四) 法律、行政法规和部门规章规定的其他较重行政处罚。)*

Note that per Article 12, lack of intent is a defense against being included in the List (当事人有证据足以证明没有主观故意的，不列入严重违法失信名单。)

Whilst per Article 15, once on the List, the entity will be subject to more stringent licensing review, subject to more frequent inspections, etc.

Article 13 provides due process to defend against inclusion in the List:

A decision shall include the reasons, basis, warning of punishment measures, removal conditions and procedures, relief measures, etc. Before a decision on whether to list the entity in the List is made, the parties shall be informed of the reasons and basis for making the decision and the rights of the parties concerned according to law. The procedures of notification, hearing, service of legal documents and handling of objections shall be implemented together with the procedures of administrative punishment.

(Chinese Text:

第十三条 市场监督管理部门在作出行政处罚决定时应当对是否列入严重违法失信名单作出决定。列入决定书应当载明事由、依据、惩戒措施提示、移出条件和程序以及救济措施等。在作出列入决定前，应当告知当事人作出决定的事由、依据和当事人依法享有的权利。告知、听证、送达、异议处理等程序应当与行政处罚程序一并实施。...)

Appeals are provided for in Article 23.

Entities will remain on the list for three years per Article 21, but early removal is possible per Article 16 if the entity:

- (1) Has consciously performed the obligations stipulated in the administrative penalty decision;
- (2) Has taken the initiative to eliminate harmful consequences and adverse effects; and
- (3) Has not received further severe administrative penalties from the SAMR.

OUR COMMENTS: The Measures could be a potential heavy blow to the illegal and dishonest parties; whilst the implementation standards are yet to be grasped through the SAMR's actual practice when the Measures come into effect on 1 Sep 2021. We wait with eagerness to see if the Measures could also effectively help to deter blatant IPR infringement cases.

We will provide you with more updates on the subject matter when available.

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