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Laws and Regulations Updates

I. Decision of the State Council on Amending the Detailed Implementation Rules of Patent Law of the People's Republic of China (the "Decision")

The Premier of the State Council, Wen Jiabao, has recently subscribed the order of the State Council to promulgate the Decision, which effected from 1st February 2010.

The new Patent Law provides that where an applicant intends to file an patent application in a foreign country for an invention accomplished in China, the applicant shall report in advance to the Patent Administration Department under the State Council for confidentiality review. For the sake of implementing the aforesaid requirement, the Decision provides:-

- (a) that in view of the growing opportunities for international cooperation in research and development and in order to properly define the scope of confidentiality review, the "invention or utility model accomplished in the PRC" under the Patent Law shall refer to inventions or utility models where substantive contents of the technical solution are accomplished in the PRC; and
- (b) detailed regulations of the review procedures.

The new Patent Law has revised the filing procedure of a patent application, the

scrutiny of the application and the condition of granting a patent. Accordingly, the Decision has further supplemented and refined the relevant systems, mainly including:-

- (a) making corresponding amendments to the information required in a patent application and the brief description of the design for registration;
- (b) providing that where an applicant files applications for both invention and utility model patents for the same invention on the same day, the applicant should indicate in both applications that another patent is being applied for at the moment, and under the principle that no more than one type of patent right shall be granted to each invention, the invention patent will only be granted upon the surrender of utility model patent granted to the applicant; and
- (c) clearly stipulating that various similar designs under one multiple-design application shall be substantially similar to the primary design, and not more than 10 similar designs shall be included.

For better implementation of the disclosure requirement on sources of genetic resources with respect to patent applications for inventions based thereon under the Patent Law, the Decision defines “genetic resources” in accordance with the Convention on Biological Diversity as hereditary material with practical or potential values obtained from human, animals, plants or microbes etc. Meanwhile, considering some of the inventions have made use of biological resources but not the hereditary functions thereof and thus no disclosure obligation shall be imposed thereon, the Decision defines “invention based on genetic resources” as inventions accomplished by utilizing the hereditary functions of genetic resources. The Decision also contains provisions on the manner of disclosure:

“For patent applications for inventions based on genetic resources, the applicant shall so indicate in the application documents.”

II. Regulations on the Administration of Qualifications for Directors, Supervisors and Senior Management Personnel of Insurance

Companies (the “Qualification Regulations”)

The Insurance Law of the PRC, which came into effect as of 1st October 2009, has provided clear stipulations on the qualifications for directors, supervisors and senior management personnel of insurance companies, circumstances of disqualification and the relevant legal liabilities, as well as authoritative regulations in respect of issues including the definition of senior management personnel. The amendments contained in the recently promulgated Qualification Regulations shall be a milestone in the implementation and practice of the Insurance Law.

The Qualification Regulations have imposed stricter entry requirements for senior management personnel by:-

- (a) reasonably raising the requirements regarding professional experience: the required number of years of experience in the economic or financial industry for general managers of insurance companies has been raised from 5 and 8 years to 8 and 10 years respectively;
- (b) emphasizing requirements of managerial experience for general managers of insurance companies: the Qualification Regulations place strong emphasis on work experience in the insurance industry for general managers of insurance companies by requiring substantial managerial experience in the insurance, financial or financial regulatory industry or in medium and large enterprises;
- (c) providing additional compliance restrictions: circumstance of disqualification due to compliance restrictions has been increased from 7 to 12 in the Qualification Regulations. At the same time, the Qualification Regulations provide general provisions on “vocational qualifications of knowledge, capability and business experience required for the position”, increase the number of exemption on specific academic qualifications from 2 to 7, and lower the required number of years for professional employment; and
- (d) requiring insurance companies to establish formal employment relations with senior management personnel for the purpose of strengthening control over the same.

The Insurance Law provides that directors, supervisors and senior management personnel of insurance companies shall be familiar with insurance-related laws and regulations. The Qualification Regulations provide additional examination requirements in relation to the same and the insurance-related knowledge.

III. Administrative Measures on the Registration of Foreign-Invested Partnership Enterprises (the “Measures”)

The State Administration of Industry and Commerce (SAIC) has recently promulgated the Administrative Measures on the Registration of Foreign-Invested Partnership Enterprises and the same shall take effect from 1st March 2010.

The Measures are formulated for the purposes of regulating the establishment of partnership enterprises by foreign enterprises or individuals in the PRC, facilitating the same to encourage foreign investment, and thus stimulating economic operation and technology exchange.

The Measures contain 9 chapters covering regulations relating to the registration of foreign-invested partnership enterprises, modification and revocation of such registration, establishment of branches, details on annual auditing and the administration of certificates.

The term "foreign-invested partnership enterprise" shall refer to partnership enterprises established by two or more foreign enterprises or individuals, or by foreign enterprise(s) or individual(s) and Chinese natural person(s), legal entity(ies) and other organization(s) in the PRC.

The Measures provide that establishment of foreign-invested partnership enterprises is not allowed in prohibited industries stated in the Catalogue and Guidelines of

Industries for Foreign Investment, or in relation to projects which are labeled as “in the form of Sino-foreign joint-venture only”, “in the form of Sino-foreign co-operation only”, “in the form of Sino-foreign joint ventures or co-operation only”, or those “wholly-owned by Chinese party”, “major shareholding by Chinese party” or those with requirements on the proportion of foreign investment.

Foreign-invested partnership enterprises established in China shall fulfill the requirements under the Partnership Enterprise Law and the Administrative Measures on the Establishment of Partnership Enterprises by Foreign Enterprises or Individuals in China.

Wholly state-owned companies, state-owned enterprises, listed companies and charitable non-profit and social organizations shall not assume as the general partners of a foreign-invested partnership enterprise.

The summary is only intended to provide an outline of certain recent developments in the PRC and is not intended to be relied upon or taken as legal advice provided by Sit, Fung, Kwong & Shum or Hong Kong Sit, Fung, Kwong & Shum Xi’an Representative Office. If you have any enquiry, please contact Alex Chan, our partner in Xi’an Representative Office at Tel: (852) 29097320 and fax: (852) 28459292 (Hong Kong) or Tel: (8629) 87203203 and fax: (8629) 87203033 (Xi’an) e-mail: alexchan@sfks.com.hk