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Laws and Regulations Updates

I. Opinions of the Supreme People's Court on Several Issues Concerning Trials of Cases Regarding Trademark Licensing and Accreditation Administration (the "Opinions")

The Supreme People's Court promulgated the Opinions on 25th April 2010, which is the first regulatory document providing guidance on certain legal standards for cases regarding trademark licensing and accreditation administration.

The Opinions consists of 20 articles and provides guidelines on the general orientation of the judicial policy and the major issues encountered in the cases of trademark licensing and accreditation administration, including review and determination of whether a trademark contains distinctive features, protection for well-known trademarks, pre-emptive registrations by agents or representatives, determination of similar goods and trademarks, protection of prior rights and review and determination regarding registered trademarks ceased to be used for three consecutive years. The Opinions clarifies the scope of the relevant laws and unifies legal standards, thereby playing a significant role in the proper fulfillment of the judicial review obligations by the People's Court and the regulation of trademark licensing and accreditation.

The Opinions provides substantive guidelines to determine the distinctive features of

trademarks, including trademarks containing foreign languages.

The Opinions provides guidelines to the problems in relation to the application of Article 31 of the Trademark Law by stating that whether the prior rights have been infringed shall be determined according to the application date for registration. Given that the objective of Article 31 of the Trademark Law is to avoid conflict of rights granted, where such prior rights cease to exist upon application of the trademark registration, no conflict of rights shall be deemed to exist and the registration of the trademark in question shall therefore not be affected by any pre-existing prior rights.

In respect of the application of Article 41 of the Trademark Law, the Opinions defines “other improper means” by both specific and general provisions to cover all possible circumstances which may arise in practice.

II. Several Opinions on Enhancing the Functions of Industrial and Commerce Authorities to Further Improve Services for Foreign-invested Enterprises (the “Several Opinions”)

The State Administration for Industry and Commerce (SAIC) promulgated the Several Opinions on 13th May 2010, which provides new development opportunities for foreign-invested enterprises.

1. Further Encouraging Foreign Investment

In order to facilitate the flexible capital injection to foreign-invested enterprises, the SAIC stipulates that, subject to registration at the State Administration of Foreign Exchange and the approval of the auditing authorities, investors of foreign-invested enterprises may convert the debts owed thereto by the company into registered capital.

Foreign-invested enterprises which fail to pay up the capital due to lack of funds shall be eligible to apply for an extension provided that the initial registered capital has been paid-up and that it has no records of infringing the law. The relevant authorities shall proceed with such extension application in a timely manner upon examination and approval.

2. Encouraging Foreign Investment in Modern Services Sector and High-Technology Industry

The Implementation Measures for the Administration of Company Name Registration issued by the SAIC provides that any foreign-invested enterprise using the word “(China)” in its company name shall have a minimum registered capital of RMB\$50,000,000. In order to meet the fast-growing demands of the foreign investors in the modern services sector and the high-technology industry, the SAIC expressly stipulates that wholly foreign-owned enterprises or enterprises wholly owned by foreign corporate shall be allowed to use such word as “(China)” in its name, provided that it is engaged in the modern services sector or the high-technology industry and has an registered capital of over RMB\$30,000,000.

3. Improving Systems and Mechanisms Regarding Services for Foreign-invested Enterprises

In order to facilitate consistency in enforcement in relation to compliance of foreign-invested enterprises, the SAIC requires Industrial and Commerce Authorities (AIC) at all levels to establish a complaint management mechanism for foreign-invested enterprises by actively contacting organizations including the Association of Foreign-invested Enterprises and Association of Liaison Officers for Business Registration, in order to obtain opinions and suggestions from foreign-invested enterprises by endeavour and to handle the issues and problems

encountered by foreign-invested enterprises in accordance with the law.

III. Circular on Further Strengthening the Implementation of Qualification Restrictions on Legal Representatives of Corporate (the “Circular”)

The SAIC released the Circular on 15 April 2010, which provides that all industrial and commercial authorities shall strictly adhere to the qualification restrictions on legal representatives of corporate.

The Circular emphasizes that in circumstances as specified in the Company Law and relevant laws and regulations where a legal representative of a corporate is prohibited to assume his position within the prescribed restriction period, the person shall be prohibited from acting as a legal representative in the corporate he is acting for or any other corporate. The Circular stipulates that the status restrictions shall be strictly applied to legal representatives only and shall not be extended to the shareholders. The status restrictions shall be lifted by automatic release mechanisms immediately upon expiration of the restricted terms and shall not be extended. Where the revocation of the company’s business licence or the closure order against the company is dismissed, the AIC ordering such revocation or executing such closure shall immediately lift the status restrictions.

The Circular calls for strengthening of data consolidation and management in relation to the status restrictions to achieve accurate, complete and timely records. Where the AIC has revoked the business licence of the corporate or has imposed a closure order thereon due to violation of the law by the corporate, it shall promptly enter the information of such corporate and the legal representative thereof into a business operation management database in accordance with the requirements of the SAIC. All provincial AICs shall procure to update the database in a daily manner.

In order to facilitate the full implementation of the Company Law and relevant laws and regulations, the Circular provides that AICs at all levels shall actively communicate with relevant authorities and the courts to gradually establish a

comprehensive information exchange platform and improve the information sources in relation to status restrictions.

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