

New Regulations on Internet Publishing in China: Foreign Capital Prohibited

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Background

Under the stringent IT regulatory regime in China, telecom businesses are generally categorized as “basic telecom businesses” and “value-added telecom businesses.”

“Basic telecom businesses,” i.e., building and operation of public telecom network infrastructure, are to a certain extent monopolized by Chinese State-owned enterprises, and subject to strict governmental approval for private entrepreneurs. “Value-added telecom businesses,” on the other hand, include all kinds of payable telecom and information services provided to consumers, users and visitors based on such public telecom network infrastructure, from fee-collecting news websites to online booking.

For most Internet-based business in China, launching and operating a website generally entails an Internet content provider (“**ICP**”) filing with the Chinese telecom regulator. If any information on such a website is payable, it then falls into the scope of “value-added telecom businesses” under Chinese law, necessitating specific governmental approval and an appropriate “value-added telecom business operating license.” On the contrary, if all the content on the website is accessible for free (e.g., a company’s homepage), the ICP filing suffices.

Separate governmental approvals may also be relevant if the contents on the website relate to news dissemination, publishing, education, healthcare, medicine or medical devices, etc. Among these services, Internet publishing (defined by law as providing the public with publications through the information network) is strictly regulated. To be specific, the Chinese guidelines on foreign direct investment have defined “general publishing business” as a prohibited category of foreign investment in China since 2002. Internet publishing services have also been expressly prohibited from accepting foreign investment since last March.

On February 4, 2016, Chinese regulators promulgated the new “Regulations on the Management of Internet Publishing Services” (the “**2016 Regulations**”) to provide more detailed guidelines on regulating Internet publishing activities. The 2016 Regulations took effect on March 10, 2016.

Important Aspects in the “Regulations on the Management of Internet Publishing Services”

There are several noteworthy aspects in the 2016 Regulations:

- Wide Scope of Definition of Internet Publishing Services: The 2016 Regulations adopt a wide scope of “Internet publications,” covering (i) all informative or ideological characters, images, maps, games, animation, video or audio in the areas of literature, art, science, etc., (ii) digital copies of printed books, newspapers, magazines, or published audio or video programs, e-

publication, etc., (iii) digital database of the foregoing, and (iv) any other categories of digital works to be determined by the Chinese State Administration of Press, Publication, Radio, Film and Television (“**SARFT**”). The online dissemination of these publications will be regulated by these new regulations, and subject to licensing requirements as discussed below.

- **Licensing Requirement:** In addition to the ICP filing and the approval for a “value-added telecom business operating license,” it may be necessary, as discussed above, for an Internet publisher to apply for an “Internet Publishing Services License” with the competent provincial branch of the Chinese Ministry of Industry and Information Technology (“**MIIT**”). This license is subject to a renewable 5-year term and annual examinations.
- **Content Regulation and Censorship:** The 2016 Regulations impose strict content regulation and censorship. Each Internet publisher is required to implement specific internal rules on editorial proofreading and content censorship in order to maintain the quality of its publications, and to avoid unacceptable dissemination to the public. A series of content is not allowed for Internet publishing, including information that conflicts with the basic principles of the Chinese Constitution; infringe on China’s sovereignty, unity, or the public safety; or contents discriminating relevant ethnic groups; or those relating to China’s State secret, defamation of others, pornography or superstitious contents. SARFT is further authorized by the 2016 Regulations to name certain categories of contents relating to the State’s security and social safety as “Key Contents.” Without a prior filing with SARFT, no Internet publishing about these “Key Contents” is permitted. Separately, launching online games also necessitates application to the provincial office of SARFT, and then the formal approval by SARFT.
- **Strict Penalties for Violation:** Heavy penalties are set up under the 2016 Regulations. Online publishing without the appropriate Internet Publishing Services License may cause administrative penalties such as (i) an administrative order to shut down the website, and to delete all published contents, (ii) confiscation of the relevant equipment, and (iii) a fine up to 10 times of any illegal gains through such unauthorized Internet publishing. In some case scenarios, civil law liabilities to third parties (e.g., defamation) or even criminal liabilities (e.g., leakage of State secrets) may also be triggered.

Foreign Capital’s Involvement Strictly Prohibited

Foreign capital is expressly prohibited from investing into this Internet publishing business. The 2016 Regulations contain several clauses to this effect:

- **Clause 10:** No foreign-invested enterprises in China will be permitted to engage in Internet publishing services. Chinese Internet publishers’ cooperation with either foreign-invested enterprises in China or foreign parties requires a prior approval from SARFT.
- **Clauses 8 and 9:** For Chinese Internet publishers, their legal representatives must be Chinese citizens having permanent residence in mainland China. As such, a foreign executive of a Chinese publishing entity will have difficulty meeting the requirements for application of the Internet Publishing Services License. Also, the 2016 Regulations expressly require Chinese Internet publishers to place their servers within mainland China.
- **Clause 21:** The 2016 Regulations also explicitly prohibit any holders of the licenses from assigning, lending, selling or transferring to others the issued licenses in any other means. It seems that any contractual control and management structure of a Chinese Internet publisher by foreign capital would also not be allowed under this strict prohibitive provision.

Haynes Boone Comment

Traditional publishing business (printed publication) has been strictly regulated in China for decades. In our previous practice, we have observed that certain foreign entities indirectly enter this market, very often by contract with local publishers. Through the years, however, the legality for such contractual arrangement has been in debate and challenged from time to time. With respect to the 2016 Regulations, it seems that the Chinese regulators would not tolerate such irregularity in the area of Internet publishing.

Another part to note is about the broad and wide definition of Internet publishing activities under the 2016 Regulations. This may create uncertainty in anticipating governmental officials' discretion when dealing with certain specific information's online dissemination.

For example, a manufacturer uploads a user manual of its products online for users' reference for free. Is it an Internet publication? What if there is a fee for the manual for downloading? How about a related fee based introductory book describing the lifestyle when you use the products? Is it a proper advertisement/marketing tool, or unfortunately categorized as an Internet publication? Will the 2016 Regulations be applicable here? Such uncertainties have not been tested and clearly specified in the 2016 Regulations, and are expected to be clarified following the formal implementation of the 2016 Regulations.

For more information, please contact one of the lawyers listed below.