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Legal Updates

1. Analyzing Foreign Exchange Administrative Policies for Leasing Operations in China's Free Trade Zones
2. Brief Commentary on the Administrative Provisions for Web Publishing Services

Legal Updates

1. Analyzing Foreign Exchange Administrative Policies for Leasing Operations in China's Free Trade Zones (Authors: Shu WANG, Jun ZHU)

By the end of 2015, many free trade zones, such as China (Tianjin) Pilot Free Trade Zone, China (Shanghai) Pilot Free Trade Zone, Xiamen Area of China (Fujian) Pilot Free Trade Zone, etc. (“FTZ”), had published implementing regulations for pilot foreign exchange administration reforms. The implementing rules are generally consistent with innovations in leasing, and these regulations further clarify the foreign exchange administrative policies for finance lease companies. In this legal update, we have combined these implementing rules and other current policies in order to comprehensively analyze the relevant up-to-date foreign exchange administrative policies as they relate to the payment of FTZ finance lease/operating lease rental payments and the purchase of lease assets in foreign currency.

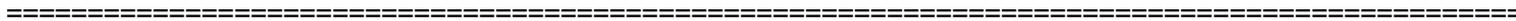
Types of Foreign Exchange Payments for Leasing	Current Policies	Han Kun Comments
<p style="text-align: center;">Foreign Currency Finance Lease Rental Payments</p>	<p>a. Applicable Conditions: in the case of finance leases to PRC domestic lessees, if more than 50% of the funds used to purchase the leased asset are from a domestic foreign currency facility or foreign currency foreign debt, the rental payments can be received in foreign currency.</p> <p>b. Applicable Scope of Leasing Companies: lease companies which are capable of receiving foreign currency rental payments include: domestic finance lease companies (regulated by China Banking Regulatory Commission), foreign invested finance lease companies and domestic finance lease companies (regulated by the Ministry of Commerce) (collectively, the “Finance Lease Companies”)</p> <p>c. Administrative Process for Lessee Foreign Currency Rental Payments: lessees may conduct foreign currency transactions directly with their bank by presenting the rental payment notice issued by the Less or and other certificate documents. No approval is required from the State of Administration of Foreign Exchange or its subdivisions (“SAFE”).</p> <p>d. Foreign Currency Rental Payment Accounts: foreign currency rental payments received by a Finance Lease Company within any FTZ may be deposited into a foreign exchange account opened at its bank pursuant to the relevant regulations.</p>	<p>Before the publication of the new policies, finance lease companies(regulated by China Banking Regulatory Commission) within the FTZs, or their project companies, received foreign currency rental payments pursuant to the <i>Reply on the Receiving of Foreign Currency Rentals in Finance Leasing by Domestic Finance Lease Companies Published by State of Administration of Foreign Exchange Comprehensive Department</i> (Huizongfu [2012] No. 80, the “Document No. 80”).</p> <p>Compared with Document No. 80, which only permits the finance lease companies regulated by the China Banking Regulatory Commission, or their project companies, to receive foreign currency rental payments, the scope of lease companies permitted to receive foreign currency rental payments has been expanded to include all lease companies which hold finance lease licenses, and original provisions in Document No. 80 will no longer be applicable, such as “‘foreign currency finance lease’ shall refer to the provisions in the <i>Notice of Implementation of Innovation of Foreign Exchange Administrative Method on</i></p>

	<p>e. Settlement of Residual Funds after the Repayment of Foreign Currency Debts: if the foreign exchange rental income received by Finance Lease Companies within any FTZ exceeds the foreign exchange debt to be repaid, the difference can be settled directly with the bank.</p> <p>f. Special Sale and Lease-Back Regulations: if the finance lease is structured as a sale and lease-back, the asset to be leased can be purchased by the less or either in foreign currency or in RMB. Foreign currency received by the lessee in this case cannot be settled.</p>	<p><i>Foreign Exchange Facilities</i> and conduct centralized creditor registration,” and “SAFE approvals are needed if the foreign exchange rental income exceeds the foreign exchange debt to be repaid.”</p>
<p>Foreign Currency Operating Lease Rental Payments</p>	<p>a. Applicable Conditions: in the case of operating leases with PRC domestic lessees, if more than 50% of the funds used to purchase the leased asset are from a domestic foreign currency facility or foreign currency foreign debt, or the leased asset is leased from an offshore less or and the rental payments need to be paid in foreign currency, then the payments can be made in foreign currency. Compared with finance leases, operating leases have the additional option of leasing an asset from an offshore less or and then subleasing that asset. This provides a means for paying foreign currency rental payments in the transaction structured as “lease in and lease out of a FTZ”.</p> <p>b. Settlement of Foreign Currency Operating Lease Rental Payments: Normally, foreign currency rental payments cannot be</p>	<p>There are no national policies with respect to receiving foreign currency rental payments under an operating lease. The <i>Reply of Experiment on Receiving Foreign Currency Rentals under Operating Leases in Tianjin Dongjiang Free Trade Port Zone</i> (the “Reply”), published by SAFE Comprehensive Department on 12 August 2015, is the main reference document for lease companies to receive foreign currency operating lease rental payments.</p> <p>Although the Reply resolved the issue regarding a lack of regulations on receiving foreign currency rental payments under a bonded area operating</p>

	<p>settled unless it is for the purpose of paying domestic taxes.</p> <p>c. Purpose Requirements for Foreign Currency Operating Lease Rental Payments: foreign currency rental payments can be used for the purpose of (i) repayment of foreign debts; (ii) repayment of parent entrusted loans; (iii) repayment of domestic foreign exchange loans; (iv) making foreign rental payments; (v) repayment of purchase price loans; and (vi) other foreign exchange income and expenses in accordance with the SAFE regulations.</p> <p>d. Material Examination by the Foreign Currency Rental Payment Account Bank: when receiving foreign currency rental payments, relevant materials shall be submitted to the opening bank, including without limitation an explanation of the source of funds for the leased asset, the import customs declaration or import cargo recording list for the leased asset, and the operating lease agreement.</p> <p>e. Management Requirements for Operating Lease Foreign Currency Rental Payment Special Accounts: the lease company is required to open a special current account for the purpose of receiving foreign currency rental payments, and such accounts are to be specially managed.</p>	<p>lease, the Reply is only applicable to lease companies registered and entering into operating leases in Tianjin Dongjiang Free Trade Port Zone, and the Reply is subject to a 2 year trial period. It has not been determined what regulations will apply to lease companies conducting business in other bonded areas, and whether these policies will be further amended after the conclusion of the trial period. These issues bring uncertainty to lease companies' operating lease business which is based on stable cash flows and the matching of rental and finance payments.</p>
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<p>Purchasing Finance Lease Assets in Foreign Currency</p>	<p>a. Management Principles: If a Finance Lease Company is in a bonded area and its project companies need to purchase aircraft, ships or large equipment from offshore sellers and lease such assets to onshore lessees, the Finance Lease Company may purchase the finance leased assets with foreign currency by having the relevant documentation, such as agreements and commercial documents.</p> <p>b. Inspection Required for Foreign Exchange Payments for Purchases in Aircraft Finance Leasing: in the case of purchasing aircraft from offshore sellers for lease to onshore lessees, the approvals issued by National Development and Reform Commission to the airlines with respect to the purchase or lease of the aircraft, the purchase agreement and commercial documents, etc. are required to be submitted for foreign exchange payments.</p> <p>c. Inspection Required for Foreign Exchange Payments for Purchases in Ship and Equipment Finance Leasing: in the case of purchasing ships and equipment from offshore sellers for lease to onshore lessees, the purchase agreement and commercial documents, etc. are required to be submitted for foreign exchange payments.</p> <p>d. Inspection Required for Foreign Exchange Payments for Purchases in Finance Leasing involving Offshore Lessees: in the case of purchasing aircraft, ships and equipment from offshore sellers for lease to offshore lessees, the purchase agreement and</p>	<p>The new policies further clarify the requirements for the Finance Lease Companies in the bonded areas and their project companies' payment of foreign exchange for the purpose of purchasing aircraft, ships and large equipment from offshore sellers to conduct finance leasing.</p> <p>It is notable that the new policies require the Finance Lease Companies and their project companies to submit the aircraft purchase or lease approvals issued by the National Development and Reform Commission to the airlines when purchasing aircraft from offshore sellers for lease to onshore lessees. Whereas such approvals are usually closely connected with the time of delivery and importation of the aircraft, the new policies may impact finance leases which provide for early stage prepayment financing.</p>
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	<p>commercial documents, etc. are required to be submitted for foreign exchange payments. SAFE may make an inspection under the non-customs document exchange payment method.</p> <p>e. Prepaid Amount Reporting Obligation: in the case of prepayments, the company shall report on the Foreign Exchange Monitoring System for Cargo Trade (Enterprise Terminal) after the payment of the prepaid amount.</p> <p>f. Foreign Exchange Payments for Purchases in Joint Purchase Finance Leasing: in the partial finance leasing, Finance Lease Companies in bonded areas, or their project companies, and a lessee may act as joint purchasers under a purchase agreement for leased assets. In such circumstance, the foreign exchange payment bank may conduct the payment of foreign exchange for the Finance Lease Companies or their project companies in the bonded areas pursuant to the agreements.</p>	
<p>Purchasing Operating Lease Assets in Foreign Currency</p>	<p>No specific policies for now.</p>	<p>There are no specific policies with respect to the purchase of operating lease assets in foreign exchange. In the practice, SAFE will apply the normal policies of foreign exchange payments in the trade of goods. However, it is possible that SAFE may refer to the above policies related to the purchase of finance lease assets in foreign currency.</p>



2. Brief Commentary on the Administrative Provisions for Web Publishing Services (Authors: Kelvin GAO, Le LIU)

The State Administration of Press, Publication, Radio, Film and Television and the Ministry of Industry and Information Technology jointly issued the *Administrative Provisions on Web Publishing Services* (the “**Administrative Provisions**”) on February 6, 2016. The Administrative Provisions, taking effect as of March 10, 2016, will supersede the *Interim Provisions on Internet Publication Administration* (the “**Interim Provisions**”) promulgated by the former General Administration of Press and Publication and the former Ministry of Information Industry in 2002.

Compared with the Interim Provisions, the Administrative Provisions set out more detailed provisions for web publishing activities, which mainly cover issues such as defining web publishing services, licensing and approvals, the administrative and supervisory regime, and legal liabilities. Those provisions that feature certain changes or developments are analyzed below:

a. Expanded Scope of Application

According to the Administrative Provisions, all web publishing services provided within the territory of China shall be subject to the Administrative Provisions. Although this scope appears not to be substantially different than that under the Interim Provisions, the scope of the Administrative Provisions has in effect been expanded, as a result of the relatively broad definitions of the “web publishing services” and the “web publications” in the Administrative Provisions.

Pursuant to the Administrative Provisions, “web publishing services” refer to the activity of providing web publications to the public through information networks; “web publications” refer to digital works which have publishing features such as having been edited, produced or processed and which are made available to the public through information networks, including:

- i. written works, pictures, maps, games, cartoons, audio/video reading materials and other original digital works containing useful knowledge or ideas in the field of literature, art, science or other fields;
- ii. digital works of which the content is identical to that of any published book, newspaper, periodical, audio/video product, electronic publication or the like;
- iii. network literature database or other digital works, derived from any of the aforesaid works by selection, arrangement, collection or other means; and
- iv. other types of digital works as may be determined by the State Administration of Press, Publication, Radio, Film and Television.

Notably, the Administrative Provisions explicitly identify maps and network literature databases as web publications, and further provide for a “catch-all” clause (i.e., web publications include other

types of digital works as may be determined by the State Administration of Press, Publication, Radio, Film and Television) which vests discretionary power in the State Administration of Press, Publication, Radio, Film and Television so as to cope with the ever-developing forms of web publishing.

b. Heightened Threshold Requirements for License Applications

In accordance with the Administrative Provisions, a web publishing service provider shall obtain the approval and a Web Publishing Service License (hereinafter referred to as “License”) from the competent administrative department for publication according to the law. Meanwhile, the Administrative Provisions tailor differentiated threshold requirements for two kinds of applicants.

Entities which are already considered to be a book, audio-video, electronic, newspaper or periodical publisher are subject to relatively low licensing requirements, which only includes:

- i. having a specific publishing platform in place, such as domain name and intelligent terminal application, for engaging in the web publishing business;
- ii. having a specific scope of web publishing services; and
- iii. having the necessary technical equipment for the provision of web publishing services, while the related servers and storage equipment are located within the territory of the People’s Republic of China.

Other types of entities which are engaged in providing web publishing services, must meet the following requirements in addition to those set forth above for traditional publishing entities:

- i. having a specific name that is not identical to the name of any other publishing service provider, and having a business name and articles of association which permit engaging in web publishing;
- ii. its legal representative and key person in charge shall meet relevant requirements of the state, its legal representative shall be a Chinese citizen of long-term residence within the territory of the People’s Republic of China and have full capacity to act, and at least one of either the legal representative or key person in charge has a mid-level or higher professional qualification in the publishing field;
- iii. other than the legal representative and key person in charge, the entity has at least eight (8) full-time editing and publishing staff who have professional qualifications in publishing or other relevant fields recognized by the State Administration of Press, Publication, Radio, Film and Television and meet the needs of the entity’s scope for web publishing services, and among whom at least three (3) have mid-level or higher professional qualifications;
- iv. having a content proofreading system meeting the needs of the provision of web publishing services;

- v. having a fixed place of business; and
- vi. other requirements that may be set forth by relevant laws, administrative regulations or the State Administration of Press, Publication, Radio, Film and Television.

Compared with the Interim Provisions, the Administrative Provisions additionally provide for the requirements of placing the related servers and storage equipment within the territory of the People's Republic of China, establishing a content proofreading system, and specify the personnel qualification requirements for entities engaging in web publishing services. Also, for the first time, the submission of feasibility reports for web publishing services is required in addition to other application materials.

c. Denial of Foreign Entry and Pre-approval Items

Echoing the *Catalogue for the Guidance of Foreign Investment Industries* as revised in 2015, the Administrative Provisions places web publishing services in the prohibited category for foreign investment. Thus, Sino-foreign equity joint ventures, Sino-foreign cooperative joint ventures and wholly foreign-owned enterprises cannot legally engage in providing web publishing services. Moreover, foreign nationals are not allowed to be the legal representative of any web publishing service entity.

In addition, the Administrative Provisions bring the following under the scope of items which require the pre-examination and approval by the State Administration of Press, Publication, Radio, Film and Television:

- i. collaborative projects involving web publishing services between web publishing service providers and a Sino-foreign equity joint venture, Sino-foreign cooperative joint venture or wholly foreign-owned enterprise, or a foreign entity or individual; and
- ii. web publication of online games (including online games subject to authorization by an overseas copyright owner).

d. Valid Term of the License

Unlike the Interim Provisions which do not address the term of validity for the previous equivalent to the License, the Administrative Provisions stipulate that the valid term of the License is five (5) years. Sixty (60) days prior to the expiration of the term, an application for extension may be filed by the web publishing service provider, and approval is subject to the discretion of the competent administrative authority.

e. Extended Scope for Change Registration and Record Reporting, New Annual Inspection Requirement

Compared with the Interim Provisions, the Administration Provisions mainly add the following into

the scope of items which require the web publishing service provider to subsequently carry out a change registration or record reporting.

- i. In the event of changes in the capital structure or establishment of branches, the web publishing service provider shall go through the procedure for change registration with the competent administrative authority; and
- ii. Where a web publishing service provider suspends its web publishing services, it shall report to the competent administrative authority for records and explain the reasons and the duration of the suspension. A web publishing service provider may not suspend its web publishing services for more than 180 days.

However, where a web publishing service provider fails to commence web publishing services within 180 days from the date of registration and it is due to force majeure or other justifiable reasons, the Administrative Provisions allow the web publishing service provider to apply to the competent administrative authority for an extension of the time limit.

Furthermore, under the Administrative Provisions, web publishing service providers which hold a License shall submit an annual self-inspection report on a yearly basis to the competent administrative authority. The authority will examine and verify the provider's conditions for establishment, registration items, operation of publishing business, publishing quality, legal compliance, internal management, etc. Where any web publishing service provider is found to be no longer satisfying the conditions for Licensure, the License may be revoked.

f. Imposing Checks and Verification Obligations on Providers of Internet-related Ranking and Promotion Services

Under the Administrative Provisions, a provider of internet-related services shall check the License and business scope of web publishing service providers to which it provides manual intervention ranking of search results, advertising, promotions or other services. In addition, the competent administrative authority may order such providers of internet-related services to terminate the provision of relevant services to web publishing service providers which publish or distribute any web publications containing content which is prohibited by the Administrative Provisions.

g. Enhanced Protection for the Legitimate Rights and Interests of Minors

The Administrative Provisions not only continue to include provisions which protect the legitimate rights and interests of minors, but also add a provision that forbids the publishing of any content that "discloses the personal privacy of minors."

h. Legal Liabilities of the Key Person in Charge

The penalty provisions of the Administrative Provisions generally follow the framework of the Interim

Provisions, and feature essentially the same level of punishment. Notably, in contrast to the Interim Provisions which only subject the web publishing service providers committing illegal acts to punishment, the Administrative Provisions also aim to hold the legal representative or key person in charge liable to legal liabilities, e.g. where the license of a web publishing service provider is revoked, its legal representative or key person in charge shall not be legal representative or key person in charge of any web publishing service provider within ten (10) years from the date of revocation of the License.

i. Administrative Measures to be Separately Formulated by the Competent Authority

The Administrative Provisions state repeatedly that certain measures, such as the specific classification of web publishing services, implementing special share rights for the management shares of web publishing service providers, and identity management for web publications, remain to be formulated and further clarified by the competent administrative authority. It remains to be further observed when such measures will be promulgated and how they will impact web publishing services.

Summary

Compared with the Interim Provisions, the Administrative Provisions make no innovative breakthroughs or changes, but rather detail relevant existing provisions and additionally devise certain administrative measures to address features of the network environment. In light of such changes, it appears to us that policymakers, instead of relaxing supervisory control over the web publishing services, intend to regulate the industry development and maintain market order in the hope of stimulating the growth of web publishing services as well as encouraging the unified development of old and new publishing media.

Important Announcement

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If you have any questions regarding this publication, please contact:

Contact Us

Beijing Office

Tel.: +86-10-8525 5500
Suite 906, Office Tower C1, Oriental Plaza
No. 1 East Chang An Ave.
Beijing 100738, P. R. China

Estella CHEN Attorney-at-law

Tel.: +86-10-8525 5541
Email: estella.chen@hankunlaw.com

Shanghai Office

Tel.: +86-21-6080 0909
Suite 5709, Tower 1, Plaza 66, 1266 Nanjing
West Road,
Shanghai 200040, P. R. China

Yinshi CAO Attorney-at-law

Tel.: +86-21-6080 0980
Email: yinshi.cao@hankunlaw.com

Shenzhen Office

Tel.: +86-755-3680 6500
Room 2103, 21/F, Kerry Plaza Tower 3, 1-1
Zhongxinsi Road, Futian District, Shenzhen
518048, Guangdong, P. R. China

Jason WANG Attorney at-law

Tel.: +86-755-3680 6518
Email: jason.wang@hankunlaw.com

Hong Kong Office

Tel.: +00852-2820 5600
Suite Rooms 2001-02, 20/F, Hutchison
House, 10 Harcourt Road, Central,
Hong Kong, P. R. China

Dafei CHEN Attorney at-law

Tel.: +852-2820 5616
Email: dafei.chen@hankunlaw.com