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China Tightens Controls over Foreign NGOs with New Law

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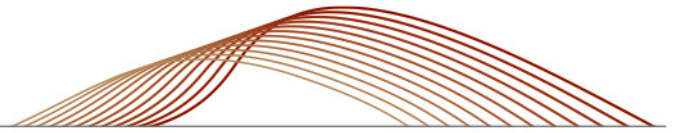
On April 28, 2016, the Standing Committee of the National People's Congress adopted the *PRC Law on the Management of Foreign Non-Governmental Organizations' Activities within Mainland China* (中华人民共和国境外非政府组织境内活动管理法, the "Foreign NGO Law"), concluding a legislative process that began with the first draft's release for public comment in December 2014. The Foreign NGO Law, which takes effect on January 1, 2017, marks a major attempt to consolidate and clarify rules regarding foreign NGOs in China, many of which previously operated in a legal grey zone. At the same time, the Foreign NGO Law substantially strengthens the government's supervision of such organizations' activities by requiring that they register with the Ministry of Public Security or its local counterparts (collectively, the "MPS") and granting the MPS broad powers to scrutinize their operations, including finances.

Overview

The Foreign NGO Law covers registration and record-filing, supervision and management, legal liability, and other aspects of "non-profit and non-governmental social organizations legally established outside of China." Covered institutions include foundations (基金会), civil societies (社会团体), and think tanks (智库机构) operating within China.¹ Of particular note to educational institutions, the ancillary provisions to the Foreign NGO Law clarify that collaboration and exchanges between domestic and foreign schools, hospitals, natural science and engineering science research establishments, and academic organizations are regulated by other laws.²

Under the new rules, foreign NGOs may engage in activities that are "beneficial to public interests" related to economics, education, technology, culture, healthcare, sports, environmental protection, poverty assistance, and disaster relief.³ Foreign NGOs' activities are required to be compliant with Chinese laws, cannot threaten the country's "unity and security or solidarity among different ethnic groups," and must not "damage the interests" of the nation, society, or other entities. Furthermore, the law expressly bans NGOs from engaging in or funding any for-profit or political activities, or from illegally engaging in or funding religious activities.⁴

Public security agencies at various administrative levels are tasked with handling the new registration and filing requirements.⁵ Government authorities with sector-specific expertise are charged with coordinating with the MPS to monitor the foreign NGOs' operations within their jurisdiction.⁶



Two Operating Models Established

The new rules present two models for operating as a foreign NGO in China.

The first method is to establish a representative office (代表机构).⁷ Eligible parent organizations must be able to undertake civil liabilities independently and have operated for at least two years (实质性开展活动) outside China.⁸ Under Chinese law, a representative office is not a legal person, meaning that it cannot enter into contracts or bear legal liability. These responsibilities are borne by the parent NGO.⁹ The representative office is required to have one chief representative and one to three representatives.¹⁰ The representative office is also required to operate under its registered name, within its registered scope of activities and in its designated geographic region.¹¹

Representative offices are required to present their annual plan and annual report to the MPS and sector-specific government authorities on an annual basis.¹² Annual reports will be made publicly available on the MPS's website.¹³ Representative offices are also subject to annual inspection by the MPS.¹⁴

The second method is to conduct *ad hoc* activities in collaboration with a "Chinese partner," which is limited to a state organ (国家机关), a civil organization (人民团体), a public institution (事业单位), or a social organization (社会组织).¹⁵ The Chinese partner is required to file certain documentation with the MPS prior to conducting the activity in question.¹⁶ Upon completion, the foreign NGO and its Chinese partner are required to file a report detailing the outcome of the activity and associated costs with the MPS.¹⁷

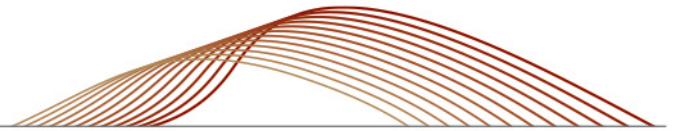
The new rules do not place a limit on the number of representative offices a foreign NGO can establish, but each representative office is required to be approved and registered separately. The law expressly prohibits foreign NGOs from establishing their own branch offices (分支机构) or recruiting new members in China, absent permission from the State Council.¹⁸

One of the most pressing questions for foreign NGOs remains the types of activities that may be lawfully conducted. To provide further guidance, the MPS and other government stakeholders are set to jointly issue a catalogue outlining the scope of permitted operations and projects. Also promised is a list of the government agencies with jurisdiction over each of the fields in which foreign NGOs are allowed to operate.¹⁹ This information is not yet available and the government has only said that such information should be available before the law comes into effect. Given that less than one year remains until the Foreign NGO Law comes into effect, foreign NGOs operating in China would be well advised to be on the lookout for any new developments.

Funding and Fundraising

Extending existing restrictions on the representative offices of foreign foundations, the Foreign NGO Law prohibits all foreign organizations from engaging in fundraising in China. Local operations of authorized organizations may be supported by (i) funds legally acquired from outside China; (ii) domestic bank deposits; and (iii) other funds legally obtained within China (without specifying what those other sources might be).²⁰

A foreign NGO with an established representative office is required to open a bank account for the representative office with a bank located within mainland China and to register such bank account's information with the MPS.²¹ A foreign NGO carrying out *ad hoc* activities is similarly required to register its Chinese partner's bank account information with the MPS, and implement separate bookkeeping measures for such bank account.²² Foreign NGOs and Chinese partners are limited to using such registered bank accounts to receive funds and make payments relating to the foreign NGO's activities within China.²³



Pursuant to the recently enacted PRC *Charity Law* (中华人民共和国慈善法), only charitable organizations deemed qualified by China's civil affairs authorities to engage in fund-raising activities are permitted to solicit funds in China.²⁴ Whether a foreign NGO may benefit from the fund-raising activities of a duly authorized domestic charity remains to be clarified.

Government Oversight

The new rules endow the MPS with broad investigative powers to ensure compliance, including the authority to:

1. interview the chief representative and other representatives;
2. enter and inspect the foreign NGO's offices and areas of operation;
3. request information from entities or individuals;
4. review, copy, and archive documents and materials;
5. seal or seize venues, facilities, or property allegedly associated with illegal conduct; and
6. require financial institutions to provide information regarding the bank accounts of related entities or individuals.²⁵

The Foreign NGO Law also permits the MPS to seek a judicial order to freeze funds identified in (6) above.²⁶

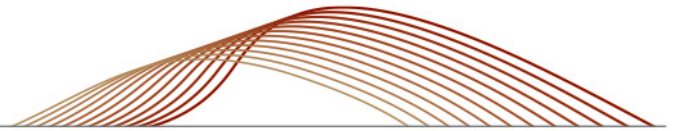
In addition, the Foreign NGO Law grants jurisdiction to other governmental authorities with responsibility for national security, foreign affairs, finance, monetary regulation, customs, taxation, anti-money laundering, etc., to supervise foreign NGOs and their representative offices.²⁷

Individual Liability for Violations

Depending on the seriousness of the violation, the relevant branch of the MPS may take a range of actions, including issuing a warning, suspending illegal activity, confiscating illegal gains, revoking the organization's registration certificate, and/or even detaining the individual in charge. Chinese entities or individuals that cooperate with foreign NGOs which lack representative offices or which carry out unregistered *ad hoc* activities may be similarly liable.²⁸ A foreign NGO whose representative office's registration certificate is thus revoked or whose *ad hoc* activities are thus terminated is prohibited from operating in China for five years.²⁹

The new rules specify that the performance of any of the following activities will result in liability for the individual in charge:

1. provoking the obstruction of law enforcement;
2. acquiring state secrets in violation of the law;
3. engaging in disinformation, defamation, or publishing or disseminating other harmful information that hinders national security or damages national interests;
4. engaging in or funding political activities, or illegally engaging in or funding religious activities; and
5. engaging in other conduct that threatens national security or damages the national interest or public interest.³⁰



The MPS has discretion to designate any foreign NGO found to have engaged in the above misconduct as being “unwelcomed,” in China, barring them from ever re-establishing representative offices or organizing *ad hoc* activities in China in the future.³¹

Grace Period to Comply with New Rules

The Chinese government has given foreign NGOs a grace period of eight months to comply with the new Foreign NGO Law. The grace period also provides authorities with time to establish the administrative infrastructure to handle the registration and filing processes required by the new law. Even so, impacted organizations should move quickly to ensure that they meet the January 1, 2017 deadline.

Foreign NGOs that previously registered with the civil affairs authorities or the Administrations for Industry and Commerce are not exempt. Yunhong Hao, head of the MPS Foreign NGO Management Office, confirmed that these organizations are required to register with the MPS. However, Mr. Hao provided assurance that the operations of foreign NGOs that were previously duly registered would not be affected before the new law takes effect.³²

China-based MNCs Should Evaluate Their Relationships with NGOs

The Foreign NGO Law affects not only foreign NGOs and their employees. It also prohibits entities and individuals within China from receiving funds from, or acting on behalf of, foreign NGOs that lack a duly registered representative office or working with foreign NGOs engaging in *ad hoc* activities that have not been appropriately registered.³³ This restriction applies whether the collaborating entity or individual is acting on behalf of, or simply “cooperating” with, the unauthorized foreign NGO.

Accordingly, companies operating in China should evaluate their corporate social responsibility programs and partners to ensure that they have met or will meet the requirements of the foreign NGO Law when it comes into force. Those working with foreign NGOs that do not satisfy the legal requirements should communicate with those organizations as early as possible to understand the compliance strategy and, if necessary, suspend cooperation until such requirements are met. In addition, entities engaging in permitted philanthropic work in China using funds from foreign sources, such as foreign foundations, should confirm that they meet the registration and filing requirements.



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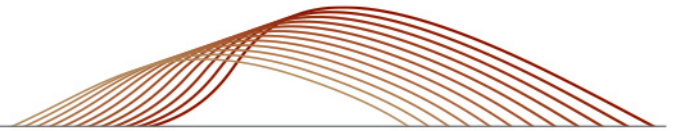
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- ¹ Foreign NGO Law, Article 2. Other types of NGOs, such as domestic social organizations, domestic foundations and private “non-enterprise units” (民办非企业单位), are regulated by the Regulations on Registration and Administration of Social Organization (社会团体登记管理条例), the Regulations on Administration of Foundations (基金会管理条例) and Provisional Regulations on Administration and Registration of Private Non-Enterprise Units (民办非企业单位登记管理暂行条例), respectively. Representative offices of foreign foundations, formerly governed by the Regulations on Administration of Foundations, are subject to the Foreign NGO Law.
- ² See Article 53. Subject to the limitations of Article 5, discussed below.
- ³ *Id.*, Article 3.
- ⁴ *Id.*, Article 5.
- ⁵ *Id.*, Article 6.
- ⁶ *Id.*
- ⁷ *Id.*, Article 9. The law does not place any restrictions on the residence or citizenship of these individuals.
- ⁸ *Id.*, Article 10.
- ⁹ *Id.*, Article 15.
- ¹⁰ *Id.*, Article 29.
- ¹¹ *Id.*, Article 18.
- ¹² *Id.*, Articles 19, 31.
- ¹³ *Id.*, Article 31.
- ¹⁴ *Id.*
- ¹⁵ *Id.*, Article 16.
- ¹⁶ *Id.*, Article 17.
- ¹⁷ *Id.*, Article 30.
- ¹⁸ *Id.*, Articles 18, 28. During a press conference held on April 28, 2016 following the enactment of the Foreign NGO Law, Guo Linmao, Inspector of the National People’s Congress Standing Committee’s Legislative Affairs Commission, explained that the latter exception is aimed at scientific organizations, stating that “the Chinese government encourages scientists and scholars to join foreign scientific institutions.” However, Chinese scientists and researchers who wish to join foreign NGOs will now require government approval. See http://www.npc.gov.cn/npc/zhibo/zzyb25/node_29882.htm.
- ¹⁹ Foreign NGO Law, Article 34.
- ²⁰ *Id.*, Article 21.
- ²¹ *Id.*, Article 13.
- ²² *Id.*, Article 22.
- ²³ *Id.*
- ²⁴ *PRC Law on Charity*, promulgated by the National People’s Congress on March 16, 2016, effective September 1, 2016.
- ²⁵ Foreign NGO Law, Articles 41, 42.
- ²⁶ *Id.*, Article 42.
- ²⁷ *Id.*, Articles 43, 44.
- ²⁸ *Id.*, Articles 45, 46.
- ²⁹ *Id.*, Article 48. Although the Foreign NGO Law does not provide a mechanism to appeal the MPS’s decision, such actions should be subject to administrative review or administrative litigation under general principles of Chinese law.
- ³⁰ *Id.*, Article 47.
- ³¹ *Id.*, Article 48.
- ³² See http://www.npc.gov.cn/npc/zhibo/zzyb25/node_29882.htm.
- ³³ Foreign NGO Law, Articles 32, 46.