
China Issues Draft Legislation to Strengthen Regulation over Foreign NGOs

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Nonprofit and nongovernmental organizations in the PRC (NGOs), both domestic and foreign, have played important roles in China's economic and social development over the years. While the number of foreign NGOs conducting activities in China has increased significantly in recent years, their operations (including but not limited to registration, funding, scope of activities, etc.) are subject to various vague but strict restrictions imposed by the authorities.

The *Administrative Regulations on Foundations* issued by the State Council (**Foundation Regulations**), which took effect June 1, 2004, have been the primary legislation governing the establishment and operation of foundations in China. The Foundation Regulations allow only a Chinese domestic entity or a Chinese national to establish a foundation in China, and requires a foreign entity to use its subsidiary in China as the donor to establish a foundation in China. A foreign foundation is also required to meet a number of requirements for the establishment, including obtaining approval from a Professional Supervisory Unit (“业务主管单位” in Chinese) and the Ministry of Civil Affairs (**MCA**), which has proved to be very difficult in practice. Rather than establishing a foundation in China, some foreign foundations have chosen to establish a representative office (**Rep Office**) to facilitate their efforts in China (which also requires the sponsoring by a Professional Supervisory Unit). However, the scope of business of a Rep Office is limited. For example, a Rep Office is not permitted to raise funds or accept donations in China.

There is no overarching regulation governing the presence and operation by foreign NGOs other than foundations. Over the past years, various NGO's have adopted different approaches to operate in China: some chose to register as for-profit enterprises; some chose to operate in a grey area under the patronage of local officials; some chose to operate without a license. Lack of clarity in law has brought uncertainty and legal risks with respect to the operation of foreign NGOs in China.

To address these issues, the National People's Congress released the second draft of *The Foreign NGO Management Law* (**Draft NGO Law**) on May 5, 2015 for public comment. While the Draft NGO Law aims to provide more clear regulatory requirements and guidance for foreign NGOs to operate in China, many

provisions contained therein have been interpreted by foreign NGOs and commentators to place overly broad (and costly) restrictions on foreign NGOs.

Scope of Application

A foreign NGO is broadly defined as “a nonprofit and non-government social organization established outside of China,” and the Draft NGO Law applies to any activities conducted by such foreign NGO within China (Art. 2). Technically, this could include a nonprofit university alumni organization organizing tours for its alumni in China, a nonprofit construction group providing training sessions for certain engineers in China, and a charity organization aiming to provide disaster response activities.

As required by the Draft NGO Law (Art. 6), any foreign NGO operating in China must either register as a legally registered representative office or obtain a temporary activity permit prior to conducting any activities in China. Due to the broadly defined scope of application of the Draft NGO Law, foreign organizations deemed to be NGOs under the Draft NGO Law may be required to obtain prior approval from the authorities for any activities. (The statute provides no clear definition of “activities.”) Failure to do so may result in confiscation of illegal property and income with respect to the activity and administrative liabilities for the responsible person, such as an up-to-ten-day detention and a fine up to RMB50,000 (Art. 57). If a foreign NGO determines that it is too much trouble to apply for a representative office or a temporary permit and that it will incur too much risk by not applying for such approval, it may simply leave China.

The Draft NGO Law also provides a list of sectors in which foreign NGOs are welcome to engage, which are economics, education, science and technology, health, culture, sports, environmental protection and charity (Art. 3). Foreign NGOs engaging in one of these sectors may find it easier to apply than those engaging in sectors that are deemed to be sensitive by the Chinese authorities, such as human rights, civil liberties, etc.

Form of Presence

As describe above, under the Draft NGO Law, there are only two ways for a foreign NGO to legitimately conduct activities in China: either (1) through an established Rep Office registered in China, or (2) by obtaining a temporary activity permit.

Any foreign NGO that that has not registered or obtained a temporary activity permit, is neither allowed to conduct activities within China nor allowed to engage or fund any individual, legal person or other organizations to conduct activities within China. Any foreign NGO failing to register or obtain a temporary activity permit could face confiscation of illegal property and income with respect to the activity and administrative liabilities for the responsible person, such as an up-to-five-day detention and a fine up to RMB50,000 (Art. 58).

1. Rep Office

Any foreign NGO intending to establish a Rep Office in China must have at least two years of substantial operation overseas. The Draft NGO Law requires the NGO to obtain prior approval from its Professional Supervisory Unit. However, the law is silent over the application procedures with the Professional Supervisory Unit and how to determine the appropriate Professional Supervisory Unit for a foreign NGO. We expect that more detailed guidelines in this regard will be released after the promulgation of the Draft NGO Law.

After obtaining the approval from the Professional Supervisory Unit, a foreign NGO must then file an application with the Public Security Bureau (**PSB**), which is the registration authority for foreign NGOs conducting activities in China. The PSB will issue a registration certificate (**Registration Certificate**) within 60 days after receiving the application (Art. 12). Only one Rep Office is allowed to be established in China, and no branches are permitted. The Rep Office does not have a separate legal personality. Initial approvals for the Rep Office can stand for a maximum of 5 years, after which a new application is required to be made with the Professional Supervisory Unit and then by the PSB after approval by the former (Art. 15).

2. Temporary Permit

The other way for foreign NGOs to carry out activities in China is to apply for a temporary activity permit (**Temporary Permit**). A foreign NGO is required to work with a Chinese partner (a State organ, a people's organization, a public institution or a social organization) for any temporary activities and such activities should last no longer than one year. A foreign NGO must first obtain approval from the Professional Supervisory Unit (Art. 19) and then make the application with the competent PSB for the Temporary Permit (Art. 20). The Chinese partner may be engaged by the foreign NGO to handle the application with the Professional Supervisory Unit and the PSB (Art. 21). The PSB has 30 days to decide whether to approve or not approve the application (Art. 22).

It appears from the draft law that obtaining a Temporary Permit will not be easy, due to the requirement to have a Chinese partner to sponsor the foreign NGO. If a foreign NGO does not have solid connections with a Chinese partner before applying for a Temporary Permit, the Chinese partner is likely unwilling to take the risk to "guarantee" the foreign NGO by agreeing to sponsor it for the Temporary Permit. The political risk borne by the Chinese partner could outweigh the reward it may obtain from cooperating with the foreign NGO. This may be a practical barrier for foreign NGOs to apply for a Temporary Permit in China.

Supervision by Multiple Authorities

The Draft NGO Law involves a multiple supervision framework. The activities carried out by foreign NGOs in China are monitored by the following authorities:

- Public Security Bureau, as the registration authority for foreign NGOs
- Professional Supervisory Unit, which includes the relevant ministries of the State Council, the relevant department of the Provincial Government, and any organization authorized by the State Council or the Provincial Government
- Other supervisory authorities, such as government agencies responsible for national security, finance, foreign affairs, Customs, tax, etc.

Under the current regime, the MCA is responsible for supervising domestic nonprofits and foreign foundations. However, the Draft NGO Law empowers the PSB to be the registration authority to approve the registration and supervision of all foreign NGOs. The change of the supervision power from the civil affairs department to the police department has raised significant concerns from foreign NGOs. The PSB is responsible for criminal investigations, and the Draft NGO Law also provides the PSB with the power to (i) enter any NGO's offices to conduct an on-site inspection, (ii) question individuals, (iii) review, copy, seal any documents, and (iv) seal and/or take away any property, materials, or venues (Art. 49). The PSB also has the power to inquire into bank accounts and may freeze any bank accounts relating to the investigation

of the foreign NGO (Art. 50). The Draft NGO Law provides the PSB with a wide range of power and discretion to manage and supervise NGOs in China.

In addition to the PSB, the Professional Supervisory Unit and other relevant supervisory authorities are also empowered to monitor, guide and supervise foreign NGOs' activities in China within their respective authority. One can imagine how closely the Chinese authorities will be watching every move by a foreign NGO in China. These overly tight monitoring mechanisms may restrict the activities carried out by foreign NGOs in China and may even force some out of China.

Onerous Reporting Requirements

The Draft NGO Law also imposes various reporting requirements on foreign NGOs in China.

A Rep Office is required to report its annual activity plan for the next year to the Professional Supervisory Unit by November 30 each year. This report should include, among other information, the implementation of the Rep Office's activities and the use of funds. After the Professional Supervisory Unit approves this report, the Rep Office must file it with the Public Security Bureau (Art. 24). It is unclear from the draft law whether any additional reporting or approval is required if the Rep Office intends to carry out activities beyond the scope described in the report.

Before the launch of any project in China, the Rep Office must submit its Registration Certificate and a description of the project to the local PSB for filing (Art. 24).

The Rep Office is also required to submit an annual work report to its Professional Supervisory Unit. This report should include, among other information, a financial and accounting report, audit report, description of activities in the past year, and any change in personnel and organizational structure. After the Professional Supervisory Unit provides its opinion on the report, the Rep Office should submit the report to the PSB (Art. 37).

For a foreign NGO that has obtained a Temporary Permit, a report must be filed within 30 days after completion of the temporary activity (Art. 36).

Restrictions on Funding and Staffing

Funding for activities conducted by foreign NGOs in China is limited to money legally raised outside of China, interest earned on deposits in China, and other money lawfully acquired within China (Art. 26). Unless otherwise provided by the State Council, a foreign NGO and its Rep Office are prohibited from raising funds or accepting donations within China. The Rep Office should manage its funds through a bank account registered with the PSB. Any foreign NGO conducting temporary activities in China should manage its funds through the bank account of its Chinese partner, and should be separately booked and audited (Art. 27).

In addition to restrictions on funding, the Draft NGO Law also imposes certain restrictions on the staffing of the Rep Office and foreign NGOs with a Temporary Permit. All employees and volunteers of a Rep Office must be hired through local employment service agencies or other agencies designated by the Chinese government. Employee information must be filed with the PSB and Professional Supervisory Unit for their records (Art. 32). The Draft NGO Law prohibits foreign NGOs from recruiting members in China (Art. 33).

Our Observations

We have the following observations based on our review of the Draft NGO Law:

1. The current leadership in China has attached great importance to national security. The Communist Party of China (**CPC**) established a National Security Commission in November 2013 to enhance the management of national security. In the meantime, a National Security Law and a Counter-Terrorism Law are being drafted. The Draft NGO Law is one of the efforts by this Administration to strengthen national security. As one can see from the draft, foreign NGOs are viewed by the Chinese authority as a source of uncertainty and even a potential threat to national security, and are regulated and monitored by multiple authorities through multiple channels.
2. Despite the enhanced scrutiny of foreign NGOs, the Draft NGO Law provides more clear requirements and procedures for foreign NGOs to follow to carry out activities in China. This improvement will at least clear up certain uncertainties that currently exist for foreign NGOs having actual operations in China. Those operating in a gray area or without a license should carefully review the draft law and be prepared to comply with its requirements and procedures.
3. As we pointed out in our discussion above, the scope of application of the Draft NGO Law is vague but broad. It applies to all “overseas nonprofit and non-governmental organizations” and all their “activities” in China. However, in practice, it is unknown whether the PSB and the relevant authorities will have sufficient staffing and funding to implement the Draft NGO Law, and whether there will be selective enforcement by the authorities. Due to such uncertainty, the PSB will have wide discretion to enforce the law, a condition that creates significant uncertainty and risks for foreign NGOs intending to have a presence in China.
4. The Draft NGO Law does not address the issue whether certain existing entities of foreign nonprofits can continue their operation as is. Certain foreign nonprofits have established their presence in China in the form of a for-profit enterprise, a representative office of foreign non-enterprise economic organization, an office of foreign chamber of commerce, or a representative office of foreign foundations, based on existing regulations. There is no provision under the Draft NGO Law suggesting that these entities are required to undergo the registration procedures for foreign NGOs. It is likely that these entities will be permitted to conduct their operation as is unless the rules significantly change, since their operations in China are legal so long as they operate within the scope of their approved activities.
5. It is uncertain at this stage when and how the Draft NGO Law will be formally passed and released. However, we suspect that no significant change will be made to the current draft. One can tell from the draft that the Professional Supervisory Unit and the Chinese partners are important players under this law since they are designated to share the political risks with the PSB. The Professional Supervisory Unit and the Chinese partners are more familiar with the foreign NGOs in their respective sectors than the PSB, and their opinions are valued by the PSB. One suggestion we have for foreign NGOs intending to operate in China is that rather than worrying about how the PSB will enforce the law, a foreign NGO may start to consider how to enhance its relationship with existing partners in China and how to establish contact with more partners in China. Some Chinese partners have regular and good communications with the relevant authorities, which may serve as the Professional Supervisory Unit for the foreign NGOs.

These efforts will benefit any future application made by the foreign NGOs under the Draft NGO Law once it is effective.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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