

The Foreign NGO Law and its Implementation

Legal Path for Foreign NGOs in China

Foreign NGOs have been gradually operating in China since China opened up in early 1980s, and reached a peak after China's accession to the WTO in 2001. Before the *Administrative Law on Activities of Overseas NGO within Mainland China* (the "Foreign NGO Law") became effective on 1 January 2017, the law related to foreign NGOs were scattered in multiple regulations, and most foreign NGOs operate in China in the form of affiliation ("Gua Kao"), for-profit company registration, or non-registration. By the end of 2016, the official Chinese source stated that there are at least more than 7,000 foreign NGOs working in China¹.

The Foreign NGO Law has been implemented for 4 years now. There are 576 foreign NGO representative offices successfully registered and 3254 temporary activities filed as of as of 1 January 2020. The number of successful registration and filings substantially reduced comparing to 2016 official statistics. Moreover, almost half of the registered offices are trade related, such as chamber Of commerce of different countries, which is not a typical area for foreign NGOs.

This paper analyzes the application of the Foreign NGO Law in practice in order to help foreign NGOs assess the best legal approach to their current and future work in China.

¹ <https://www.brookings.edu/blog/up-front/2016/12/15/the-state-of-ngos-in-china-today/#:~:text=According%20to%20official%20Chinese%20sources,effect%20on%20September%201%2C%202016.>

What is the scope application of foreign NGO Law?

The Foreign NGO Law applies to foreign NGOs' relevant activities in mainland China. NGOs from Hong Kong, Macau and Taiwan operating in mainland China are also governed by the Foreign NGO Law.

The Foreign NGO Law does not define NGOs, but stipulates that foreign NGOs are non-profit, non-governmental social organizations such as foundations, social organizations or think tanks. In practice, organizations that enjoy tax-exempt status in their home countries are generally considered foreign NGOs. Social enterprises that do not have tax-exempt status are generally not allowed to operate in China as foreign NGOs.

Foreign schools, hospitals, natural science and engineering technology research institutions Or academic organizations and domestic schools, hospitals, natural science and engineering technology research institutions or academic organizations to carry out exchanges and cooperation is not applicable to the Foreign NGO Law. However, cooperation between the above-mentioned foreign institutions and other domestic institutions requires registration or filing in accordance with the requirements of the Foreign NGO Law.

What are the differences between Rep Office and temporary filing?

The foreign NGO Law provides two forms of operation: (1) registration of representative office ("Rep Office") and (2) filing for temporary activities. A Rep Office is a permanent establishment and may operate NGO projects independently; filing for temporary activities are for single or multiple short-term projects that partner with Chinese local NGOs. The temporary activities shall be no longer than one year, otherwise re-filing is required. Those that are successfully filed lasted generally a month or so. Foreign NGOs wishing to operate in China on a long-term basis are attempting to register Rep Offices.

To set up a Rep Office in China, the foreign NGO must register in their home country and have been in operation for more than two years. Therefore, foreign organizations or individuals cannot directly establish a foreign NGO Rep Office in China.

Although there is no explicit requirement for temporary activity filing to operate for more than two years, in practice, almost all foreign NGOs that have successfully completed temporary activity filing have been established and operating in their home countries for more than two years.

How to set up a Rep Office

Qualified foreign NGOs may start the dual approval registration process. The foreign NGO must first obtain the approval from the Professional Supervisory Unit (the "PSU") before applying to the Foreign NGO Management Office in the local public security bureau (the "local PSB office") to register. The list of qualified PSUs can be found on the foreign NGO administration platform (the "Platform")² and is updated periodically.

The application documents are mainly in the following 4 categories and as specified in the Table below:

1. Standard Registration Forms
2. Documents to show that the foreign NGO's legal existence in its home country
3. Information on the Rep Office
4. Letter of Approval by PSU



² https://ngo.mps.gov.cn/ngo/portal/view.do?p_articleId=192153&p_topmenu=2&p_leftmenu=5

Category	Document List
Standard Registration Forms	<ol style="list-style-type: none"> 1. Application for Establishment of Rep Office 2. Foreign NGO Registration Form 3. Chief Representative Registration Form 4. Chief Representative's No Criminal Record Declaration 5. Power of Attorney (POA)
foreign NGO's legal existence in its home country	<ol style="list-style-type: none"> 1. Certificate of the foreign NGO's registration in its home country 2. 2-year existence and operation documents 3. The Foreign NGO's Charter
Information on the Rep Office	<ol style="list-style-type: none"> 1. The Rep Office's name 2. Business address 3. Source of fund
Letter of Approval by PSU	<ol style="list-style-type: none"> 1. PSU approves in writing the Rep Office set up in China

How to fill out the Standard Registration Forms?

The standard registration forms can be filled out and automatically generated directly on the Platform. These forms include information on foreign NGOs and their Rep Offices.

How to prove foreign NGO's legal existence in its home country?

These documents are usually the foreign NGO's official registration documents, such as registration certificate, tax registration, charter or bylaws, summary of past activities, websites, etc. As these documents are established outside China, they shall be legalized by the home country's notary and its China consulate.

How to name the Rep Office?

Generally, the name will be the foreign NGO's name followed by the name of the city where it is registered. If the foreign NGO's name does not have its country origin, then the country name shall also be added. For example, if a foreign NGO from Canada and named Wildlife Foundation that registers in Beijing, then its Rep Office's name will be the "Wildlife Foundation Beijing (Canada) Representative Office".

How to apply for registered business address?

A Foreign NGO shall provide a signed lease for at least 1 year on its Rep Office' registered office. Some local PSB requires that the business address to be in certain commercial building not residential homes.

Since at the time of the lease, the Rep Office has not established yet, the Foreign NGO may sign the lease itself or authorize the chief representative to sign the lease on behalf of the Rep Office and transfer the lease to the Rep office after it is set up.

What is the source of fund?

Since Rep Offices are not allowed to solicit donations domestically, a foreign NGO is required to submit a statement that the domestic operation its Rep Office is fully funded by the foreign NGO. This statement can be issued by the foreign NGO or its board of directors.

How to obtain an approval letter from PSU?

This is an official letter issued by PSU to approve the establishment of foreign NGO's Rep Office in China. In practice, this is not only the most important document in the application but also the hardest document to obtain. The Foreign NGO Law has not provided a standard procedure for foreign NGOs to request for PSUs' approval and most PSUs review these requests on a case-by-case basis.

What are the timelines for registration?

The Foreign NGO Law states that foreign NGOs shall apply to local PSB within 30 days from the date of the PSUs' letter of approval and PSB shall render the decision within 60 days after the application is accepted. Here the 60-day timeline starts from when the local PSB "accepted" the application, not when the application is "filed". In practice, most foreign NGOs take more or less than 1 year to register.

What a Rep Office can and cannot do?

Rep Offices may open its own official bank accounts, directly hire local or international employees, and operate NGO projects independently. In addition, Rep Offices are subject to specific regulations regarding donations, program operations, and annual audits.

Can the Rep Office conduct public fundraising domestically?

No. The Foreign NGO Law clearly states that a Rep Office may not publicly raise fund domestically. Although it cannot do public fundraising, a Rep Office may accept direct donations from domestic individuals or companies.

Can a Rep Office operate outside of its registered province?

Foreign NGOs are not allowed to establish branches, therefore, if the activities are carried out outside the registered territory, the foreign NGO should register a new Rep Office or make a temporary activity record in the region.

The activity area of the Rep Office is generally based on the level of the PSU in charge. If the PSU is at the provincial level, the area of activity is generally within the province; if the business unit is at the country level, the area of activity may be nationwide or in a specific province, municipality, or autonomous region.

Since many ministries are reluctant to manage foreign NGOs, many foreign NGOs must choose a provincial office and register a Rep Office in a different province at the same time.

What is the annual filing requirement for Rep Offices?

Foreign NGOs should submit a summary of their work for the previous year including the implementation of activities, financial statements, staff restructuring, etc. as well as a project plan and financial budget for the new year to the competent authorities and the local PSB office.

How to file temporary activities?

Just like the dual approval process in setting up the Rep Office, to file for temporary activities, the foreign NGO's Chinese partner shall first obtain the approval from its own authorities, then the foreign NGOs may file with the local PSBs. Filing documents include:

1. "Foreign NGO Temporary Activities Filing Form"
2. Documents and Materials showing the foreign NGOs' legal establishment
3. The written cooperation agreement between the foreign NGO and Chinese partner
4. Funding source for the activities
5. The official written approval from the Chinese partners' authorities.

What should be included in the cooperation agreement between the foreign NGO and the Chinese Partner?

The Foreign NGO Law does not specify the contents to be included in the cooperation agreement, and the PSB has not provided any template for the cooperation agreement. In practice, the local PSB offices mainly focus on the specific provisions in the agreement regarding

1. the content of the activities,
2. the time and duration of the activities, and
3. the source and use of funds for the activities.

Can foreign NGOs hold multiple temporary events at the same time?

Yes. In practice, some overseas offices allow foreign NGOs to hold multiple temporary activities without having to provide the same filing documents, such as proof of the foreign NGO's legal presence in the country, proof of funding for the temporary activities, etc.



When the temporary activities involve different regions, if the Chinese partner is a national government agency or organization, the foreign NGO can choose one offshore office for registration, but if the Chinese partner is at the provincial level or below, the foreign NGO needs to file in different regional offshore offices at the same time.

Can an NGO project that has been in operation for more than one year file for temporary activities?

Yes, but temporary activities that are older than one year need to be filed again.

What are the legal consequences of violating the foreign NGO Law?

The legal consequences of violating the Foreign NGO Law mainly include:

1. administrative liability - fines or administrative detention of domestic principals
2. suspension or prohibition - suspension of activities, closure of Rep Offices, or inclusion in the list of undesirable foreign NGOs
3. criminal liability when foreign NGOs engage in activities against national securities.

The management model of the Foreign NGO Law is to prevent violations by prior approval, so the activities of foreign NGOs within the approval matters generally

do not constitute violations. In practice, the overseas office also supervises and controls foreign NGOs relatively closely, so in case of violations or potential violations, the overseas office will usually take the initiative to contact the main contact person or representative of the foreign NGO in China and request to correct the violations.

Suggestions

Obtaining the PSU's Approval

The list of PSUs is categorized according to the fields in which NGOs mainly engage in activities, and foreign NGOs should choose the proper PSU that best matches to the type of activities in China. However, due to lack of standard procedures for obtaining the Letter of Approval, plus some of the PSUs are reluctant to supervise foreign NGOs, the fields of the foreign NGOs' activities are not required to be exactly the same as the fields of the PSUs that issued the Letter of Approval. Thus, getting the Letter of Approval is more important than from whom you get it.

A very small number of PSUs (such as the Ministry of Civil Affairs³ and the State Council Leading Group Office of Poverty Alleviation and Development⁴) have published the procedure of applying for a Letter of Approval to the public, but most of the PSUs do not have a defined procedure to follow. In practice, foreign NGOs should communicate (preferably in person) with potentially suitable PSU to understand the specific requirements and procedures for obtaining a Letter of Approval.

Looking for Suitable Place of Registration or Filing.

Foreign NGOs should register or file in the PSB office of the place where they mainly operate. In practice, different provinces have different degrees of welcome for foreign NGOs. If it is difficult to register in the main place of activity, foreign NGOs could look for other more friendly provinces and choose a wider territory in order to carry out their activities legally.

³ http://www.gov.cn/zhengce/zhengceku/2018-12/31/content_5441205.htm

⁴ http://www.cpad.gov.cn/art/2017/8/22/art_50_67981.html.

On the Platform⁵, you can find the statistics on success registrations and filings. Beijing, Shanghai and Guangdong are the three regions with the most registered foreign NGOs. This is probably because almost half of the successfully registered foreign NGOs are in areas related to trade and economy. In Chongqing, however, successful foreign NGOs are mainly poverty alleviation and education related, which shows that Chongqing is more welcoming to NGOs in those fields.

Informal Consultation with the Local PSB

Even though this informal consultation stage is not stipulated in the law, however, in practice, it is important for foreign NGOs to consult with the local PSB office when they start the registration process. The consultation will help foreign NGOs to understand the local requirements and preference. Most PSB officers welcome such informal consultation and treat it as an opportunity to evaluate the foreign NGOs.

Moreover, in some foreign NGO friendly cities, the local PSB may even help foreign NGOs to connect with the right PSUs to obtain the Letter of Approval.

Alternatives for Foreign NGOs to Operate in China

Cooperation among Foreign NGOs

Both PSU and PSB offices are more willing to accept large or internationally known foreign NGOs to avoid the management risks and uncertainties, as well as to promote more public welfare with smaller management costs. Therefore, it would be more difficult for small sized foreign NGOs than for big ones to register their Rep Offices or file for temporary activities. Small sized foreign NGOs may consider affiliate and cooperate with other successfully registered foreign NGOs to jointly operate their public welfare activities in China.

For-Profit Operation

If the foreign NGO's operating model in China has the capacity to generate income and does not rely primarily on donations, then the foreign NGO may consider incorporating a for-profit limited liability company in China to operate commercially. Examples include providing tools and high technology at reduced (but not free) prices to rural areas, introducing foreign language teachers to remote areas in the west and charging referral fees, recruiting Chinese students or Chinese teachers to foreign non-profit schools or research institutions, and promoting and organizing sports events abroad and charging for services or tickets. Although all of these have a public benefit purpose, their activities involve operating income in China, and are therefore more suitable for registration as a limited liability company of a commercial nature.

Conclusion

The implementation of the Foreign NGO Law has brought about changes in the pattern of foreign NGOs' operations in China. Only by taking a comprehensive view of the legal provisions and practical operations we can accurately assess the actual impact of the Foreign NGO Law and help more and more foreign NGOs enter China to carry out more public welfare activities in compliance with the laws.

⁵ https://ngo.mps.gov.cn/ngo/portal/view.do?p_articleId=65502&p_topmenu=3&p_leftmenu=1.