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Legal Updates

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Legal Updates

1. The Catalogue for the Guidance of Foreign Investment Industries under the Negative List Approach (Authors: Jun LI, Effy SUN)

On December 7, 2016, the National Development and Reform Commission (“**NDRC**”) and the Ministry of Commerce (“**MOFCOM**”) jointly announced the issuance of a revised draft for public comment of the *Catalogue for the Guidance of Foreign Investment Industries* (2015 Version) (“**Revised Draft**”). As the usual practice has been to issue revisions every three to four years, the speed with which the Revised Draft has been worked on demonstrates the proactive attitude of policymakers towards the negative list regulatory approach for foreign investment.

Special access administrative measures (also known as a negative list), a key supporting document to the “pre-access national treatment plus negative list,” were not issued at the time the new regulatory regime was formally introduced in October 2016. The role of the negative list has instead been delegated to the *Catalogue for the Guidance of Foreign Investment Industries* (2015 Version) (“**2015 Catalogue**”). The 2015 Catalogue, in its layout of encouraged, restricted, and prohibited categories, lacks a clear description of special access administrative measures for foreign investment. The main purpose of the current revisions is to respond to the needs of the new regulatory regime by providing a unified list of restrictions as well as to improve the clarity of the foreign investment access regime.

Overview of the Revised Draft

The Revised Draft proposes to reform the organizational structure of the 2015 Catalogue by merging the encouraged, restricted, and prohibited categories into two broad categories, “encouraged” and “special foreign investment access administrative measures” (“**Negative List**”). The Negative List combines those entries in the encouraged category subject to shareholding requirements with the entries in the previous restricted and prohibited categories. The Negative List is further divided into two sub-categories: restricted and prohibited. The Revised draft currently lists 344 encouraged entries and 62 Negative List entries (35 restricted entries and 27 prohibited entries).

Based on our preliminary review, the Revised Draft contains the following main adjustments to specific entries:

- a. The Revised Draft presents a unified Negative List by placing encouraged entries subject to special measures into the restricted category, which results in 11 entries presented as both encouraged and Negative Listed (restricted category) (see the table below).

#	Original Catalogue Entries	2015 Catalogue	Revised Draft
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1	11.石油、天然气（含油页岩、油砂、页岩气、煤层气等非常规油气）的勘探、开发（限于合资、合作） Oil, natural gas (including oil shale, oil sands, shale gas, coal-bed methane and other unconventional oil and gas) exploration and development. (limited to equity/cooperative joint ventures)	Encouraged category Shareholding limit	Both encouraged /restricted category Only for oil, natural gas (including coal-bed methane, excluding oil shale, oil sands, shale gas, etc.), exploration and development. Shareholding limit remains
2	210. 民用飞机设计、制造与维修：干线、支线飞机（中方控股），通用飞机（限于合资、合作） Design, manufacture and maintenance of civil aircrafts: aircrafts for main and regional lines (PRC parties control) and general-purpose aircrafts (limited to equity/cooperative joint ventures)	Encouraged category Shareholding limit	Both encouraged /restricted category Shareholding limit remains
3	212. 民用直升机设计与制造（3吨级及以上需中方控股） Design and manufacture of civil helicopters (3 tons and above require PRC parties control)	Encouraged category Shareholding limit	Both encouraged /restricted category Shareholding limit remains
4	214. 地面、水面效应飞机制造及无人机、浮空器设计与制造（中方控股） Ground-effect, water-effect, surface aircraft manufacture, and design and manufacture of unmanned aerial vehicles, aerostat (PRC parties control)	Encouraged category Shareholding limit	Both encouraged /restricted category Shareholding limit remains
5	293. 核电站的建设、经营（中方控股） Nuclear power plants construction, operation (PRC parties control)	Encouraged category Shareholding limit	Both encouraged /restricted category Shareholding limit remains
6	295. 电网的建设、经营（中方控股） Power grid construction, operation (PRC parties control)	Encouraged category Shareholding limit	Both encouraged /restricted category Shareholding limit remains
7	301. 铁路干线路网的建设、经营（中方控股） Main railway line construction, operation (PRC parties control)	Encouraged category Shareholding limit	Both encouraged /restricted category Shareholding limit remains
8	307.民用机场的建设、经营（中方相对控股） Civil airport construction, operation (PRC parties holding relative majority of equity interests)	Encouraged category Shareholding limit	Both encouraged /restricted category Shareholding limit remains
9	308. 航空运输公司（中方控股，且一家外商及其关联企业投资比例不得超过25%） Air transport (PRC parties control, and the investment of a single foreign investor and its affiliated enterprises not exceeding 25%)	Encouraged category Shareholding limit	Both encouraged /restricted category Shareholding limit remains Add nationality requirement for legal representative

10	309. 农、林、渔业通用航空公司（限于合资、合作） General aviation for agricultural, forestry and fishery (limited to equity/cooperative joint ventures)	Encouraged category Shareholding limit	Both encouraged /restricted category Shareholding limit remains Add nationality requirement for legal representative
11	310. 定期、不定期国际海上运输业务（限于合资、合作） Scheduled or non-scheduled international marine transportation services (limited to equity/cooperative joint ventures)	Encouraged category Shareholding limit	Both encouraged /restricted category Shareholding limit remains

- b. In accordance with the principle of consistent administration of domestic and foreign investment, the Revised Draft deletes 11 restricted entries applicable to both foreign and domestic investors, which are no longer regarded as foreign-specific access measures (see the table below).

#	Original Catalogue Entries	2015 Catalogue	Revised Draft
1	14.小电网范围内，单机容量 30 万千瓦及以下燃煤凝汽火电站、单机容量 10 万千瓦及以下燃煤凝汽抽汽两用机组热电联产电站的建设、经营 Construction and operation of, within small power grids, single capacity of 300,000 kilowatts and below coal-fired condensing steam power stations, single capacity of 100,000 kilowatts and below coal-fired condensing or extracting steam dual-purpose unit cogeneration power plants	Restricted category	Delete
2	37.大型主题公园的建设、经营 Large-scale theme park construction, management	Restricted category	Delete
3	7.列入《野生药材资源保护管理条例》和《中国稀有濒危保护植物名录》的中药材加工 Processing of Chinese herbal medicines included in the <i>Wild Medicinal Resources Protection and Management Regulations</i> and the <i>Rare and Endangered Plants of China Catalogue</i>	Prohibited category	Delete
4	11. 象牙雕刻 Ivory carving	Prohibited category	Delete
5	12. 虎骨加工 Tiger bone processing	Prohibited category	Delete
6	14. 大电网范围内，单机容量 30 万千瓦及以下燃煤凝汽火电站、单机容量 20 万千瓦及以下燃煤凝汽抽汽两用热电联产电站的建设、经营 Construction and operation of, within large power grids, single capacity of 300,000 kilowatts and below coal-fired condensing steam power stations, single capacity of 200,000 kilowatts and below coal-fired condensing or extracting steam extraction dual-purpose unit cogeneration power plants.	Prohibited category	Delete
7	24. 军事、警察、政治和党校等特殊领域教育机构 Military, police, political and party schools and other special educational institutions	Prohibited category	Delete
8	33.高尔夫球场、别墅的建设 Construction of golf course and villa	Prohibited category	Delete
9	34.危害军事设施安全和使用效能的项目 Projects that harm the security and efficiency of military installations	Prohibited category	Delete

10	35.博彩业（含赌博类跑马场） Gambling and lottery industry (including racetrack gambling)	Prohibited category	Delete
11	36.色情业 Pornography	Prohibited category	Delete

- c. To further open up and improve industry structures, the Revised Draft moves 7 entries from the restricted category to the permitted category and removes shareholding and nationality requirements for 7 encouraged entries, with some entries being moved to the permitted category (see the table below).

#	Original Catalogue Entries	2015 Catalogue	Revised Draft
1	11. 矿井瓦斯利用（限于合资、合作） Mine gas utilization (limited to equity/cooperative joint ventures)	Encouraged category Shareholding limit	Remove shareholding limit Encouraged category
2	209. 轨道交通运输设备（限于合资、合作） Rail transport equipment (limited to equity/cooperative joint ventures)	Encouraged category Shareholding limit	Remove shareholding limit Change to permitted category
3	221. 海洋工程装备（含模块）的制造与修理（中方控股） Manufacture and repair of marine engineering equipment (including modules) (PRC parties control)	Encouraged category Shareholding limit	Remove shareholding limit Change to permitted category
4	223. 船舶低、中速柴油机及曲轴的制造（中方控股） Manufacture of low and medium speed diesel engines and crankshafts for ships (PRC parties control)	Encouraged category Shareholding limit	Remove shareholding limit Change to permitted category
5	261. 民用卫星设计与制造、民用卫星有效载荷制造（中方控股） Design and manufacture of civil satellite; manufacture of civil satellite payload (PRC parties control)	Encouraged category Shareholding limit	Remove shareholding limit Encouraged category
6	318. 会计和审计 Accounting and auditing.	Encouraged category Nationality requirement for principal partner	Remove nationality requirement Change to permitted category
7	341. 综合水利枢纽的建设、经营（中方控股） Comprehensive water conservancy project construction, operation (PRC parties control)	Encouraged category Shareholding limit	Remove shareholding limit Change to permitted category
8	3. 贵金属（金、银、铂族）勘查、开采 Precious metals (gold, silver, platinum group) exploration, mining	Restricted category	Delete Change to permitted category
9	5. 锂矿开采、选矿 Lithium mining, mineral processing	Restricted category	Delete Change to permitted category

10	6.豆油、菜籽油、花生油、棉籽油、茶籽油、葵花籽油、棕榈油等食用油脂加工（中方控股），大米、面粉、原糖加工，玉米深加工 Soybean oil, rapeseed oil, peanut oil, cottonseed oil, tea seed oil, sunflower oil, palm oil and other edible oil processing (PRC parties control), rice, flour, raw sugar processing, deep corn processing	Restricted category	Delete Change to permitted category
11	7.生物液体燃料（燃料乙醇、生物柴油）生产（中方控股） Production of bio-liquid fuels (fuel ethanol, biodiesel) (PRC parties control)	Restricted category	Delete Change to permitted category
12	17.公路旅客运输公司 Highway passenger transportation	Restricted category	Delete Change to permitted category
13	22.外轮理货（限于合资、合作） Ocean shipping tally (limited to equity/cooperative joint ventures)	Restricted	Delete Change to permitted category
14	29.资信调查与评级服务公司 Credit investigation and rating services	Restricted	Delete Change to permitted category

- d. The Revised Draft deletes the catch-all entries in the 2015 Catalogue. Instead, in the explanatory notes to the Negative List, it is provided that where CEPA-related agreements, international agreements or treaties which China has concluded or in which it participates, or where the laws and regulations of China have provided otherwise, such provisions shall prevail. This approach could offer flexibility for Chinese government to tailor negative list on a country-specific basis without amending the Negative List.

#	Original Catalogue Entries	2015 Catalogue	Revised Draft
1	十四、国家法律法规和我国缔结或者参加的国际条约规定限制的其他产业 Other industries that are restricted by laws and regulations and international treaties concluded or participated in by China	Restricted category	Delete
2	十三、国家法律法规和我国缔结或者参加的国际条约规定禁止的其他产业 Other industries that are prohibited by laws and regulations and international treaties concluded or participated in by China	Prohibited category	Delete

Comments

The proposed revisions to the 2015 Catalogue are of great significance for they will create a clearer, more open investment environment. However, perhaps due to time constraints, the Draft Revision does not break from the concept of a guidance catalogue, and many adjustments are more with respect to the classification and layout to satisfy the negative list form requirements. The current Negative List is still in a transitional phase, as its expressions are overly generalized, and the restrictive measures are not sufficiently specific or clear. We look forward to broader changes to the catalogue, or a new and independent negative list to be introduced.

Based on the current organizational structure, the restricted category also includes certain encouraged entries subject to shareholding limit. As listed in the table above, industries categorized as both encouraged and Negative Listed include oil and gas exploration, construction and operation of nuclear power plants, construction and operation of power grids, etc. According to the Negative List explanatory notes in the Revised Draft, entries that are listed both in the encouraged category and on the Negative List enjoy preferential treatment and, at the same time, are subject to access requirements. This indicates the continuation of incentives for encouraged industries, such as reduced tariffs for imported equipment. In this sense, the 2015 Category, after revisions, can be viewed to consist of both a “positive list” and a “negative list”. The encouraged works as a “positive list” listing sectors eligible for preferential treatments under laws and regulations, while the Negative List lists sectors offered with less-favorable national treatment.

According to the Negative List explanatory notes in the Revised Draft, the Negative List only contains restrictive measures for foreign investment. This change in administrative approach conforms to the principle of national treatment for foreign investment, and corresponds to the ongoing market access negative list reform. Under this approach, foreign investors must first comply with the foreign investment access requirements, and, after entry, follow the same administrative measures as other market players, including state-owned and private enterprises, based on their respective industries, areas, and business. The restricted and prohibited entries deleted from the Revised Draft are those applicable to both foreign and domestic investment, such as large-scale theme parks, military, police, political and party schools and other special educational institutions, golf courses, villas, activities harmful to military installations, pornography and gambling. These entries are now reflected in the *Market Entry Negative List Draft (Pilot)*, issued by NDRC and MOFCOM on March 2, 2016.

In addition, the explanatory notes in the Revised Draft point out in particular that “where an offshore company legally established or controlled by a domestic company, enterprise, or individual acquires or merges with a domestic company affiliated with such domestic company, enterprise, or individual, the existing provisions relating to foreign projects, establishment and amendments to foreign invested enterprises shall continue to apply.” The situation to which this provision applies is similar to that of Article 11 of the *Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors* (MOFCOM Decree No. 6 of 2009), which regulates related-party mergers and acquisitions. Per this provision, a M&A transaction involving a domestic affiliate is required to be submitted to MOFCOM for examination and approval. The purpose of this note in the Revised Draft can be understood to emphasize that related-party M&A transactions are to be approved by MOFCOM, regardless of whether they involve a Negative Listed industry. On the other hand, according to the joint announcement by NDRC and MOFCOM dated October 8, 2016, foreign investment by way of M&A transactions will continue to be subject to the existing approval system, regardless of whether it involves a Negative Listed industry. The joint announcement appears broader in scope than the Revised Draft, which only mandates that related-party M&A transactions be subject to the existing approval regime and does not mention other types of M&A. Could this mean that the Revised Draft

contemplates that M&A transactions by foreign investors of domestic enterprises will be subject to record-filing, rather than administrative approval, if the sector involved is not on the Negative List and the deal does not constitute a related-party transaction? Whether this “aggressive” interpretation of the note is valid is subject to further clarification by policymakers.

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2. **Commentary on Foreign NGO Guidelines for Registering Representative Offices and Filing to Conduct Temporary Activities (Author: Laixiang LI)**

On November 28, 2016, the Ministry of Public Security (“MPS”) released *the Guidelines for Foreign Non-Governmental Organizations (“Foreign NGOs”)¹ for Registering Representative Offices (“Rep Offices”) and Filing to Conduct Temporary Activities* (the “Guidelines”) on its website, which Foreign NGOs have long anticipated. The Guidelines are the first implementing rules for *the Law of the People’s Republic of China on the Management of Foreign Non-Governmental Organizations’ Activities within Mainland China* (the “Foreign NGO Law”) which was promulgated on April 28, 2016, with the aim of providing guidelines for the implementation of the Foreign NGO Law, which becomes effective on January 1, 2017.

In essence, the Guidelines show very few modifications from the version previously issued to certain invited Foreign NGOs for comment. The Guidelines are composed of four parts: Rep Office registration, filing for temporary activities, related matters and appendices (including filing forms and procedure flow-charts).

Registration of Rep Offices by Foreign NGOs

The Rep Office registration procedures for Foreign NGOs may be divided into four types: initial registration, amendment registration, filing of annual reports and annual reviews, and registration for dissolution.

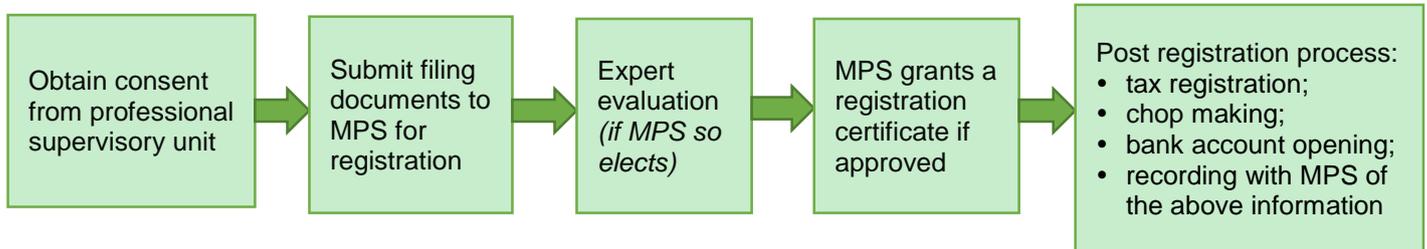
a. Initial Registration

- Conditions precedent to setting up Rep Offices: The Guidelines reiterate the corresponding provisions in the Foreign NGO Law, such as the definition and activities of Foreign NGOs, and conditions precedent for Foreign NGOs to set up Rep Offices. In this regard, the Guidelines fail to make the Foreign NGO Law more explicit. For example, under the Foreign NGO Law, one condition for Foreign NGOs to establish a Rep Office is that “[the Foreign NGO] has a record of continuous existence of at least two years outside of Mainland China and has conducted

¹ For purposes of this article, “Foreign NGOs” includes non-governmental organizations that have been established in the Hong Kong and Macau Special Administrative Regions and Taiwan.

substantial operations during that time.” The Guidelines repeat this requirement, without clarifying the “substantial operations” standard.

The registration procedure can be divided into five steps, as shown in the below:



Please note that:

- i) According to the Guidelines, the Foreign NGO should apply to and obtain consent from the relevant authority for such authority to serve as the professional supervisory unit (“PSU”) in accordance with the yet to be promulgated List of Operational Fields, Categories of Projects and PSUs for Foreign NGOs to Carry Out Activities in Mainland China (2017 Version). The list is expected to be introduced before January 1, 2017.

Where the activities of a Rep Office involve multiple operational fields, the PSU for the Rep Office should be determined based on the principal area of its operations.

- ii) The MPS Foreign NGO Administration Office at the provincial level is the registration authority for Foreign NGO Rep Offices. According to a press release issued by the MPS, however, registration applications should be submitted to reception windows that have been opened at the MPS Exit and Entry reception halls at the provincial level. It is not clear whether the Foreign NGO Administration Office is subordinate to the MPS Exit and Entry Administration.
- iii) The expert evaluation process is not mandatory, and may be conducted only if the registration authority deems it necessary and chooses to undertake it. However, the Guidelines do not specify under what circumstances the registration authority may require the expert evaluation process.
- iv) An Organization Code Certificate is not required. Article 14 of the Foundation Management Regulations clearly specifies that the Rep Office of a foreign foundation should apply for an Organization Code Certificate after obtaining the registration certificate. This is not the case under the Foreign NGO Law or the Guidelines. In addition, as the Decision of the General Administration of Quality Supervisions, Inspections and Quarantines issued an order that abolished the law requiring the issue of Organization Code Certificates on October 18, 2016, we understand that there is no legal basis to require Rep Offices to obtain an Organization Code Certificate.

➤ Filing documents required: A Foreign NGO needs to submit the following documents to establish a Rep Office:

- i) Application Letter for Foreign NGOs to establish a Rep Office;
- ii) Foreign NGO Rep Office Registration Form;
- iii) Foreign NGO Rep Office Chief Representative Registration Form;
- iv) Power of Attorney to establish a Foreign NGO Rep Office;
- v) Proof of Foreign NGO's legal registration outside of Mainland China;
- vi) Charter documents of the Foreign NGO;
- vii) Documents evidencing the existence of the Foreign NGO for a continuous period of at least two years outside of Mainland China and conducting substantial operations during that time;
- viii) Identification document and resume of the chief representative for the Rep Office;
- ix) No criminal conviction certificate or statement for the chief representative of the Rep Office;
- x) Proof of office premises for the Rep Office;
- xi) Proof of financial resources;
- xii) Consent from the PSU;

For items i), ii), iii) and ix) listed above, the Guidelines provides corresponding templates to applicants for reference.

➤ Notarization and certification requirement: Identification documents should be notarized and verified as follows for Foreign NGOs and proposed chief representatives who are foreigners or residents of Macao, Hong Kong or Taiwan:

- i) Documentation pertaining to foreigner identifications, proof that the Foreign NGO has been lawfully established abroad, the Foreign NGO's charter, and proof that the Foreign NGO has been in existence for a continuous period of at least two years and has conducted substantial activities during that time, should be notarized by the relevant notarization agency or by a notary public in its respective country of origin (unless the laws of the country of origin provide otherwise), and certified by the relevant authorities and PRC embassy (or consulate) located within the country of origin.
- ii) Documentation pertaining to Hong Kong resident identifications, proof that the Foreign NGO has been lawfully established in Hong Kong, the Foreign NGO's charter, and proof that the Foreign NGO has been in existence for a continuous period of at least two years and has conducted substantial activities during that time, should be notarized by a notary public recognized in Mainland China.

- iii) Documentation pertaining to Macau resident identifications, proof that the Foreign NGO has been lawfully established in Macau, the Foreign NGO's charter, and proof that the Foreign NGO has been in existence for a continuous period of at least two years and has conducted substantial activities during that time, should be notarized by the notary department within the Special Administrative Region Government of Macau or by a notary public recognized in Mainland China.
- iv) Documentation pertaining to Taiwan resident identifications (Taiwan residents should submit the "The Mainland Travel Permit for Taiwan Residents" as proof of identification), proof that the Foreign NGO has been lawfully established in Taiwan, the Foreign NGO's charter, and proof that the Foreign NGO has been in existence for a continuous period of at least two years and has conducted substantial activities during that time should be notarized by a local notary public.

We noted that the Guidelines removed the personal resume notarization requirement as provided in the version for public comments.

In addition, all documents written in foreign language should be accompanied with a certified Chinese translation.

- Determining a name for a Foreign NGO's Rep Office: The name of a Foreign NGO's Rep Office are required to consist of components in the following order: "name of the Foreign NGO + the region where the Rep Office is to be located + Rep Office (or branch office or liaison office etc.). "The region where the Rep Office is to be located" refers to the county or higher level in the administrative division where the Rep Office is to be located. For those Foreign NGOs whose name does not contain its own original registration country or region, the name of the Rep Office to be registered should also contain the original registration country or region of its foreign parent organization.

Example: The Beijing Rep Office of the Bill & Melinda Gates Foundation could be named "the Bill & Melinda Gates Foundation (U.S.A.) Beijing Rep Office".

- Determining the Foreign NGO's registered geographic regions: Consistent with the MPS press release, the Guidelines provide that each Foreign NGO should specify the registered geographic regions within which its Rep Office intends to conduct activities. Such areas may be within or beyond provincial boundaries, however the choice of geographic regions should be consistent with the Rep Office's actual operational scope and needs. Furthermore, if the Foreign NGO intends to establish two or more Rep Offices, there should be no overlapping of the geographic regions of different Rep Offices.

The Guidelines, however, do not specify how to justify that the geographic regions being applied for is consistent with the Rep Office's actual operational scope and needs. We understand that if the geographic regions being applied for are beyond the provincial registration area, it will be

necessary to elaborate on the geographical distribution of previous or proposed projects in the application letter.

b. Amendment registration

Amendment registration refers to any change or modification to items shown on the Rep Office's registration certificate (namely, the name of the Rep Office, chief representative, location, scope of operation, geographic regions, and the PSU):

- In terms of the procedures, the Rep Office should initially obtain PSU approval and then apply for the modification with the registration authority.
- Should the Foreign NGO change its name, the name of its Rep Office in Mainland China should be modified accordingly. Upon the completion of the name change registration, the Foreign NGO's Rep Office shall update its filings for specific items, such as copies of tax registrations, official seals and bank account information.
- The Foreign NGO's Rep Office may need to change its PSU as a result of changes occurring in its scope of operation, in which case it shall apply at the same time to change its PSU and to change the scope of operations. When applying for changes to more than two different items, there is no need to submit duplicate documents for each application.

c. Annual Reports and Annual Reviews

- Annual report filings: The Rep Office of a Foreign NGO is required to submit an activity plan for the coming year which includes project implementation and use of funds to the PSU prior to December 31st of each year. The Rep Office needs to fill in the Foreign NGO Annual Report Filing Form and file the form together with the activity plan for the coming year with the registration authority within 10 days upon obtaining approval from the PSU. If any adjustment needs to be made to the plan under certain circumstances, the Rep Office should fill in the Foreign NGO Annual Report Modification Filing Form and timely file with the registration authority.

In addition to project implementation and use of funds, the Foreign NGO Law and the Guidelines do not contain any other compulsory information that needs to be included in the annual report. We understand that the cumbersome filing procedures for the representative office of a Foreign NGO have been simplified since there is no need to submit any unnecessary documentation under the new rules. The simplified procedures would avoid doing repetitive filing work as a result of changes in the future.

- Previous annual report: The Rep Office of a Foreign NGO is required to submit its annual report for the preceding year to its PSU prior to January 31st of each year. Upon receiving feedback from the PSU, the Rep Office needs to complete the Annual Report under supervision and to submit the report to the registration administration authority by March 31st for an annual review. The annual report should include a financial report audited by a recognized accounting firm in

Mainland China in accordance with national accounting principles, and details on activities and changes to employees and the organization. The annual report is published on the website of the registration authority.

The annual report template attached to the Guidelines includes the following sections: basic information of the Rep Office, registration changes, Rep Office employees, main activities, and the annual report on main activities and annual financial report. It should be noted that the information for each part-time employee is to be outlined in the Rep Office employees section and that the main activities section is to include information on charitable expenditures, revenues, donations and primary projects.

d. Registration for Dissolution

The Foreign NGO Rep Office may need to submit the following documents when applying to cancel its registration: liquidation report (including information on social insurance), cancellation of tax registration or a statement stating that no tax registration was obtained by the taxation authority, and proof of completion of necessary settlement or a statement stating that no registration was obtained by the competent foreign exchange authority. From our previous experience in dealing with liquidation matters, it may take a long time to prepare and to obtain the aforementioned documentation.

The Guidelines accurately reflect the requirements set out in Article 15.2 of the Foreign NGO Law: After the Rep Office is deregistered, the Foreign NGO that established the Rep Office assumes any relevant legal liability of the Rep Office. This means that the Foreign NGO is subject to unlimited liability for its Rep Office in Mainland China and the Rep Office cannot be excused from any liabilities or obligations arising out of or in connection with its operation (although it is a separate issue whether or not such provision can be enforced by PRC authorities in other jurisdictions where Foreign NGOs are registered).

Filing to Conduct Temporary Activities

The Guidelines sets out rules on filing to conduct temporary activities by restating the Article 16 and Article 17 stipulated in the Foreign NGO Law. The Guidelines have not made any remarkable changes to these provisions except for providing two templates: (i) the Foreign NGO Temporary Activities Filing Form and (ii) the Foreign NGO Temporary Activities Status Report Form. According to Article 17 of the Foreign NGO Law, where Foreign NGOs intend to carry out temporary activities, the Chinese partners shall handle approval procedures in accordance with relevant regulations. The Guidelines, however, have not provided any details on approval authority and procedures thus far.

Likewise, the MPS Foreign NGO Administration Office at the provincial level is the registration authority for conducting temporary activities by Foreign NGOs.

Other Information Contained in the Guidelines

The Guidelines provide the contact number of the MPS Foreign NGO Administration Office (i.e., 010-5818 6465 and 5818 6464), which will assist Foreign NGOs to address queries about policies on Foreign NGOs.

The Guidelines restate Article 53 of the Foreign NGO Law, namely, foreign schools, hospitals, natural sciences and engineering technology research institutions or academic organizations shall organize exchanges and cooperation with domestic partners in accordance with the relevant regulations. However, it has not provided any further information in relation to such “relevant regulations”. Some foreign research institutions and academic organizations have been exploring such “relevant regulations” since the Foreign NGO Law was published.

In addition, the Guidelines authorize the MPS Foreign NGO Administration Office at the provincial level to issue rules by taking into account local conditions to facilitate Foreign NGO registration and filing services.

Comments

The Guidelines provide several application forms for the registration of Rep Offices and filings for Foreign NGOs to conduct temporary activities. The Guidelines mainly restate the regulations stipulated in the Foreign NGO Law. Further details and specific procedures, however, are yet to be provided. In addition, the Guidelines merely provide the regulations in relation to procedures of the registration and filing with the registration authority (namely the MPS Foreign NGO Administration Office), but it does not contain any regulations related to the procedures for receiving consent from the PSUs. Given that the MPS has stated that there would be no “interim period” or “grace period” for the implementation of the Foreign NGO Law, we understand that, even with the Guidelines, Foreign NGOs still face significant registration and filing challenges in Mainland China, such as how a Foreign NGO can obtain PSU approval. These practical issues still need to be clarified and confirmed by the PSU and the registration authority.

Note: Some legal provision translations are quoted from the China Development Brief website (<http://chinadevelopmentbrief.cn/articles/guidelines-on-registering-a-representative-office-and-filing-to-conduct-temporary-activities-for-overseas-ngos/?from=singlemessage&isappinstalled=0>). We appreciate China Development Brief permitting us to use their translations.



Important Announcement

This Newsletter has been prepared for clients and professional associates of Han Kun Law Offices. Whilst every effort has been made to ensure accuracy, no responsibility can be accepted for errors and omissions, however caused. The information contained in this publication should not be relied on as legal advice and should not be regarded as a substitute for detailed advice in individual cases.

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