



HAN KUN LAW OFFICES

Legal Commentary



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Commentary on Foreign NGO Guidelines for Registering Representative Offices and Filing to Conduct Temporary Activities

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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.

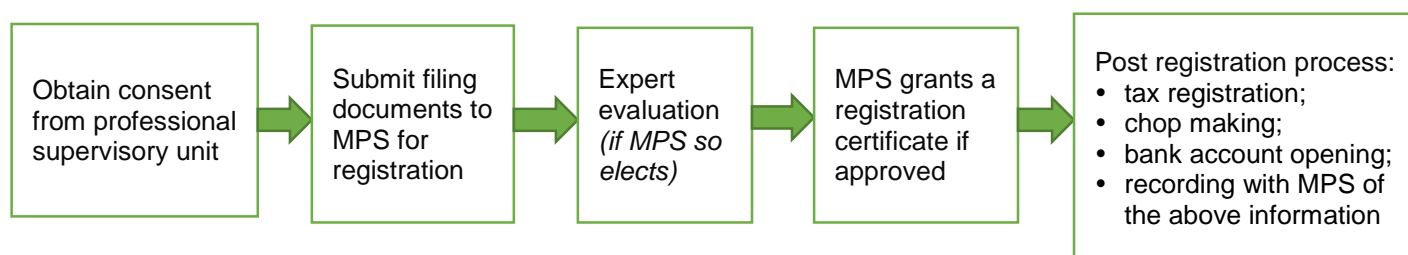
a. Initial Registration

- Conditions precedent to setting up Rep Offices:

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.

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 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".
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- 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 Legal Commentary 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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