

NGO 法律热点问题

《境外非政府组织代表机构登记和临时活动备案办事指南》简评

公安部于2016年11月28日在其网站公布了《境外非政府组织代表机构登记和临时活动备案办事指南》(以下简称“《办事指南》”),作为《中华人民共和国境外非政府组织境内活动管理法》(以下简称“《非政府组织管理法》”)出台以来公布的首个配套性文件。《办事指南》延续了《非政府组织管理法》的思路及规定,并对《非政府组织管理法》的部分内容进行了细化,包括梳理了登记及备案的程序及申请材料清单,并提供了部分申请文件的标准表格等(详见下述第一部分的讨论)。但是,就具体实施《非政府组织管理法》以及引导境外非政府组织(以下简称“境外NGO”)进行预判和准备工作的目的而言,《办事指南》仍有一些有待明确之处(详见下述第二部分的讨论)。

第一部分:细化和亮点

《办事指南》旨在对境外NGO代表机构的登记和临时活动备案的条件、流程及材料要求进行细化,其中不乏亮点,主要包括:

(一)明确境外NGO代表机构的基本登记程序和所需文件。设立代表机构需经业务主管单位同意后,方可在登记机关登记。登记管理机关保留进一步组成专家组进行评估的权力。

(二)采取“事先备案、事后报告”的监管模式。

(1)对NGO代表机构而言,在每年12月31日前将下一年度活动计划报业务主管单位,业务主

管单位同意后报登记管理机关备案;在每年1月31日前向业务主管单位报送上一年度工作报告,经业务主管单位同意后,报送登记管理机关。

(2)对临时活动备案而言,中方合作单位在开展临时活动十五日前,向登记管理机关备案;在临时活动结束后三十日内,将活动情况、资金使用情况等书面报送登记管理机关。

(三)进一步明确了省级人民政府公安机关境外非政府组织管理办公室为境外NGO代表机构和临时活动的登记管理机关。就上海而言,相关信息显示将来该等境外非政府组织管理办公室可能设在上海市公安局出入境管理局所在地办公。

(四)明确了境外NGO代表机构可跨省开展活动,但活动地域要与其业务范围和开展活动的实际情况相符;同时明确了一个境外NGO可以设立两个以上代表机构,但每个代表机构确定的活动地域之间不得相互重叠交叉。

(五)明确了同一代表机构可涉及多个活动领域,且无需就每个活动领域取得全部业务主管单位的同意,而应当根据其主要活动领域确定业务主管单位。

(六)授权各省级人民政府公安机关境外非政府组织管理办公室可根据《办事指南》,结合本地实际,制定相应办事指南,为境外NGO办理登记备案提

供指引和便利服务；同时公布了公安部境外非政府组织管理办公室联系电话（010-58186465、58186464），接受社会咨询。

第二部分：有待明确之处

《办事指南》虽有诸多亮点，亦存在有待明确之处。部分规定仍然略显模糊、宽泛，存在操作上的不确定性。举例而言：

(一) 《境外非政府组织在中国境内活动领域和项目目录、业务主管单位名录（2017年）》（以下简称“《目录》”）尚未公布。《办事指南》明确了境外 NGO 应当依照《目录》，根据本组织业务范围、活动地域和开展活动的需要，向相应单位提出担任该组织设立代表机构业务主管单位的申请。但截至目前，该《目录》仍未公布，除《非政府组织管理法》宏观规定外（即经济、教育、科技、文化、卫生、体育、环保、济困、救灾等领域），怎样理解上述范围、可以在哪些细分领域开展活动、分别由哪些业务主管单位管理仍未可知。近期实务操作中，一些境外 NGO 希望提前预判自己拟开展的活动领域是否可行，并希望提前与相应的业务主管单位展开沟通以提前准备相关材料或安排活动计划，目前看来仍需等待一些时间。

(二) 成立代表机构的历史业绩要求有待明确。对于境外 NGO 代表机构的设立，《非政府组织管理法》及《办事指南》均要求该等境外 NGO 需“在境外存续二年以上并实质性开展活动”，但对于实质性开展活动的判断标准，以及该等实质性活动是否必须在境外开展并未进行明确。因此，对于专注于中国市场的境外 NGO 如果在《非政府组织管理法》生效前仅在中国境内展开实质性活动且已达到两年；或者拟在《非政府组织管理法》生效后先通过与中方合作单位合作开展临时活动，并在达到两年后申请设立代表机构的情形是否符合该等设立要求，还有待进一步明确和解释。

(三) 配套税务规定有待明确。尽管《办事指南》规定了境外 NGO 代表机构应当凭登记机关签发的登记证书依法办理税务登记，但是对于境外 NGO 代表机构具体应当如何缴税、应当缴纳哪些税、税率

是多少、是否依照外国企业常驻代表机构的有关规定缴税；以及对于境外 NGO 与中方合作单位合作开展临时活动的情形是否需要缴税、是否需要中方合作单位代扣代缴等问题，《办事指南》未予以回答。我们预测，在《非政府组织管理法》实施后初期，不排除税务机关可能依照外国企业常驻代表机构的有关规定对境外 NGO 代表机构进行征税，同时基于境外 NGO 代表机构的活动性质，陆续制定专门的规定。

(四) 临时活动备案的“批准文件”有待明确。对于境外 NGO 临时活动的备案，《办事指南》要求提交中方合作单位获得批准的文件。根据经验，该等中方合作单位获得批准的文件可能包括：（1）该等中方合作单位就其设立或成立的相关批准文件；（2）针对境外 NGO 与中方合作单位拟合作开展的具体活动事项，中方合作单位向相关主管部门取得的批准文件。对于该等中方合作单位获得批准的文件的具体内容，有待相关法律法规或主管机关的进一步说明及澄清。

(五) 排除适用范围有待明确。

(1) 尽管《非政府组织管理法》及《办事指南》均明确规定了境外学校、医院、自然科学和工程技术的研究机构或者学术组织与境内学校、医院、自然科学和工程技术的研究机构或者学术组织开展交流合作，按照国家有关规定办理，不受《非政府组织管理法》管辖，但是对于相关概念的具体定义及“国家有关规定”具体指哪些规定却并未作出明确说明，例如“自然科学”和“工程技术”的内涵可以非常广，判断标准也往往不一，这使得境外 NGO 在预判自己是否应当适用《非政府组织管理法》时往往感到困惑。

(2) 境外 NGO 在境内从事非公益活动的合法性、监管要求，暂未涉及。

(六) 已登记代表机构的如何处理有待明确。在《非政府组织管理法》公布之前，有一些境外 NGO 已经通过在民政部门、工商部门等机关注册各类机构进行过登记。该等已登记代表机构如何适用《非政府

组织管理法》和《办事指南》，目前的登记是否继续有效，有待明确。

综上，尽管《办事指南》对《非政府组织管理法》进行了一定程度的细化。但不难发现，截止目前为止，境外NGO关心的部分操作问题尚有待明

确。希望即将公布的《目录》或者官方通过新闻发布会等形式可以对更多细节进行阐释。部分操作问题也可能需要等到《非政府组织管理法》、《办事指南》、《目录》正式实施以后，不断总结，不断修正。我们将持续关注。

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NGO

Brief Comments on the Guidelines for Registration of Representative Institutions and Record-Filing of Temporary Activities of Overseas Non-Governmental Organizations

The Ministry of Public Security of the People's Republic of China (the "PRC") published the *Guidelines for Registration of Representative Institutions of Overseas Non-Governmental Organizations and Record-Filing of Temporary Activities* (the "**Guidelines**") on its website on November 28, 2016, which is the first supporting set of regulations after the promulgation of the *Law of the People's Republic of China on the Management of Activities of Overseas Non-Governmental Organizations within the Territory of China* (the "**NGO Management Law**"). The Guidelines follow the principles and provisions of the NGO Management Law, and build upon the registration and filing system, including specifying the processes and application documents, providing some standard forms of application documents, etc. (see discussions in Part I for details). That being said, the Guidelines are not clear enough on certain points, for implementing the NGO Management Law and guiding overseas non-governmental organizations (the "**Overseas NGOs**") to make draw any premature conclusions (see discussions in Part II for details).

Part I: Elaborations and Highlights

The Guidelines aim to elaborate the requirements, procedures and documents in relation to the registration of a representative office and the record-filing of temporary activities of Overseas NGOs in the PRC, which may be summarized as follows, mainly:

1. The Guidelines specify the procedures and the required documents for setting up a representative office of an Overseas NGO in the PRC. An Overseas NGO shall first acquire the approval of its professional supervisory authority before it registers the PRC representative office with a competent registration authority. In addition, the registration authority reserves its power to assemble a panel of experts to conduct further assessment before approving the registration.
2. The Guidelines provide for a supervisory model of "record-filing beforehand and reporting afterwards".
 - (1) For a representative office of an overseas NGO, it shall submit its activities plan every year before December 31 for the following year to its professional supervisory authority, and after obtaining the approval of its professional supervisory authority, it shall

then submit the same materials to the registration authority. In addition, a representative office shall submit its summary report of completed activities every year before January 31 for the previous year to its professional supervisory authority, and after the approval of its professional supervisory authority, it shall then submit the same materials to the registration authority.

(2) For the record-filing of temporary activities, an overseas NGO shall conduct record-filing with the registration authority via its Chinese partner fifteen (15) days before the proposed temporary activities, and shall submit its summary report of completed activities, including the use of funds and other important information, to the registration authority within thirty (30) days after the conclusion of the temporary activities.

3. It is confirmed that the Overseas NGO management offices under public security authorities of the provincial people's governments will serve as the registration authorities for the representative offices and the temporary activities of Overseas NGOs. In Shanghai, for example, according to news reports, it is likely that the Overseas NGO management office will be set up at the office venue of the Exit-Entry Administration Bureau of Shanghai Public Security Bureau.

4. The Guidelines make it clear that representative offices of Overseas NGOs may conduct trans-provincial activities, provided that the regions where their activities are carried out shall be consistent with their registrations. Meanwhile, the Guidelines also allow an Overseas NGO to set up two or more representative offices in the PRC, provided that the regions covered by each representative office shall not overlap.

5. Under the Guidelines, if a representative office of an Overseas NGO carries out activities in multiple areas, it is not required to obtain

approvals from the professional supervisory authority for each area, and it is permissible to make a single application at the professional supervisory authority covering its main activity area.

6. The Guidelines authorizes provincial NGO management offices to formulate provincial Guidelines in accordance with local practices. At the same time, the Overseas NGO management office of Ministry of Public Security released its hotline (010-58186465 and 010-58186464) for answering public consultations.

Part II: Points to be clarified

Despite the elaborations and highlights mentioned above, certain content of the NGO Management Law and the Guidance still appear to be ambiguous, and may cause uncertainties in practice, for instance:

1. *The Catalogue of Activity Areas and Projects and Catalogue of Professional Supervisory Authorities of Overseas Non-Governmental Organizations within the Territory of the PRC (2017)* (the "**Catalogue** ") has not been promulgated.

The Guidelines make it clear that an Overseas NGO shall first apply for the approval of a professional supervisory authority in accordance with the Catalogue, based on its main activities, if the Overseas NGO wants to set up a representative office in the PRC. However, the Catalogue is still under discussion and has not been promulgated. Except for the general provisions under the NGO Management Law (i.e., Overseas NGOs may engage in activities for public benefit in areas such as economy, education, science, culture, health, sports, environmental protection, poverty, and disaster relief.), it is unknown how to define these activity areas, and what the corresponding professional supervisory authority would be. As 2016 comes to an end, some Overseas NGOs are considering

making assumptions about whether their activities in the PRC are doable or consistent with the NGO Management Law, and some of them wish to communicate with their professional supervisory authorities in advance, to better prepare for their activities in the PRC in 2017. It seems that these Overseas NGOs may have to wait for the promulgation of the Catalogue.

2. Requirements for the track records of an Overseas NGO are not clear.

Both the NGO Management Law and the Guidelines require that an Overseas NGO have been established overseas for no less than two years and have conducted “substantial activities”, if it wants to set up a representative office in the PRC. However, the NGO Management Law and the Guidelines are silent on the criteria of “substantial activities”. As a result, for an Overseas NGO focusing on the PRC, it is not clear whether an Overseas NGO could satisfy the above requirement if it conducted substantial activities only within the PRC, or if after the NGO Management Law goes into effect, filings of temporary activities via the cooperation of Chinese partners in the PRC could satisfy the requirement of “substantial activities”.

3. The supporting tax provisions need to be clarified.

The Guidelines require that a representative office of an Overseas NGO shall apply for tax registration after its establishment. But the Guidelines does not mention how a representative institution shall pay taxes, what kind of taxes it shall pay, what the tax rates are applicable, and whether the relevant provisions in relation to permanent representative institutions of foreign enterprises will apply, and for cooperating with an Chinese partner to conduct temporary activities by an Overseas NGO, whether such Overseas NGO shall pay taxes and whether its Chinese partner is required to withhold and collect taxes. It is very likely that

after the NGO Management Law goes into effect, the PRC tax authorities may first levy taxes on the representative offices of Overseas NGOs in accordance with the provisions for permanent representative institutions of foreign enterprises. Based on the practices of representative offices of Overseas NGOs, the PRC tax authority may then gradually formulate specific provisions.

4. The *approval* documents for record-filing of temporary activities are not clear.

For record-filing of temporary activities of an Overseas NGO, the Guidelines require that its Chinese partner shall submit the “approval documents obtained by the Chinese partner” as one application document. According to our experience, such “approval documents obtained by the Chinese partner” may refer to (1) the establishment documents of the Chinese partner; and/or (2) the approval documents obtained by the Chinese partner in connection with the contemplated activities that an Overseas NGO and its Chinese partner intend to conduct jointly, subject to further explanation and clarification by the registration authorities.

5. The *scope* of exceptions is not clear.

(1) Both the NGO Management Law and the Guidelines indicate that overseas schools, hospitals, natural sciences and engineering technologies research institutes, or academic organizations wishing to engage in exchanges and cooperation with their counterparts in China shall follow the relevant PRC provisions and the NGO Management Law shall not apply. However, the NGO Management Law and the Guidelines do not specify the scope of “relevant provisions of the State”. For instance, the scope of natural sciences and engineering technologies could be very broad, and the criteria for judgment may vary, which makes it difficult for an Overseas NGO to make assumptions about whether or not its activities in the PRC shall fall under the NGO

Management Law.

- (2) It remains unclear whether it is legitimate and if so, what registrations are needed, for an Overseas NGO which wants to conduct activities which are not for public benefit.
6. The impact on existing representative offices of Overseas NGOs is not clear.

Before the promulgation of the NGO Management Law, certain Overseas NGOs have registered their representative offices with the Civil Affairs Departments, Administrations for Industry and Commerce, etc. in different legal forms. It remains unclear what these existing representative institutions shall do after the NGO Management Law and the Guidelines go into

effect, and whether their existing registrations will continue to be valid.

In summary, although the Guidelines provide for many procedural details based on the NGO Management Law, there is not enough information to answer certain practical questions with respect to the registration of representative offices or filing of temporary activities. We hope that the upcoming Catalogue or the press conference held by relevant authorities will provide further answers and explanations. It is very likely that certain practical questions may be subject to ongoing review and corrections after the implementation of the NGO Management Law, the Guidelines and the Catalogue. We will continue to monitor this situation and update you with more information as it becomes available.

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