

JUNHE SPECIAL REPORT



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Testing Out Negative List System For Oversea NGOs

According to the Report of the 20th National Congress of the Communist Party of China (“**CPC Report**”), high-quality development is a top priority in building a modern socialist country. China shall gradually expand the opening-up of rules, regulations and standards and make some cuts to the Negative List for foreign investment. The aim is to protect by law the rights and interests of foreign investors and create a market-oriented, law-based and internationalized first-tier business environment.

As for the regulation of overseas non-governmental organizations (“**Overseas NGOs**”), it is recommended to test out the Negative List system as early as possible to attract more overseas NGOs to China.

I. Current Regulatory Status

Presently, when Overseas NGOs come to China, they need to follow *the Administrative Law on Activities of Overseas Non-government Organizations within the Territory of the People’s Republic of China* (“**Administrative Law**”) and its supporting document *the Guidance on Registration and Filing for Temporary Activities of Representative Offices of Overseas Non-government Organizations* (“**Guidance**”). Overseas NGOs’ activities in China need to first be approved by an industrial supervisory authority and then be registered at a local public security bureau (“**PSB**”).

The Ministry of Public Security issued *the Catalogue of Fields and Projects for Overseas NGOs Carrying out Activities in Mainland China* in

2016 and amended it in 2019. Some provincial level PSBs issued catalogues, such as the Shanghai Municipal Public Security Bureau, who issued *the Catalogue of Fields and Projects for Overseas NGOs Carrying out Activities in Shanghai*, detailing the ministerial level catalogue (collectively, the “**Catalogue**”). Only projects or activities falling within the Catalogue could be approved by industrial supervisory authorities and then register at PSBs.

II. Dilemmas in Practice

Although *the Administrative Law*, *the Guidance* and *the Catalogue* have built a basic operational framework for Overseas NGOs, in practice, it is still difficult to set up representative offices of Overseas NGOs. This difficulty hinders some Overseas NGOs and will harm China’s high-quality reform and opening up.

This situation is caused by various reasons. Compared with PSBs which have set up a new department to enforce *the Administrative Law* (i.e., the Administrative Office of Overseas NGOs), many industrial supervisory authorities are unfamiliar with and lack motivation to handle *the Administrative Law* or Overseas NGOs. The functions of Overseas NGOs are complex, ranging from science and technology, trade and commerce to religion and politics, which are difficult to regulate. Industrial supervisory authorities are reluctant to accept and approve Overseas NGOs, either to reduce workloads or avoid risks, making it difficult for Overseas NGOs to establish representative offices or carry out

activities in China.

III. Negative List System

The Negative List system is the main supervision in the field of foreign investment. It sets out in a centralized manner special administrative measures with respect to the access of foreign investment by illustrating the prohibited and restricted industries, fields and businesses in China. All kinds of market participants are allowed to have equal access to industries, fields and businesses which are not included in the Negative List.¹

Administration in the field of foreign investment has undergone an opening-up journey from approvals on a project-by-project basis, to implementation of Industrial Guidance Catalogues, and then to the Negative List which is shorten continuously. These practices could provide a good reference for the administration of Overseas NGOs.

IV. Testing Out the Negative List System for Overseas NGOs

According to the PSB Overseas NGOs Service Platform, as of 22 November 2022, 678 Overseas NGOs have registered their representative offices since the implementation of the Administrative Law in 2017². Industrial authorities and PSBs should have gained solid supervisory experience in the field of Overseas NGOs. On the other hand, according to statistics from the Ministry of Commerce, from January 2021 to November 2022,

43,370 foreign-invested enterprises were newly established nationwide, with a 29.3% year-on-year increase³. Comparatively speaking, the potential of Overseas NGOs is still huge in China. Testing out the Negative List system for Overseas NGOs could be the right way to realize the ideal of “accelerating the construction of new development paradigms and striving to promote high-quality developments” that was set out in the CPC Report.

1. Refer to the Supervision of Domestic NGOs and Offer a National Approach

It was emphasized as early as 2013, in *the Explanation of Institutional Reform and Functional Restructuring Plan of the State Council* issued by the State Council, that organizations in certain types of industries (such as industry associations and commerce chambers, science and technology, public welfare and charity, urban and rural community services) could apply directly to civil affairs authorities for registration by law⁴. Approvals from supervisory authorities were no longer needed in these areas. Correspondingly, a “national treatment” for Overseas NGOs should be taken into consideration, and no industrial approval should be required. From the perspective of national safety, PSBs should have the capability to conduct national safety reviews on social organizations. In most cases, social organizations in fields such as industry associations and commerce chambers, science and technology, public welfare and charity, and urban and rural community services, are generally conducive to

¹ See Opinions of the State Council on Implementing Negative List System for Market Access, available at http://www.gov.cn/zhengce/content/2015-10/19/content_10247.htm, The State Council Website, last review on 22 November 2022.

² See Information Disclosure –Institutional Announcement, available at <https://ngo.mps.gov.cn/ngo/portal/toInfogs.do>, The Overseas NGOs Service Platform of the Ministry of Public Security, last review on 22 November 2022.

³ See 43,370 new foreign-invested enterprises nationwide in the first 11 months of 2021, People’s Daily

Online, available at <http://finance.people.com.cn/n1/2022/0103/c1004-32322853.html>, People’s Daily Online, last review on 22 November 2022.

⁴ See Notice on allocation of tasks during the implementation of the State Council institutional reform and functional transformation program, available at http://www.gov.cn/zwggk/2013-03/28/content_2364821.htm, The State Council Website, last review on 22 November 2022.

the stability of social development. Following a PSB review, these Oversea NGOs should be able to register directly. If necessary, industrial supervisory authorities may put some events or activities on a Negative List, but this list should be as short as possible.

2. Implement Negative Lists in Certain Territories and Form a Propagable and Replicable Experience for the Whole Country

As it takes time to amend *the Administrative Law*,

the Guidance and *the Catalogue* under Chinese legislative principles, it is advisable to first adopt the Negative List system in certain territories (*i.e.*, national free trade zones, business zones and development areas). Overseas NGOs on the Negative List are prohibited or subject to special approval requirements. For other Overseas NGOs, they could directly file their registration applications at a zone PSB, and such zone will soon become popular with high-quality Overseas NGOs.

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君合专题研究报告



2022年12月1日

探索在境外 NGO 领域适用负面清单制度

二十大报告指出：“高质量发展是全面建设社会主义现代化国家的首要任务”“稳步扩大规则、规制、管理、标准等制度性开放”“合理缩减外资准入负面清单，依法保护外商投资权益，营造市场化、法治化、国际化一流营商环境”。

就国际非政府组织（以下简称“**境外 NGO**”）领域的监管而言，建议尽快探索适用负面清单制度的可能性，为境外 NGO 在中国境内活动提供更多便利。

一、监管现状

目前，境外 NGO 在中国的活动主要依据《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“**《管理法》**”）以及配套文件《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》**”）进行。简单而言，必须先由行业主管部门批准，而后在公安部门进行登记。

公安部于 2016 年发布《境外非政府组织在中国境内活动领域和项目目录》，并于 2019 年对该目录进行修订。省级公安机关，如上海市公安局，于公安部发布《目录》之后发布《上海市境外非政府组织活动领域和项目目录业务主管单位名录》（以下统称“**《目录》**”）对前述公安部门的目录作出具体指引。只有落入《目录》中的项目或活动，才有可能获得行业主管部门的批准，而后在公安机关登记。

二、实践困境

虽然《管理法》、《办事指南》、《目录》等一系列现行的法律法规，搭建起了境外 NGO 的基本运行框架，但实践中，要真正成功设立境外 NGO 的代表机构并不容易。这阻碍了优质境外 NGO 在华发展和活动，不利于中国高质量的改革开放。

形成这种情况，有多种原因。（1）相比公安系统为了执行《管理法》单独成立了新的部门（即：境外非政府组织管理办公室），很多行业监管机关对《管理法》和境外 NGO 并不熟悉，且缺乏动力。

（2）境外 NGO 类型比较复杂，既有科技类、商贸类、专业组织类，也有涉及宗教类、涉政治类，存在一定的监管难度。（3）无论从规避风险，还是减少自身工作量角度，不少行业监管部门对境外 NGO 采取了回避态度，让一些有意在中国设立代表机构、开展活动的优质境外 NGO 走投无门。

三、负面清单制度

负面清单制度是目前外商投资领域采取的主要监管方式。它是指“以清单方式明确列出在中华人民共和国境内禁止和限制投资经营的行业、领域、业务等，各级政府依法采取相应管理措施的一系列制度安排。市场准入负面清单以外的行业、领域、

业务等，各类市场主体皆可依法平等进入”¹。

外商投资领域经历了，从早期的按照项目审批，到实行产业指导目录，再到负面清单，进而不断缩短负面清单的开放过程。境外 NGO 领域可以相仿借鉴。

四、在境外 NGO 领域实行负面清单制度的可能性

根据公安部境外非政府组织办事服务平台的公开信息²，自 2017 年《管理法》实施以来，截至 2022 年 11 月 22 日，已有 678 家境外 NGO 在我国成功登记设立了代表机构。境外 NGO 的工作积累了一定的监管经验。另一方面，根据商务部统计³，2021 年 1-11 月，全国新设立外商投资企业 43,370 家，同比增长 29.3%；各相关部门和地方共同努力，我国外商投资环境持续优化。相比较而言，境外 NGO 领域的市场潜力依然巨大。鉴此，探索在部分区域或者部分行业试行境外 NGO 领域实行负面清单制度，符合二十大报告中“加快构建新发展格局，着力推动高质量发展”的愿景。

1、参考境内 NGO 监管方式，给予“国民待遇”

早在 2013 年国务院颁布的《关于国务院机构改革和职能转变方案的说明》⁴就已经强调了“行业

协会商会类、科技类、公益慈善类、城乡社区服务类社会组织可直接向民政部门依法申请登记”，不再需要业务主管单位审查同意。既然对于上述行业境内 NGO 可以直接登记，那么对于境外 NGO 应考虑给予国民待遇。从国家安全监管角度看，行业协会商会类、科技类、公益慈善类、城乡社区服务类社会组织，总体有利于社会稳定发展的组织，公安部门在受理具体登记申请时，有能力对其进行国家安全审查。当一旦确认上述类别境外 NGO 的安全性后，其实际活动中，需要行业部门监管的部分可以通过“负面清单”来限制，并且负面清单尽可能缩减。

2、在部分区域优先试行“负面清单”，形成可推广、可复制的经验

由于全国范围内修订《管理法》、《办事指南》、《目录》需要遵循我国的立法原则，可以考虑在特定区域（比如：国家级自贸区、商务区、开发区等）进行法律适用的调整，采取“负面清单”制度，对于纳入“负面清单”领域的境外 NGO 予以禁止或特殊审批要求，对于非“负面清单”领域的境外 NGO 取消主管单位准入环节，直接由当地公安机关进行登记备案，形成优质境外 NGO 的聚集区。

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¹ 中央政府门户网站：《国务院关于实行市场准入负面清单制度的意见》，http://www.gov.cn/zhengce/content/2015-10/19/content_10247.htm，2022 年 11 月 22 日访问。

² 公安部境外非政府组织办事服务平台：《信息公开 - 机构公示》，<https://ngo.mps.gov.cn/ngo/portal/toInfogs.do>，2022 年 11 月 22 日访问。

³ 人民网网站：《2021 年前 11 个月全国新设外商投资企业 43370 家》，

<http://finance.people.com.cn/n1/2022/0103/c1004-32322853.html>，2022 年 11 月 22 日访问。

⁴ 中央政府门户网站：《国务院办公厅关于实施<国务院机构改革和职能转变方案>任务分工的通知》，http://www.gov.cn/zwqk/2013-03/28/content_2364821.htm，2022 年 11 月 22 日访问。