

NGO

Brief Analysis of the Impact of China's Law on the Activities of Overseas NGOs

The *Law of the People's Republic of China on the Management of Activities of Overseas Non-Governmental Organizations within the Territory of China* ("**Management Law**") was adopted at the twentieth session of the Standing Committee of the twelfth National People's Congress on April 28, 2016 and will go into effect as of January 1, 2017. The Management Law provides rules for the registration, operating activities, financial management, and punishment mechanisms, etc. of overseas non-governmental organizations' ("**Overseas NGOs**") within the territory of China. Although the Management Law has not come into effect, nor have the competent authorities offered further ancillary or implementation rules, however, it can be expected that the implementation of the Management Law will have a profound impact on the activities of Overseas NGOs

within China. Below is a brief forecast and analysis of the impact of the Management Law, focusing on certain questions that may concern Overseas NGOs.

I. The Management of the Overseas NGOs' WFOE in China

Overseas NGOs have already been very active in China prior to the adoption of the Management Law. However, it has been difficult for Overseas NGOs to fully obtain legal identities. Currently the Civil Affairs Department or its local counterparts (the "**Civil Affairs Departments**") mainly administrate the Overseas NGOs, i.e. handling applications from Overseas NGOs to establish representative institutions of foreign foundations, foreign chambers of commerce, and private non-enterprise units etc. However, since the representative offices

of foreign foundations and the foreign chambers of commerce can only be established by certain types of institutions, and approval for establishment of private non-enterprise units cannot be easily obtained, it has been very difficult for an Overseas NGO to establish an entity institution with the Civil Affairs Departments. As an alternative approach, in order to secure legal status in employment, financial and taxation management, many Overseas NGOs have chosen to establish a wholly foreign owned enterprise¹ (“WFOE”) or representative office² with the Administration for Industry and Commerce.

To complete the registration under this alternative approach, the name of the WFOE is required to contain “Limited Liability Company” or “Limited Company”. The WFOE needs to have a certain amount of registered capital and to set a specific business scope (but it is barred from actually conducting business operations because of its identity as a NGO).

The emergence of this alternative approach is mainly a result of the difference in the definition of “enterprise” under Chinese laws and foreign laws. When examining an application to establish a WFOE by a NGO, the Chinese Commercial Departments relies

on the legal status certificate of the NGO (which is similar to a business license, notarized by a public notary office of the country of origin of the Overseas NGO and certified by the Chinese embassy in that country). Many Overseas NGOs are registered overseas in the form of “LLC” or other forms that look like a “Company”. The Chinese commercial authorities may be unable to determine whether the Overseas NGO is a for-profit institution based on the legal status certificate provided by the NGO. In practice, the commercial authorities and the registration authorities do not make further inquiries during the approval/examination process, which makes it possible for an Overseas NGO to establish a WFOE or a representative office within China.

The Management Law is silent on whether the WFOEs established by Overseas NGOs before the implementation of the Management Law will be required to be closed or otherwise regulated. In the press conference for the 12th session of the Standing Committee of the National People's Congress, the relevant official only replied that the Public Security Departments will actively discuss with the Civil Affairs Departments and Industry and Commerce Departments, etc. with respect to the approaches for transition to ensure the activities of the representative institutions registered with the Civil Affairs Departments

¹ To facilitate the discussion, this article only analyzes WFOE. Sino-foreign joint venture enterprises and Sino-foreign co-operative enterprises may refer to this article's conclusion.

² As the representative office is smaller in scale and simple in structure due to the limitation on its number of personnel and range of activity compared with WFOE, it was not separately analyzed in this article.

or Industry and Commerce Departments will continue uninterrupted until the Management Law goes into effect. The Public Security Department will continue to have them registered if such representative institutions provide relevant supplemental materials in accordance with the law following the promulgation of the Management Law. The official did not mention any approaches for transitioning WFOEs.

It is worth noting that the current Chinese policies with respect to foreign-invested enterprises are made and implemented jointly by the Commercial Department, the National Development and Reform Commission, the Industry and Commerce Department, etc. To establish a foreign-invested enterprise, the approval of the Commercial Department needs to be obtained first (approval by or filing with the competent Development and Reform Commission will also be required for investments in construction projects), and then followed by the establishment of registration with the Industry and Commerce Department. WFOE, as one type of Chinese company, also needs to comply with the Company Law of the People's Republic of China.

Obviously, the management of the foreign-invested enterprises and the management of the activities of Overseas NGOs within China are different, with each

having its own system. In terms of their nature, a WFOE is a Chinese legal person which can bear civil liabilities independently; whereas a representative institution of an Overseas NGO is not an independent legal person and cannot bear civil liabilities independently (its legal liabilities shall be borne by the Overseas NGO). In terms of the purpose of establishment, a WFOE, as a company, is aiming to conduct business operations and make profits; whereas a representative institution of an Overseas NGO cannot engage in or fund profitable activities within China. In terms of the authorities in charge, a WFOE is managed by the National Development and Reform Committee and Commercial Department, and registered with the Industry and Commerce Department; whereas a representative institution of an Overseas NGO is managed jointly by the competent authorities and the Public Security Department, and registered with the Public Security Department.

To forecast solely from a technical perspective, the established WFOEs may be categorized by its function, nature and scope of business activities. Those WFOEs which meet the requirements of foreign-invested enterprises and are able to conduct normal operations may be preserved; while those WFOEs which do not meet the requirements for foreign-invested enterprises and the purpose of which are to conduct public good within China on behalf of the Overseas NGOs

may be recommended to cancel their registration and the Overseas NGOs shall register with representative institutions. If an Overseas NGO keeps the WFOE but the WFOE engages in any activities which may only be carried out by a representative institution of an Overseas NGO or which are prohibited under the Management Law (such as raising funds within China in the name of the Overseas NGOs), the WFOE shall face compliance risk.

II. Fundraising Activities of Overseas NGOs

According to the Management Law, neither Overseas NGOs nor their representative institutions may engage in fundraising within China. Currently, funds for the activities of overseas NGOs within China include: (1) Funds legally obtained overseas (mainly overseas NGOs allocation); (2) Interest on bank deposits within the territory of China; (3) Other funds legally obtained within the territory of China. It may be concluded that the Management Law maintains the administration's current way of management, namely, Overseas NGOs cannot engage in fundraising in China or collect donations.³ According to the responses offered by the relevant officials in the press conference for the 12th session of the Standing Committee of National People's Congress, Overseas

NGOs are not allowed to solicit contributions within China because only charitable organizations are qualified to solicit contributions under the Charity Law. Where charitable organizations engage in fundraising, they are required to obtain the qualification for public fundraising from the Civil Affairs Departments. The representative institutions of Overseas NGOs are not legal persons and their temporary activities are short-term, so they do not conform to the provisions on fundraising in the *Charity Law*, and are not allowed to engage in fundraising.

In practice, Overseas NGOs may engage in fundraising in the name of a domestic qualified entity. For example, an offshore fund "A" sets up fund "B" within China through its related parties. Fund "B" obtains the qualification for fundraising or collect donations following its incorporation. Fund "A" may carry out activities indirectly through fund "B". On the surface, it seems that the arrangement is unproblematic (i.e. the fundraising is carried out in the name of a qualified entity). However, fund "A" might be considered engaging in fundraising if actual control is found to exist between fund "A" and fund "B". Therefore, any such arrangement of this kind shall be carefully considered. The Management Law stipulates that an Overseas NGO is not allowed to carry out activities or carry out activities in disguised form within the territory of China if it does not register and establish with a representative

³ For example, Regulations on Administration of Foundations states: "representative offices of foreign funds cannot engage in fundraising in China or collect donations."

institution or if it carries out temporary activities without record-filing. The Management Law prohibits any Overseas NGO from entrusting or funding any domestic entities or individuals, directly or in disguised form, to do so. Such restrictions also indicate that the above arrangement and the possible actual controlling relations may increase exposure to compliance risk.

Another common practice is for an Overseas NGO to set up a WFOE which will organize meetings and generate revenue from conference fees and other means. The proceeds shall be remitted abroad and shall be managed and applied by the Overseas NGO. Under this model, the risk of being recognized as fundraising within China will be much higher if the WFOE explains to the payees that the real motives of charging is to raise funds for the activities of Overseas NGOs when collecting the conference fees. If the WFOE makes no statement in this regard but treats it as its normal operating income and has it remitted abroad after fulfilling taxation obligations, the compliance risk may be mitigated to a certain extent.⁴

The Management Law does not restrict fundraising outside of China by the Overseas NGOs or their representative offices. In

⁴ This method is only viable for situations lacking a clear distinction and explicit management requirements for the investors of WFOE in the Management Law and other relevant foreign investment laws. There is risk in this method also, if it is stipulated explicitly in the subsequent rules that the Overseas NGOs and the organization which is regarded as the Overseas NGOs are forbidden to establish a WFOE within China, and it is necessary to apply to the public security authorities for registration for their establishment of representative offices.

another words, Chinese natural persons, legal persons or other organizations are not ruled out to be donors for fundraising carried out abroad. Such fundraising will not violate the Management Law if it is carried out abroad. In determining whether the fundraising is carried out abroad, factors which will be jointly considered include identifying the site of collection for donation, the subject who accepts donations and its bank account and the provisions of the donation agreement. It should be noted that the donation remitted overseas shall be subject to foreign exchange control policies (such as donations above a certain amount cannot be freely remitted abroad, and it is necessary to provide the notarized donation agreement when remitted out of China⁵), and the donors will not be able to enjoy taxation deductions on these donations.

III. Business Activities

Before the adoption of the Management Law, there were no express rules, laws, or national standards for the management of Overseas NGOs. The Management Law sets forth express provisions on the activities of Overseas NGOs.

1. Scope of Activities: the Overseas NGOs shall carry out activities within their registered business scopes, including economy, education, science and technology, culture,

⁵ In practice, the number of notary departments that could transact this business is limited.

health, sports, environmental protection and the public welfare work. The directory of the specific business scopes has yet to be promulgated.

2. Requirements for activity regions: the Overseas NGOs shall carry out activities within the registered area. Considering that the Ministry of Public Security under the State Council and public security organs of the people's governments at the provincial level are authorized as the administrative authorities for the registration of Overseas NGOs by the Management Law, and the activity region is one of the registration items, the representative offices of Overseas NGOs may be divided into two categories (national and regional) in the future. The national offices will apply to the Ministry of Public Security for registration and then carry out activities nationwide, while the regional offices will apply to the public security organs of the people's governments at the provincial level for registration and then carry out activities only within their registered activity regions. However, even if the geographical restrictions exist, an Overseas NGO may expand its business area by establishing more regional offices.

3. Competent Authorities: the Management Law states that the activities of Overseas NGOs will also be regulated by the competent business authorities apart from the Public Security Departments. The

directory of the competent business authorities has yet to be promulgated. The absence of the directory of competent business authorities is one of the key reasons that Overseas NGOs have not been able to register as private non-enterprise units⁶ before the Management Law is enacted. The division of competent business authorities, the management of Overseas NGOs and their representative offices and the management of their temporary activities involve an intersection of powers and coordination among different departments. It is foreseeable that the initial directory of the competent business authorities probably will not cover every possible business scope of existing Overseas NGOs in China but only some typical business fields which have already been relatively clearly divided (such as education, environmental protection, etc.). For those sensitive or ambiguous fields, such as national security, religion, etc., we cannot rule out the possibility that no competent business authority will be included in the directory and thus forcing the Overseas NGO to face a rejection of their registration.

We understand that the Management Law is the result of years of management experience by the competent authorities. As a whole, the Management Law continues the existing policy, and clarifies the grey areas. In

⁶ According to the requirements of the Civil Affairs Departments, the examination of opinions issued by the competent business authorities shall be submitted for the registration of private non-enterprise entities.

a practical respect, the Management Law also consolidates the existing legislation of the incorporation, management and the activities of Overseas NGOs.

Ancillary rules of the Public Security Departments and other relevant departments are needed for the implementation of the Management Law. This analysis is a

hypothetical analysis based on the relevant provisions of the Management Law in the hopes of offering some helpful information on the activities of Overseas NGOs within China.

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NGO 法律热点问题

《境外非政府组织境内活动管理法》影响简析

《中华人民共和国境外非政府组织境内活动管理法》（下称“《境外 NGO 管理法》”）于 2016 年 4 月 28 日经第十二届全国人民代表大会常务委员会第二十次会议通过，并将于 2017 年 1 月 1 日起实施。《境外 NGO 管理法》对境外非政府组织（下称“境外 NGO”）在中国境内的机构登记、活动规范、财务管理、处罚机制等均作出了规定。尽管《境外 NGO 管理法》目前尚未生效，且主管机关也未出台进一步的配套规定或实施细则，但可以预期的是，随着《境外 NGO 管理法》的落地和实施，必将会深刻影响境外 NGO 的在华活动。本文拟从境外 NGO 可能关心的若干问题入手，对《境外 NGO 管理法》出台后的影响进行简要预测分析。

一、境外 NGO 境内 WFOE 的管理

此前，境外 NGO 在中国境内的活动已经非常活跃，但一直难以取得完全合法的身份。彼时对境外 NGO 的管理主要是民政部体系，即，境外 NGO 可申请成立境外基金会代表机构、外国商会、民办非企业单位等。但实际由于境外基金会代表机构、外国商会的设立仅针对特定类型的机构，而民办非企业单位的设立又往往难以取得批准，因

此民政部体系下境外 NGO 很难设立实体机构。作为一种变通做法，实践中大量的境外 NGO 通过在工商部门设立外商独资企业¹（下称“WFOE”）或者代表处²的方式完成实体登记，以期部分实现人员聘用、财务、税务管理的合法化。

需要说明的是，在上述变通做法下，为完成注册，WFOE 的企业名称需要体现“有限责任公司”或“有限公司”的字样，要设定一定金额的注册资本，且需设定特定的经营范围（但由于其 NGO 的身份，可能并不实际开展经营）。

这种变通做法的出现主要是因为中外法律对“企业”的定义存在差异。中国商务部门在批准 WFOE 的设立申请时，对境外 NGO（作为 WFOE 的投资方）性质的认定依赖于该境外 NGO 所在国公证机关公证并经中国驻该国使（领）馆认证的主体资格证明，是一份类似营业执照的文件。很多境外 NGO 以“LLC”等看起来是“公司”的形式在境外注册，从其提供的主体资格证明上无法判断其是否属于营利机构，而实践中商务部门、工商部

¹ 为便于讨论，本文仅对外商独资企业进行分析，中外合资、中外合作企业可参考本文的分析结论。

² 代表处由于人员数量、活动范围的限制，和 WFOE 相比规模较小且结构简单，因此本文并未单独分析。

门在办理设立登记审批/审查时也不会额外询问该境外 NGO 是否是营利性机构，从而使境外 NGO 在境内设立 WFOE 或者代表处成为可能。

对于该法实施之前境外 NGO 通过工商局设立的 WFOE 是否需要关闭，或需采取其它方式处理，《境外 NGO 管理法》并未明确规定。在全国人大常委会第十二次会议新闻发布会上，相关负责人仅答复，公安部门将和民政部门、工商部门等有关部门积极研究过渡政策，在《境外 NGO 管理法》生效之前，保证已在民政部门或工商部门依法登记的代表机构的活动继续开展，《境外 NGO 管理法》实施以后，前述代表机构只要依法补充有关的材料，公安部门会继续给予登记，但并未提及 WFOE 的过渡安排。

需要注意的是，目前中国关于外商投资企业的政策，是由商务部门、发改委、工商局等职能部门共同制定和实施的。设立外商投资企业需要先取得商务部门的批准（如有投资项目还需要取得发改委的核准或备案），之后到工商部门进行设立登记。WFOE 属于中国公司的一种，也同样适用《中华人民共和国公司法》的规定。

由此可见，外商投资企业的管理和境外 NGO 在华活动的管理并不相同，且自成体系。从性质上说，WFOE 是中国法人，可以独立承担民事责任，而境外 NGO 代表机构并不是独立法人，无法独立承担民事责任，涉及法律责任的，由境外 NGO 承担；从设立目的上来说，WFOE 是公司，以从事经营和营利为目的，境外 NGO 代表机构在境内不得从事或资助营利性活动；从主管部门来说，WFOE 主要由发改、商务部门管理，在工商部门登记，境外 NGO 代表机构由业务主管部门、公安部门共同管理，在公安部门登记。

仅从技术层面预测，对于已经设立的 WFOE，应区分其作用、性质、业务活动领域，对于实际上符合外商投资企业相关要求，并可正常从事经营的实体，可以继续保留；对于实际上并不符合外商投资企业相关要求，其设立目的主要是代表境外 NGO 在中国境内开展公益事业的实体，可能会被建议注销 WFOE，并取得境外 NGO 代表机构登记。如果保留 WFOE 登记，又从事了应通过境外 NGO 代表机构实施的活动，或者通过 WFOE 的形式，从事了《境外 NGO 管理法》所禁止的行为（例如以境外 NGO 的名义在境内募捐），则在一定程度上存在合规风险。

二、境外 NGO 的募捐行为

根据《境外 NGO 管理法》的规定，境外 NGO 及其代表机构不得在中国境内进行募捐。从现状看，境外 NGO 在中国境内的活动资金包括：（1）境外合法来源的资金（主要是境外 NGO 的拨款）；（2）中国境内的银行存款利息；（3）中国境内合法取得的其他资金。可以说，《境外 NGO 管理法》延续了主管部门一直以来的管理思路，即不允许境外 NGO 在境内组织和接收捐赠³。根据全国人大常委会第十二次会议新闻发布会上相关负责人的答复，不允许境外 NGO 在中国募捐是由于根据《慈善法》的规定，只有慈善组织才能有资格进行募捐。慈善组织进行募捐需要取得民政部门授予的公开募捐资格。而境外 NGO 的代表机构不是法人，境外 NGO 的临时活动都是短期，因此不符合《慈善法》关于募捐的规定，所以不得进行募捐。

实践中，境外 NGO 的募捐活动可能通过境内适格主体的名义展开。例如境外基金 A（通过关联方）在中国设立基金 B，基金 B 经合法设立并

³ 例如《基金会管理条例》明确规定“境外基金会代表机构不得在中国境内组织募捐、接受捐赠。”

取得在境内组织、接受捐赠的资格，基金 A 间接通过基金 B 来开展活动。这样的安排表面上看似没有问题，即募捐以适格主体的名义开展，但如果基金 A 和基金 B 之间存在实际控制关系，则基金 A 有可能被认定从事境内募捐活动。因此，建议慎重考虑该等安排。《境外 NGO 管理法》也明确规定境外 NGO 未登记设立代表机构、开展临时活动未经备案的，不得在中国境内开展或者变相开展活动，不得委托、资助或者变相委托、资助中国境内任何单位和个人在中国境内开展活动，也说明上述安排及其可能涉及的实际控制关系有可能存在违规风险。

此外，实践中还存在一种做法，即境外 NGO 在境内设立 WFOE，通过召开会议、收取会务费等方式取得收入，汇出境外后由境外 NGO 统一管理和支配。在这种模式下，如果 WFOE 在收取会务费的同时向付款人说明了其收款的真正目的是募集捐款用于境外 NGO 活动，则被认定为在境内募捐的风险较大。如果 WFOE 对此并不明确说明，将其视为正常的经营收入，依法纳税后汇出境外，违规风险相对较小⁴。

对于境外 NGO 或者代表机构的境外募捐活动，《境外 NGO 管理法》并没有明确的限制，也就是说，不排除捐赠的主体是中国的自然人、法人或其他组织，但只要在境外进行，应不会违反《境外 NGO 管理法》的要求。而判断募捐是否在境外发生，可以依据募捐发生的地点、接受捐赠的主体和银行账号、双方签署的捐赠协议的规定综合判断，但应注意从境内汇出的捐款需要受限于外

汇管制（一定额度以上无法自由汇出、汇出时需提供经公证的涉外捐赠协议⁵），且捐赠人无法享受捐赠款的税前抵扣。

三、业务活动

《境外 NGO 管理法》出台之前，对境外 NGO 的管理由于缺乏明确立法，并没有全国统一的规范。《境外 NGO 管理法》对境外 NGO 的活动进行了明确规定：

1、业务领域：应在登记的业务范围活动，包括经济、教育、科技、文化、卫生、体育、环保等领域和济困、救灾等公益事业，具体业务领域清单尚未公布。

2、地域要求：应在登记的地域内开展活动。考虑到《境外 NGO 管理法》授权公安部 and 省级公安机关作为境外 NGO 在中国境内开展活动的登记管理机关，且活动地域为设立登记的内容之一，因此可预见未来境外 NGO 代表机构可能分为全国性和地域性两类，全国性的在公安部取得登记，可在全国范围内活动，地域性的在省级公安部门取得登记，仅可在登记的地域内活动。但即使是存在地域限制，境外 NGO 可通过设立多个地域性的代表机构来扩展其业务活动范围。

3、主管部门：《境外 NGO 管理法》规定除公安部门作为登记管理机构之一，境外 NGO 在华活动还受到业务主管单位的管理，具体名录尚未公布。由于业务主管部门也一直是《境外 NGO 管理法》出台之前境外 NGO 无法取得民办非企业单位登记⁶的重要原因之一，而业务主管单位的划分、

⁴ 这种模式仅在目前《境外 NGO 管理法》和外商投资相关法律对于 WFOE 的投资方（境外 NGO）身份没有明确的区分及管理要求的情形下适用。如果后续出台相关规定，要求境外 NGO 或视为境外 NGO 的机构不得在境内设立 WFOE，必须到公安部门进行境外 NGO 代表机构的登记，则该模式也同样存在违规的风险。

⁵ 实践中办理此项业务的公证处数量有限。

⁶ 根据民政部关于设立民办非企业单位的要求，需要提交业务主管单位审查同意的意见。

对境外 NGO 及其代表机构、临时活动的管理等涉及到不同职能部门的管理权限交叉、部门协调等问题，应可预见业务主管部门名录在最开始可能无法覆盖所有在华活动的境外 NGO 的业务领域，而可能仅覆盖到一些典型、且业务主管部门划分相对明显的活动领域（例如环保、教育等），对于一些模糊、敏感领域（例如国家安全、宗教等），不排除实践中没有业务主管部门且不允许在境内登记的情况。

我们理解，《境外 NGO 管理法》是主管部门对

于境外 NGO 在中国境内多年活动管理经验的总结，总体来看，延续了以往的政策要求，且对之前存在的“灰色地带”予以了明确规定，并在设立、管理及活动等方面，对以往的立法和实务经验进行了归纳和总结。由于《境外 NGO 管理法》的具体实施还有待公安部门及其他相关部门出台配套规定，以上分析仅是基于《境外 NGO 管理法》有关内容的假设性分析，以期对境外 NGO 在华依法开展活动有所帮助。

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