



## China's New Law on Foreign NGOs: Bad News for NGOs and Confusing Guidance for Foreign Schools, Hospitals, Research Institutions and Academic Organizations?

*While much of the news with regard to China's newly-adopted law on Foreign NGOs has focused on its adverse impact on NGOs, a short provision in the Foreign NGO Law may give confusing guidance for foreign schools, hospitals, research institutions and academic organizations and their activities related to China. This Alert discusses this provision and its potential impact on these institutions. (We will address the new framework for Foreign NGOs that are the main target of this new legislation and the tax implications on Foreign NGOs in two separate Alerts.)*

The PRC National People's Congress ("**NPC**") passed the final *Law of PRC on Management over Foreign NGOs' Activities in China* (the "**Foreign NGO Law**") on April 28, 2016. The Foreign NGO Law is the third of a series of laws that were adopted or proposed last year to address the growing concerns by China's leadership about national security and foreign interference with China's domestic affairs.<sup>1</sup> The second draft of the Foreign NGO Law (the "**Second Draft**") had been released about one year ago and received extensive comment and criticism both from domestic and foreign parties concerned about its potential adverse impact. While the Foreign NGO Law as adopted reflects some improvements from the previous drafts, one provision of the Foreign NGO Law (Article 53) raises questions that could have significant consequences for foreign schools, hospitals, research institutions and academic organizations. Whether or not the drafters intended to place a significant damper on the development of cooperation between Chinese and foreign education, health and academic organizations will need to be resolved before the Foreign NGO Law takes effect on January 1, 2017.

### **I. IS ARTICLE 53 INTENDED TO BE A CARVE-OUT OR DOES IT SWEEP ALL ACTIVITIES OF FOREIGN SCHOOLS, HOSPITALS, RESEARCH INSTITUTIONS AND ACADEMIC ORGANIZATIONS WITHIN THE FOREIGN NGO LAW?**

The Foreign NGO Law includes a vague definition of a foreign NGO (the "**Foreign NGO**") as follows: "non-profit, non-government social organizations that have been legally established outside China, such as foundations, social organizations, and think tanks, etc."<sup>2</sup> While this language is slightly different from the prior draft, it appears to remain purposely vague to allow the Chinese authorities flexibility to apply the Foreign NGO Law broadly. In the Second

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<sup>1</sup> The other two laws are: (i) the National Security Law of the People's Republic of China, which became effective from July 1, 2015; and (ii) the Anti-terrorism Law of the People's Republic of China, effective from January 1, 2016. In addition, a draft Cyber Security Law was released for public comments on July 6, 2015.

<sup>2</sup> See Article 2 of the Foreign NGO Law.

Draft, a brief reference<sup>3</sup> was made to education institutions, which was interpreted as carving out such approved joint programs and joint schools from the scope of the Foreign NGO Law, but leaving open the question of whether other education and research activities would be subject to the Foreign NGO Law.

Much of the commentary with regard to the Second Draft focused on avoiding negative impact on education and research cooperation with foreign schools, hospitals and research institutions and academic organizations. Taking these comments into account, the drafters apparently sought to broaden the scope of the carve-out from the Foreign NGO Law, but the language used for this Article 53 (the "**Carve-out Provision**")<sup>4</sup> can end up leaving more questions than it resolves. It would have been very simple to exempt such organizations from the definition of NGO, so the approach the drafters have taken in the Foreign NGO Law leaves open the possibility that it is intended to send a message to such organizations to refrain from any activities prohibited by the Foreign NGO Law.

While exchange and cooperation activity between foreign and domestic schools, hospitals, natural science and engineering research institutions or academic organizations appear to be specifically carved-out from the Foreign NGO Law as specified under the Carve-out Provision, they are expressly subject to the national security provisions of the Foreign NGO Law, and certain activities are specifically prohibited, namely, for-profit activities, political activities and illegal religious activities.<sup>5</sup> Nevertheless, we understand the key intention and focus of the drafters with this provision is to remind foreign schools, hospitals, and research institutions and academic organizations that they should operate in China in full compliance with applicable law.

Thus, foreign schools, hospitals, natural science and engineering research institutions and academic organizations with a domestic counterpart in compliance with applicable PRC laws can take some comfort that they do not require registration as a Foreign NGO's representative office or secure an approval and record filing for temporary activities from the relevant government agencies under the Foreign NGO Law. However, at the same time, foreign schools, hospitals, natural science and engineering research institutions and academic organizations must refrain from engaging in or providing financial support to for-profit activities, political activities and, illegally, with respect to religious activities. More troubling, however, is whether any other activities of foreign schools, hospitals, research institutions or academic organizations that are not engaged in exchange or cooperation with a domestic counterpart, or research institutions or academic organizations that are engaged in exchanges or cooperation that is outside of the "natural sciences or engineering", even when they have a domestic counterpart, are subject to the substantive requirements of the Foreign NGO Law. Hopefully, given that the Foreign NGO law will not take effect until January 1, 2017, there will be time for the Chinese government to clarify such ambiguities. Otherwise, foreign parties undertaking such activities without first having obtained approval from the Ministry of Public Security shall be doing so at their own risk.

## II. QUESTIONS TO BE CONSIDERED

As is the case with many laws and regulations in China, the Foreign NGO Law arguably creates more questions than it resolves. Namely, before the Foreign NGO Law comes into effect, the following questions will need to be resolved:

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<sup>3</sup> Article 66 of the Second Draft provides: "Sino-foreign cooperation in establishing joint institutions and joint programs shall still follow laws and administrative regulations such as the *PRC Law on Promoting Private Operation of Educational Institutions* and the *PRC Regulations on Sino-Foreign Cooperative Education*."

<sup>4</sup> Article 53 of the Foreign NGO Law provides: "The exchange and cooperation between foreign schools, hospitals, natural science and engineering research institutions or academic organizations and the domestic schools, hospitals, natural science and engineering research institutions or academic organizations shall follow and comply with the relevant regulations and rules of the state. If the foreign schools, hospitals, institutions or organizations referred to in the preceding paragraph violate the provisions of Article 5 herein when they conduct their activities in China, they shall be subject to legal liabilities in accordance with law."

<sup>5</sup> Article 5 of the Foreign NGO Law provides: "Foreign NGOs that conduct activities within China shall comply with the law of China; shall not threaten China's national unity and safety and the unity of all ethnic groups of China; shall not jeopardize China's national interests, societal public interests or the legitimate rights and interests of the citizens, legal persons and other organizations. Foreign NGOs shall not engage in or provide financial support to for-profit activities or political activities within China. They are also forbidden to illegally conduct or sponsor religious activities."

1. **The Carve-Out Provision.** No guidance is provided in the Foreign NGO Law on how this will be interpreted or implemented in practice. Does the Chinese counterpart need to be the same-type institution as the foreign party? For example, if a foreign medical school cooperates with a Chinese hospital, is such activity covered by the Carve-Out Provision? If a foreign research institution carries out research in conjunction with a Chinese hospital, is that activity by a Foreign NGO or is it covered by the Carve-Out?
2. **Prohibition on for-profit activities.** What types of activities will be deemed as either carrying out or sponsoring for-profit activities in China? For example, would the provision of a training program, e.g., an executive education program, which will charge certain service fees be caught up under Article 53 and Article 5? One would assume that as China seeks to build its education and healthcare base, it is not intended to preclude hospitals or schools from engaging in continuing education or advisory services to Chinese hospitals or schools or companies, but without further clarification on the intent of the carve-out, the uncertainty may hinder such programs.
3. **Activities carried out directly or indirectly.** Article 9 of the Foreign NGO Law includes a provision to the effect that a Foreign NGO shall not directly or indirectly carry out or support activities in China without either registering its representative office or record-filing of its temporary activity. If a foreign university or research organization has properly established a wholly foreign-owned entity, "**WFOE**", will the activity of that WFOE be considered its own activity or indirect activity of the foreign parent?
4. **Incidental activities.** Is a foreign university that comes to China to recruit, or to have liaison meetings with its alumni required to either register as a representative office of an Foreign NGO (not likely for only incidental activities) or work with a Chinese Cooperative Body and secure an approval and record filing for temporary activities from relevant Chinese authorities (likely difficult to obtain)?

### III. CONCLUSION

As the Foreign NGO Law will not come into effect until January 1, 2017, and the NPC Standing Committee has indicated that further guidance and implementing rules will become available before the effective date of the Foreign NGO Law, there is some time to assess the impact of the Foreign NGO Law and to discuss with the relevant regulators where clarification is needed. Hopefully, the time will be used to clarify what many observers consider to be a murky environment. Otherwise, China will, in trying to rid itself of unwanted influences from Foreign NGOs, have discouraged foreign education institutions, hospitals, research institutions and academic organizations from being involved as China seeks to transition to a developed economy.

We have prepared an in-house English translation of the Foreign NGO Law, please click [here](#).