

DOING EDUCATION BUSINESS IN CHINA

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Abstract

Since higher education in China first began to open up in the late 1980s with the launch of the Johns Hopkins University-Nanjing University program in 1986, the overarching theme of China's market for higher education has been one of increasing demand, sophistication, and openness.

However, foreign universities and businesses seeking to access this market are often perplexed by the Chinese government's complex and frequently ambiguous education policies and law. Operating educational activities in China involves navigating many different areas of Chinese law. This article highlights key Chinese laws that apply to higher education institutions in the areas of tax, intellectual property, research, student recruitment, immigration, cybersecurity, and online programs. The article also examines the legal framework and operational structures within which foreign participants can participate in China's education sector.

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INTRODUCTION

Since higher education in China first began to open up with the launch of the Johns Hopkins University-Nanjing University program in 1986, the overarching theme of China's market for higher education has been one of increasing demand, sophistication, and openness.

However, foreign universities and businesses seeking to access this market are often perplexed by the Chinese government's complex and frequently ambiguous education policies and law. A series of recent developments, ranging from the unveiling of the Double-First Class project in 2015 to the heavy emphasis on education by the Nineteenth Chinese Communist Party Congress, not only promises to streamline regulatory requirements for foreign schools in China, but also encourages foreign universities to tap into the market.¹

The Chinese government recognizes the importance of Chinese-foreign cooperation in improving the quality and standing of China's education system. However, the Chinese government is wary of the potential impact of foreign influences on Chinese society at large and thus has firmly insisted that Chinese-foreign education cooperation remains under its control. On the other hand, contrary to this encouragement, the Chinese government has implemented Circular of the State Administration of Taxation on Certain Issues relating to the Implementation of Tax Treaties (Bulletin 11), which imposes a higher tax burden on certain educational activities by foreign universities.

Given that the most significant activity by foreign participants has been in higher education, this article largely focuses on issues related to higher education. Operating educational activities in China involves navigating many different areas of Chinese law. This article highlights key Chinese laws that apply to higher education institutions (HEIs) in the areas of tax, intellectual property (IP), research, student recruitment, immigration, cybersecurity, and online programs. The article also examines the legal framework and operational structures within which foreign participants can participate in China's education sector.

I. Legal Frameworks Regulating Foreign Participants Doing Business in China

A. Regulations on Foreign Investment in Education Sector

In December 2001, China became a member of the World Trade Organization (WTO) setting the stage for the opening up of China's education sector to foreign involvement. However, China's WTO commitments in the education sector were relatively limited, primarily restricting foreign involvement to working in cooperation with Chinese parties.

1 In October 2015, the State Council released the Overall Plan for Coordinating and Promoting Establishment of World-Class Universities and First-Class Disciplines, aimed at providing guidance and support for Chinese universities to become world-class universities offering first-rate disciplines; Kevin Prest, *China's Ambitions for Education Development: key takeaways from the 19th Party Congress*, The British Council, <https://education-services.britishcouncil.org/insights-blog/chinas-ambitions-education-development-key-takeaways-19th-party-congress>, last visited on May 7, 2021.

As confirmed by the Foreign Investment Law (FIL), currently the regulatory approach of foreign direct investment is “pre-[market] national treatment plus the negative list administrative regime.”² Hence, entry into the Chinese market for foreign investors is subject to the negative list—Special Administrative Measures for the Access of Foreign Investment (Negative List)—which has been updated each year by the Ministry of Commerce (MOFCOM) and the National Development and Reform Commission (NDRC) since 2017.³ In general, foreign investors cannot invest in the fields that are prohibited under the Negative List, unless they obtain market entry approval and comply with certain restrictions, including a foreign shareholding cap; however, the national treatment will apply when investing in the industries not listed on the Negative List.

Under the 2020 Negative List, foreign investors are not allowed to engage in compulsory education institutions or religious education institutions, and foreign investment and engagement in preschools, senior high schools, and HEIs are restricted to Chinese-foreign cooperative education and must be under the control of the Chinese partner (namely, the principal or the principal administrative officer of a Chinese-foreign cooperative education shall be a Chinese citizen and the Chinese members shall not be less than half of all members of their councils, boards of directors, or joint management committees).

China has set up twenty-one free trade zones (FTZs), which generally have more liberal foreign investment policies. However, the Special Management Measures for the Market Entry of Foreign Investment in Pilot Free Trade Zones (FTZ Negative List) contain similar restrictions to those in the Negative List.⁴

B. General Regulatory Framework of Chinese-Foreign Cooperative Education

The fundamental laws of the Chinese education sector are (1) the Education Law,⁵ (2) the Higher Education Law,⁶ (3) the Compulsory Education Law,⁷ (4) the Law on Promotion of Privately-Run Education (Private School Law),⁸ and (5) the Vocational

2 FIL, art. 4.

3 In 2017, the Negative List was first introduced via the update of the 2017 Foreign Investment Industry Guidance Catalogue, and starting from 2018 the MOFCOM and the NDRC jointly issued the Negative List yearly for 2018, 2019, and 2020. The currently effective Negative List is the 2020 Negative List, which was published on June 23, 2020, and became effective on July 23, 2020.

4 The Special Management Measures for the Market Entry of Foreign Investment in Pilot Free Trade Zones (FTZ Negative List) is applicable to pilot free trade zones established by the State Council. There are twenty-one FTZs in mainland China as of September 2020, including the Shanghai FTZ, Guangdong FTZ, Tianjin FTZ, Fujian FTZ, Liaoning FTZ, Zhejiang FTZ, Henan FTZ, Hubei FTZ, Chongqing FTZ, Sichuan FTZ, Shanxi FTZ, Hainan FTZ, Shandong FTZ, Jiangsu FTZ, Guangxi FTZ, Hebei FTZ, Yunnan FTZ, Heilongjiang FTZ, Beijing FTZ, Hunan FTZ, and Anhui FTZ,

5 Effective Sept. 1, 1995, amended Dec. 27, 2015.

6 Effective Sept. 1, 1999, amended Dec. 27, 2015.

7 Effective Sept. 1, 2006, amended Apr. 24, 2015.

8 The Private School Law was issued on December 28, 2002, and was amended on June 29, 2013, November 7, 2016, and December 29, 2018. The new version took effect beginning December 29, 2018. The Private School Law does not allow foreign involvement in private schools that offer compulsory education at the primary or junior high school level and severely restricts foreign participation in this aspect.

Education Law.⁹ These laws form the basic legal framework for all activities in China's education system.

Echoing China's WTO commitment to open the education sector to foreign investment via a form of cooperation,¹⁰ in 2003 the State Council issued the Regulations of the People's Republic of China on Chinese-Foreign Cooperative Education (2003 Cooperative Education Regulations),¹¹ which emphasizes the introduction of high-quality educational resources in China, the protection of the legitimate rights and interests of all parties involved in Chinese-foreign cooperative education, and the strengthening of the approval and supervision of Chinese-foreign cooperative education institutions. The 2003 Cooperative Education Regulations also provide application approval procedures for the establishment of a Chinese-foreign cooperative education institution (CEI), which is an educational institution established by both a foreign education institution and a Chinese education institution and mainly target Chinese students¹² as well as the management and supervision systems, financial management, and teaching-related requirements of CEIs. Moreover, the 2003 Cooperative Education Regulations delegate the authority to regulate the Chinese-foreign cooperative education programs (CEPs)¹³ and overall planning, coordination, and management of Chinese-foreign cooperative education nationwide to the Ministry of Education (MOE).¹⁴

To implement the 2003 Cooperative Education Regulations, in 2004 the MOE issued the Implementation Measures for the Regulation of the People's Republic of China on Chinese-Foreign Cooperative Education (2004 Cooperative Education Measures),¹⁵ which provide specific rules for the establishment, activities, and management of CEIs and the rules in the approval and management of CEPs.

Although the 2003 Cooperative Regulations, together with the 2004 Cooperative Measures (Regulations), try to provide rules and norms to better serve the opening up of the education sector in China, there is still ambiguity in some language of the Regulations that hinders the implementation of the policies.¹⁶ As stipulated in article 3

9 Issued on May 15, 1996, effective Sept. 1, 1996. An amendment to the Vocational Education Law (draft for comments) was issued by the MOE on December 5, 2019, and the period to solicit public comments expired on January 5, 2020.

10 Cao Xingguo, Interpretation of the Regulations on Chinese-Foreign Cooperative Education and Its Implementation Rules, Collected Papers of China Education Association for International Exchange 2003 International Forum on Education (2003). Cao Xingguo was from the Department of International Cooperation and Exchange, Ministry of Education.

11 The 2003 Cooperative Education Regulations came into effect on September 1, 2003, and were amended on July 18, 2013, and March 2, 2019.

12 2003 Cooperative Education Regulations, art. 2.

13 2003 Cooperative Education Regulations, art. 61.

14 See http://www.moe.gov.cn/s78/A20/gjs_left/moe_861/tnull_8646.html, last visited on May 7, 2021. 2003 Cooperative Education Regulations, art. 8. Under article 8 of 2003 Cooperative Education Regulations, such power is also delegated to the administrative department of labor, that is, the Ministry of Human Resources and Society Security (MHRSS); however, according to the 2004 Cooperative Education Measures issued by the MOE and the Measures of Chinese-Foreign Cooperation in Vocational Skills Training issued by the MHRSS in 2015, the MHRSS is responsible for vocational skill training institutions, while the MOE is in charge of educational institutions.

15 The 2004 Cooperative Education Measures came into effect on July 1, 2004.

16 Wang Pu, Li Lingling, *The Historical Development and Future Prospects of Chinese-Foreign Cooperative Education Policies*, 4 SE ACAD, 242-248 (2013).

of the 2003 Cooperative Regulations, “[t]he State encourages the introduction of foreign high-quality educational resources of Chinese-foreign cooperative institutions.” But it is not clear under the Regulations what “quality educational resources” are, and instead it is simply a general vague concept since there is no specific and unified standard.¹⁷ Some scholars are concerned that lacking specific regulations on quality/standards of foreign partners, many foreign universities that are not good enough, even those that could not grant degrees, have flocked to China under the temptation of high economic benefits.¹⁸ This concern is also reflected by the MOE’s 2017 Notice on Further Regulating the Order of Chinese-Foreign Cooperative Education (2007 MOE Notice)¹⁹, which points out that in practice there are duplicated low-quality cooperation education projects and cases where the qualification and capacity of the foreign parties in a cooperative education project were not carefully verified by the Chinese parties.

It is also worth noting that the 2003 Cooperative Education Regulations restrict the social influence of CEIs and CEPs, and require Chinese control over such foreign cooperative education arrangements. For example, the Regulations prohibit the setting up of religious CEIs or CEPs in China and prohibit CEIs from providing education of a “special nature” such as compulsory education (G1–G9), politics, policing, and military affairs. The specific requirements of CEIs and CEPs are detailed in the sections below.

C. Restrictions on Activities of Foreign Nongovernmental Organizations (NGOs) in China

Though China has opened certain areas of higher education to foreign investors, investors, such as foreign universities or other nongovernmental and nonprofit organizations, should also pay close attention in conducting activities in China before they have established any entity in China, since China has enhanced its monitoring and control over activities conducted by foreign NGOs.

Pursuant to the Law of the PRC on Management over Foreign NGOs’ Activities in China (the Foreign NGO Law),²⁰ foreign NGOs are prohibited from conducting activities within China, unless they have (1) set up a Representative Office (RO) after obtaining the approval from their professional supervisory authority and registering with the local office of the Ministry of Public Securities (MPS) or (2) filed for approval of the temporary activities with the local MPS by cooperating with a domestic counterpart. Only four types of Chinese organizations are allowed to act as domestic counterparts under the Foreign NGO Law, namely, government agencies, people’s organization, public institutions, or social organizations of China.

In particular, article 53 of the Foreign NGO Law provides a carve-out from the Foreign NGO Law to overseas schools, hospitals, natural sciences and engineering technology research institutes, or academic organizations wishing to engage in

17 *Id.*

18 *Id.*

19 2007 MOE Notice issued on Apr. 6, 2007, effective on the same date.

20 The Foreign NGO Law was issued by Ministry of Public Security on April 28, 2016, and came into effect on January 1, 2017.

exchanges and cooperation with schools, hospitals, natural science and engineering technology research institutes, or academic organizations in mainland China. CEIs, CEPs, and other collaboration programs or exchange activities between a foreign university and a Chinese university do not need to register or file with the local under the Foreign NGO Law.

However, according to the local MPS's interpretation, this carve-out should be applicable to exchange and cooperative activities between organizations of the same type, for example, between a foreign school and a Chinese school, or between a foreign hospital and a Chinese hospital. Exchanges and cooperation between a foreign university and a Chinese hospital, or vice versa, are not exempted per se. Cooperation between two different types of organizations mentioned above may be exempted on a case-by-case basis.

Notwithstanding the carve-outs under article 53, foreign NGOs, including foreign universities, are prohibited from directly or indirectly conducting or funding for-profit activities, political activities, or religious activities. Moreover, foreign NGOs, whether they set up a RO or file for temporary activities, are not allowed to develop membership or proactively raise money or solicit donations within China.

After the Foreign NGO Law became effective, there have been compliance concerns related to having foreign universities sign a service agreement with its wholly foreign owned enterprise (WFOE) or a third party and assign its personnel to perform the service in China. Some local MPSs hold the view that such actions would be deemed conducting activities within China by foreign universities, which should be subject to the Foreign NGO Law, but some local MPSs hold the view that such activities should not be regulated under the Foreign NGO Law. If the services are provided by foreign universities outside of China, then the service agreement between foreign universities and Chinese parties will not be affected by the Foreign NGO Law.

Considerable uncertainty and unpredictability exist under the Foreign NGO Law because there is little formal guidance, and informal interpretations of the Foreign NGO Law are different and not final, and might change from time to time. Different foreign NGOs are taking different approaches: some keep the status quo, while others have become more vigilant about potential noncompliance.

The Foreign NGO Law sets up liabilities and punishments for noncompliance. The authors have not seen any reported cases regarding the enforcement of the Foreign NGO Law on foreign universities. However, the authors are aware of nonpublished information that the Beijing MPS has imposed some penalties on foreign universities for violations of the Foreign NGO Law.

II. Forms of Foreign Engagement in the Education Section

A. Overview of Forms of Foreign Engagement in the Education Section

There are several options for foreign HEIs to consider when entering into the Chinese education market. These options include setting up CEIs, CEPs, executive education programs, collaboration programs, online programs, WFOEs, or commercial ROs.

B. CEIs

As mentioned above, a CEI refers to an educational institution established by both a foreign education institution and a Chinese education institution. A CEI mainly targets Chinese students.²¹

An increasing number of foreign education institutions have become involved in the higher education sector in China. Thus far, the MOE has approved ten higher education CEIs with independent legal person status including the University of Nottingham Ningbo China, Xi'an Jiaotong-Liverpool University, the NYU Shanghai, Cheung Kong Graduate School of Business, the Wenzhou-Kean University, the Duke Kunshan University, the Chinese University of Hong Kong (Shenzhen), BNU-HKBU United International College, Guangdong Technion-Israel Institute of Technology, and Shenzhen MSU-BIT University.²² As of June 2020, there are approximately 1200 CEIs and CEPs offering undergraduate education and graduate education in China.²³

If a CEI grants the degrees of the Chinese HEI, it must do so in accordance with Chinese laws and regulations. Degrees of the foreign HEI granted by the CEI should be the same as the ones granted overseas and must be recognized in the foreign school's country.²⁴

While many CEIs have been developed to offer degree education, it is not a requirement that a CEI be a degree-granting institution. There are a wide range of educational offerings of CEIs. CEIs can be established at the higher education, senior high school, and preschool education level, but not for compulsory education (G1–G9).

There are two types of CEIs. A CEI can either have independent legal person status or not have independent legal person status. For a CEI with legal person status, the MOE prefers that the CEI offer undergraduate programs, even if the CEI's primary objective is to offer masters and/or doctorate degrees. The MOE encourages the joint college model or CEI without independent legal person status because of the joint colleges' close affiliation with the Chinese partners, which it perceives to have less of an impact on the current education system, in large part because such CEIs are more dependent upon the Chinese partner to operate and are subject to more control by the Chinese partner.

Below are common issues that CEIs and their foreign and Chinese partners encounter in the formation and operation of the CEI:

- There is often an asymmetry of information available to the Chinese party and foreign party from the MOE. It is not uncommon for the Chinese party to receive more information from the MOE. This may

21 2003 Cooperative Education Regulations, art. 2.

22 China Ministry of Education, http://www.moe.gov.cn/jyb_xwfb/s5147/202010/t20201027_496773.html, last visited on May 7, 2021.

23 *Id.*

24 2003 Cooperative Education Regulations, art. 23.

cause the foreign party disappointment and frustration, and result in the perception that the MOE is negotiating in favor of the Chinese party;

- The establishment or operation of the CEI may be affected by the Chinese party's internal politics. It is not uncommon that a change in leadership in the Chinese HEI can affect the resources that the Chinese HEI puts into the CEI project. Therefore, it is important to make sure that the parties' leadership shows long-term support to the CEI;
- There are often challenges with the employment of teachers for CEIs due to immigration and compensation issues. Faculty members from outside of China who plan to work at the CEI may experience difficulties in receiving visas to teach in China due to factors such as age and country of origin. Also, CEIs sometimes face challenges in attracting quality faculty because of compensation concerns, including pay disparity between expats and local hires;
- The partners are not able to recruit a sufficient number of students as expected or planned for the CEI; and
- There are changes in joint venture (JV) university-related laws and policies, including tax treatment that may affect the CEI's development or daily operations.

C. *CEPs*

A CEP refers to the cooperative education and teaching activities between a Chinese education institution and a foreign education institution. According to Article 2 of the Regulations of the People's Republic of China on Chinese-foreign Cooperative Education, Chinese students should be the main targets for a CEP.²⁵ A CEP does not involve the establishment of an educational institution.

The CEP is the most popular model adopted by foreign institutions for education cooperation in China. For CEPs, the Chinese party and foreign party should be in the same education level and type. The procedures and requirements that apply to CEPs are substantially similar to those that apply to CEIs under the regime of Chinese-foreign cooperative education.

A CEP needs the approval of the MOE. Also, a CEP should meet the following standards:

- The total number of courses introduced by the foreign university shall account for no less than one-third of the total program courses;
- The total number of the core major courses introduced by the foreign university shall account for no less than one-third of the total program core major courses;

²⁵ Regulations of the People's Republic of China on Chinese-foreign Cooperative Education, Art.2, See http://www.moe.gov.cn/s78/A20/gjs_left/moe_861/tnull_8646.html, last visited on May 7, 2021.

- The total number of the core major courses taught by teachers from the foreign university shall account for no less than one-third of the total program core major courses; and
- The teaching hours carried out by teachers from the foreign university shall be no less than one-third of the total program teaching hours.²⁶

1. Differences Between CEIs and CEPs

Table 1 is a summary chart of the key differences between (1) CEIs with independent legal person status, (2) CEIs without legal person status, and 3) CEPs.

Table 1: Differences between CEIs and CEPs

Differences	CEI With Independent Legal Person	CEI Without Independent Legal Person	CEP
Legal Status and Liability Status	An entity with independent legal personality with the capacity to operate in its own name and to be liable to third parties (with limited liability for its owners).	A new college within the Chinese partner institution that has no independent legal personality. The parties have liability to third parties for the CEI's operation, and the parties can allocate liability among each other by contract.	No independent legal personality. CEPs are subject to the Chinese partner's management. The Chinese partner is usually liable for any external debts to third parties. The foreign partner usually limits its liability to the Chinese partner by way of contractual agreement.
Approval Process	Typically, there is a two-stage approval: (1) preparatory approval from the MOE and (2) final/formal approval from the MOE. Registration is required with the Ministry of Civil Affairs or its local counterparts or an Independent Non-profit Institute if local practice permits.	Typically, one stage MOE formal approval.	One stage MOE approval only.
Capital Contributions	Required	Required	Not required

Reasonable Return	Permitted	Permitted	Usually not permitted
Management Body	Council or board of directors	Joint management committee	Joint management committee
Cost	Costs are significantly higher as the CEI requires an independent infrastructure	Depends on whether an independent infrastructure is required	Costs are generally lower because the CEP is usually based on the existing facilities and infrastructure of the Chinese partner(s)
Others	Higher profile and probably easier to market as an institution in its own right	Lower profile but appears to be encouraged by the MOE	Lower profile (but high success rate)

2. MOE Application and Approval Processes for CEIs and CEPs

In order to set up a CEI or CEP, the MOE or its local counterpart's approval must be obtained.

More specifically,

1. for CEIs and CEPs granting degrees at the bachelor level or above, they should obtain the provincial MOE's preliminary approval first and the MOE's final approval;
2. for CEIs and CEPs granting degrees of associate bachelors, no-degree higher education, or other academic education programs, they should obtain the final approval from the provincial MOE and file with the MOE for record; and
3. for CEIs and CEPs offering occupational education, they should obtain the provincial labor authority's approval.²⁷

The MOE has a cycle for approvals that require submission of applications for setting up CEIs and CEPs each March and September. In practice, for CEIs with independent legal person status, the timing for submission of the application for the MOE's approval may be more flexible, but this is subject to the local and central MOE's discretion.

There are two CEI application options:

1. Separate the approval process into two steps: (a) preparation approval and (b) establishment approval; or
2. Apply directly for establishment approval.²⁸

²⁷ 2003 Cooperative Education Regulations, art. 12.

²⁸ *Id.*, art. 13.

CEIs with independent legal person status usually take the two-step approach because of the considerable time that is needed to build a new campus and hire faculty members. CEIs without independent legal status usually apply directly for establishment approval.

The approval authority is to make a decision on whether it will grant a preparation approval for a CEI within forty-five working days upon the acceptance of the application.²⁹ The timeframe of the approval authority's grant of an establishment approval for a CEI offering nondegree education is within three months, and for CEIs offering diploma education the timeframe is within six months.³⁰

The approval process usually takes longer than the statutory timelines because of expert panel review. Expert panels are organized to review and comment on the application in the preparation approval phase as well as the establishment approval phase. In practice, the approval process timeline for CEIs with a legal person status can range between six months and one year to seek the preparation approval and another two to three years for the establishment approval. There is a statutory requirement that the establishment approval must be applied for within three years upon the receipt of the preparation approval; otherwise a new application should be made.³¹

CEIs without an independent legal person status and CEPs will typically apply for establishment approval directly, and the timeline is relatively shorter, normally ranging from four to six months or longer. Before the establishment approval is granted, CEIs and CEPs are not permitted to engage in student recruitment, including accepting applications and application fees, and their marketing activities should be limited.³²

The major required documents for applying for the MOE *preparation approval* on setting up a CEI include the following:³³

1. Application report;
2. Cooperative Education Agreement (CEA);³⁴
3. Valid documents verifying sources of assets and the amount of capital with clear statements of ownership;
4. Donation agreements where any assets have been donated;

29 *Id.*, art. 15.

30 *Id.*, art. 18.

31 *Id.*, art. 16.

32 According to article 33 of the 2003 Cooperative Education Regulations, the prospectus and advertisements of CEIs should be filed with the approval authority for record.

33 2003 Cooperative Education Regulations, art. 14.

34 Only the CEA between the foreign HEI and the China HEI will be submitted to the MOE. The agreement with the financing party does not need to be submitted to the MOE.

5. Certificate that fifteen percent of the initial investment is in place.³⁵

When applying for the MOE *establishment approval*, the key required documents include the following:³⁶

1. Establishment application report;
2. MOE preparation approval;
3. Articles of Association;
4. List of members on its first board of trustees or directors or joint managerial committee and their relevant documentation;
5. Valid documents verifying the assets of the CEI;
6. Documents verifying the qualifications of the president or principal administrator, the teachers (including foreign teachers), financial staff, and any foreign administration personnel employed by the JV university.

The application procedures and required documents for establishment of CEPs are similar to the above, although the required documents may differ slightly, which include the following:³⁷

1. A Chinese-foreign Cooperative Education Program Application Form;
2. The CEA;
3. Certificates of legal person status for both foreign and Chinese institutions (should be notarized and authenticated);
4. Certificates of capital verification (if there are any assets or funding investment);
5. The donation agreement and relevant documentation (if there is a donation involved);
6. If the foreign university has another joint program approved by the MOE, the evaluation report issued by the approval authority or the authorized appraisal should also be submitted.

3. *Other CEI Registration Requirements*

After obtaining MOE approval, a CEI with independent legal person status should be registered as a Private Non-Enterprise Unit (PNEU) with legal person status with the local Civil Affairs Bureau, or Independent Non-Profit Institute (INPI)

35 In practice, the application documents would also include certified accreditation documents for the foreign HEI, diploma samples, and the proposed education plan.

36 2003 Cooperative Education Regulations, art. 17; 2004 Cooperative Education Measures, art. 18.

37 2004 Cooperative Education Measures, art. 37.

with the local Civic Organization Registration Management Bureau. After completion of this registration, a CEI will receive a registration certificate as its business license.

Also, a CEI must obtain an Organization Code Certificate with an official number and carve official chops³⁸. A CEI will also need to open a bank account and complete applicable tax and foreign exchange registrations. After completing these after-licensing formalities and with the MOE approvals, the CEI can operate independently.

CEIs without independent legal person status should be registered as a PNEU with a partnership status.³⁹ It should be noted that the registration regulations have not been strictly implemented. A majority of CEIs have not been registered and exist as an affiliated college of the Chinese education institution. CEIs that are not registered often do not have separate bank accounts and use the Chinese education institutions' bank accounts.

For CEPs, there are no registration requirements because they do not have an independent status. Moreover, CEPs cannot open bank accounts and must use the Chinese education institutions' bank account.

4. *CEI Institutional Governance and Board*

A CEI with legal person status must establish either a board of trustees or board of directors. A CEI without legal person status or a CEP must establish a joint management committee (collectively the Board).⁴⁰ The Board is the highest governance authority of the CEI or CEP.

It is required that Chinese members hold at least half of the Board seats out of a minimum requirement of five members. In addition, each Board must have a chairperson and vice chairperson, or the joint management committee must have a director and deputy director. The legal representative of a CEI with legal person status must either be the chairperson or the chancellor of the CEI. The party holding the chair or director seat shall not hold the vice or deputy seat. The list of board member names should be filed with the competent MOE approval authority.

The Board members must be composed of representatives of the parties to the CEI. The chancellor or principal administrator and at least one-third of the Board members must have five or more years of education or teaching experience.⁴¹ None of the Board members may be a Chinese government employee.⁴²

38 In China, the official chop is equivalent to the signature of an authorized representative of a CEI, which has the power to bind such CEI. For example, the official chop can be affixed on a contract, an agreement or other legal documents to show the CEI's intention to be bound by these documents.

39 Circular on Relevant Issues Concerning the Registration of Sino-Foreign Cooperative Education Institutions, issued by Ministry of Civil Affairs on December 12, 2003, and effective from the same date, art. 4.

40 2003 Cooperative Education Regulations, art. 21.

41 *Id.*, art. 22.

42 2004 Cooperative Education Measures, art. 24.

The Board must hold at least one meeting a year, and Board members must be allowed to request interim meetings if one-third of its members seek one. The Board must hold the following rights and powers:⁴³

1. Reelection or by-election of members of the Board;
2. Appointment or dismissal of the chancellor or principal administrator;
3. Modification of the articles of association and formulation of the CEI rules and regulations;
4. Formulation of development plans and approval of the annual operations plans;
5. Raising funds for the CEI and auditing budgets and accounts;
6. Determination of the number of faculty needed and salary for such faculty; and
7. Determination on dissolution, mergers, or termination of the CEI.

Other rights that are not included above but are desired may be included in the CEI's articles of association. In addition, the adoption of the following matters must be approved by at least two-thirds of its members:⁴⁴

1. Appointment or dismissal of the chancellor or principal administrator;
2. Modification of the articles of association;
3. Formulation of development plans; and
4. Determination on dissolution, mergers, or termination of the CEI.

Although at least half of the Board must be appointed by the Chinese party, there are ways to structure the Board to provide the maximum safeguards to the foreign party; for example, the foreign party may have the right to nominate the chairperson or give the chairperson a casting vote.⁴⁵

The Communist Party of China (CPC) has requested that CEIs set up CPC organizations within the schools. Also, the CPC has requested that the CPC organization leader must have a similar position as the CEI's chancellor and a seat on the CEI's Board. It is required that the articles of association of the CEI include the CPC organization's establishment and provide that it has the power to oversee the operation of the CEI and participate in the decision-making process of the CEI. These CPC requirements should be seriously considered when setting up the governance of the CEI.

43 2003 Cooperative Education Regulations, arts. 23, 24.

44 *Id.*, art. 24.

45 The MOE may deny such a proposal on a case-by-case basis.

5. *CEI Chancellor or Principal Administrator*

The CEI chancellor/president or principal administrator (collectively the Chancellor) must be of Chinese nationality and reside in China. Also, the Chancellor must be approved by the approval authority. Other requirements for the Chancellor include that he or she must have teaching experience, have integrity, and meet the required standards of professionalism.⁴⁶ The Chancellor normally must not hold any other posts during his tenure.⁴⁷

The Chancellor must have independent authority over educational and administrative matters of the CEI and is responsible for preparing plans for the internal organizational structure of the CEI, which must be approved by the Board.

The Chancellor must hold the following duties and powers:⁴⁸

1. Execution of decisions made by the Board;
2. Implementation of the development plans and drafting of the annual operation plans, financial budgets, and rules and regulations;
3. Hiring or dismissal of staff members and implementation of awards and discipline;
4. Organization of education, teaching, and scientific research activities, and guaranteeing the quality of the education and teaching; and
5. Handling day-to-day administrative work.

Additional duties and powers of the Chancellor can be specified in the CEI's articles of association. The Chancellor can delegate the decision-making and implementation of such decisions to other officers, although the Chancellor retains responsibility and accountability for such decisions.

Theoretically, either the Chinese party or the foreign party can nominate the Chancellor. Because the Chancellor must have Chinese nationality, he or she is often nominated by the Chinese party and the foreign party consents to the nomination in consultation with the Chinese party.

6. *CEI Executive Vice Chancellor*

The Executive Vice Chancellor is usually a person nominated by the foreign party and serves as the foreign party's key leader within the CEI administrative structure. The Executive Vice Chancellor typically assumes the management power and is responsible for academic matters, with the assistance from the Academic Vice Chancellor and/or the Academic Committee. The CEI can establish the decision-making authority of the Executive Vice Chancellor in its articles of association, including that the Executive Vice Chancellor can have veto power

46 2003 Cooperative Education Regulations, art. 25.

47 2004 Cooperative Education Measures, art. 24.

48 2003 Cooperative Education Regulations, art. 26.

over decisions by the Chancellor, which can be a means for the foreign party to exert negative control.

D. Executive Education Programs

Executive education programs usually refer to academic or training programs for executives, business leaders, and functional managers. These programs focus on improving the knowledge and skills needed to become an effective leader such as accounting, finance, business strategy, or negotiation. Executive education programs can be degree granting or nondegree granting, long term or short term.

For degree-granting executive education programs, most of them take the form of a CEI or CEP. If the program has MOE approval, then the degrees granted by the foreign universities can be accredited in China. However, some programs do not have MOE approval, and therefore the degrees granted by the foreign universities cannot be accredited in China. The lack of accreditation may negatively affect students who wish to seek a job with Chinese government agencies or state-owned enterprises.

WFOEs set up by foreign universities are also actively involved in executive education programs, although this activity requires careful structuring. Although such WFOEs are not able to obtain a business license for education and training activities, customized executive education programs for companies in China are structured based on a business-to-business model and characterized as consulting services. If an open enrollment program is involved, these programs should be organized by a Chinese partner who has the proper teaching or training license meaning a Chinese school or company that has a training license or training within its business scope.

Until the Chinese Foreign NGO Law came into effect,⁴⁹ WFOEs would usually contract with its client company for delivery of the services and, in turn, outsource the provision of the executive education programs to their affiliated foreign university. However, under the Foreign NGO Law, the service agreements between the WFOEs and the foreign universities have become less clear in terms of their legality.

E. Education and Research Collaborations

According to the Higher Education Law, international exchange and cooperation in higher education are encouraged. Since China's accession in 2001 to the WTO, there have been many forms of collaboration between Chinese schools and foreign education institutions, including student and faculty exchange programs, distance education initiatives, joint research and development laboratories, joint degree programs, and Chinese-foreign cooperative educational institutions.

⁴⁹ See discussion above regarding the Foreign NGO Law in section I.C. In brief, the Foreign NGO Law treats foreign nonprofit entities, which comprise the vast majority of foreign HEIs, as foreign NGOs and, as such, subject to extensive restrictions on their activities in China. While there is an express carve-out (article 53) from these restrictions for CEIs and CEPs, the Foreign NGO Law restricts the other activities engaged in by foreign HEIs.

Whether a collaboration program needs MOE approval depends on the nature and scope of the program. The MOE holds the view that if the cooperation between the foreign education institution and the Chinese institution does not involve introducing substantial education resources of the foreign education institution, then MOE approval is not required. Moreover, if the foreign institution does not assign its teachers to teach in China, is not involved in the syllabus design, and does not provide teaching materials for the program, such a collaboration program is not deemed to be subject to the Cooperative Education Regulations.

Article 14 of the PRC Law on Progress of Science and Technology stipulates that the Chinese government encourages international scientific research and technological development cooperation and exchange. On March 17, 2018, the State Council released the Scientific Data Administrative Measures. These measures introduced rules with the aim of collecting and making public the results of government-funded scientific research. The measures have serious and far-reaching consequences for organizations in China carrying out scientific research, regardless of whether they are publicly or privately funded. Privately funded research institutions are required to submit scientific data to the Chinese government if they concern state secrets, national security, or are in the social and public interest. There is also a requirement that any data deemed to fall under the open-ended list of broad categories such as “government policy-making, public safety, construction of national defense, environmental protection, fire prevention and control, public benefit scientific research and so forth” must be handed over to the Chinese government on request free of charge. The measures also have implications for the sharing of research results by Chinese researchers with their overseas counterparts and scientific exchanges. Due to these broad measures that apply to both public and private sector research, there is the danger that the Chinese government will be able to claim “data sovereignty” over a foreign education institution’s valuable research results and potentially trade secrets.⁵⁰ See also the discussion below in section IV with regard to policy concerns during the U.S.-China trade war that are affecting research collaborations.

F. Online Programs

The delivery of online education courses internationally is a hot growth area in higher education. In China, online courses offered by a foreign institution operated from outside of China are generally beyond the MOE’s jurisdiction. As such, any degrees granted to Chinese students that are substantially based on online courses cannot receive the MOE’s accreditation. Also, there is a potential risk that the MOE, together with Chinese regulators with authority over the Internet in China, could block access to online education courses and restrict Chinese nationals from making course payments abroad.

If the online course website or server is located in China, no MOE approval is required. However, the entity operating the website would need to complete an Internet Content Provider (ICP) filing with the local office of the Ministry of

⁵⁰ *New Scientific Data Rules in China: China Claims “Data Sovereignty”* (June 4, 2018), HOGAN LOVELLS, <http://ehoganlovells.com/rv/ff003c7f0ed866718b0bbf11af46acf0f4e5122a>.

Industry and Information Technology (MIIT). If the online programs are offered on a fee basis, the website entity would also need to receive an ICP license issued by the MIIT. This is recently confirmed by the Implementation Opinions of Six Departments Including the Ministry of Education on Off-Campus Online Training (Online Training Opinions)⁵¹. The Opinions are specifically applicable to the online programs of school subjects targeting primary and high school students, and it requires a record filing with the MOE with related materials after obtaining the ICP filing (or other applicable license granted by MIIT such as an ICP license), cybersecurity protection grading filing, and rating report. The local authorities are exploring the formulation of guidelines to further regulate such programs.

Currently, an ICP license is not generally available to foreign investors. As such, the ability of foreign institutions to provide online courses in China is typically conducted from outside of China, or structured with a rather complex relationship.

In order to address the ICP license requirement, foreign investors may consider one of the following structures:

1. *The Closer Economic Partnership Arrangement (CEPA) structure.* Under the CEPA structure, Hong Kong and Macao-qualified service suppliers are allowed to establish a JV (50/50) to apply for the ICP license.⁵² This limitation on ownership generally makes this approach less attractive to a foreign university.
2. *JV in the FTZ.* China's telecommunication sector is further opening in the FTZs. In an FTZ, a foreign investor can establish with a Chinese partner a JV company to apply for the ICP license. The foreign investment ratio would be capped at 50 percent.
3. *Variable Interest Entity (VIE) structure.* The use of the VIE concept was first introduced to enable businesses that required an ICP license to operate, and such concept underlies most online businesses in China.

If the online courses are delivered through applications developed and operated in China, filings with the MOE are required. Under the Administrative Measures on Education Mobile Applications (Education APP Measures),⁵³ the education applications refer to the mobile applications of which major users are teachers and faculties, students, and parents. The main contexts of use are for educating and studying, and the main purposes are to serve the teachers and administration, studying and life activities of students, and the interaction between schools and parents, which cover a wide range of applications, not limited to the applications providing online courses or programs. The education application

51 The Online Training Opinions were issued on July 12, 2019, and took effect on the same day.

52 The CEPA refers to the Closer Economic Partnership Arrangement between the China government and Hong Kong/Macau government, which provides more favorable market entry policies for qualified Hong Kong/Macau service providers. To be a qualified Hong Kong/Macau service provider, the Hong Kong/Macau company needs to meet various conditions.

53 The Administrative Measures on Education Mobile Network Applications were published by the MOE on November 11, 2019, and took effect on the same day.

providers, including Chinese education authorities, schools, companies, and other organizations, must submit the required information of the education applications for a filing with the MOE (Provider Filing). On the other hand, Chinese education institutions and education authorities using the education applications must submit information for a filing with the MOE (User Filing), and must only use the education applications that have gone through the Provider Filing.

G. WFOE and RO

Generally, a foreign investor has two options to set up a legal presence in China: a representative office (RO) or WFOE. An RO and WFOE must be established under the State Administration of Market Regulation (the SAMR)⁵⁴ The discussion below mainly focuses on the scenario in which a Limited Liability Company (LLC) of a foreign university considers setting up an RO or a WFOE, due to the impact of the Foreign NGO Law. As foreign universities are likely to be deemed NGOs, they are not permitted to establish a WFOE, but it is feasible to have their offshore not-for-profit LLC set up a WFOE, given that the WFOE will conduct business within its registered business scope instead of carrying out non-commercial activities for or on behalf of the foreign NGO.

ROs are generally intended for liaison and market research activities. An RO may be a useful transitional vehicle for businesses initially exploring the Chinese market. Relevant laws and regulations governing the operations of ROs in China prohibit ROs from being used to conduct operational and business-generating activities. ROs are not independent Chinese legal entities. The establishment of a RO is usually only subject to the SAMR registration requirements.

Typically, setting up a WFOE is more desirable than a RO, particularly in the education sector. One of the key advantages of setting up a WFOE is that the WFOE is able to employ personnel in China. Also, the WFOE can serve as the entity for the secondment of the foreign university's personnel who teach in China for a prolonged period.

China's current regulatory policy limits the scope of educational activity in which a WFOE can engage. A WFOE can only conduct activities within its approved business scope. If a WFOE hires faculty to teach, the WFOE would require a business scope for education or training, which is usually difficult or impossible for a WFOE to obtain.⁵⁵

Setting up a WFOE can also facilitate financial matters. As an independent legal entity established under Chinese law, a WFOE can open its own bank accounts. A WFOE can also enter into contracts and agreements to receive Chinese currency payments. The WFOE can make payments in Renminbi (RMB) to Chinese entities, including to and from Chinese parties or the LLC of the foreign university, which can help facilitate cash flow.

54 The State Administration of Market Regulation (the SAMR) is the company registry authority in China.

55 The scope of activities in the education context that are permissible to a WFOE may expand as a result of recently proposed amendments with regard to for-profit vocational education, which may undergo liberalization as a result of proposals made by the MOE in December 2019.

A WFOE may also assist the personnel of the foreign university in applying for work visas, residence permits, and business visas. The WFOE can rent office space, equipment, mobile phones, and other supplies. The WFOE may help in liaison with Chinese parties, the promotion of educational programs, and enhancement of the visibility of the foreign university's programs in China.

1. *WFOE Business Scope and Formation*

Chinese laws require any foreign invested enterprise, including a WFOE, to act within its business scope as approved by the local registration authority. Certain business scopes are subject to special approval by relevant government authorities. For example, setting up a language training WFOE is subject to the approval of the local MOE, which is the prerequisite of applying for the business license with the local SAMR.⁵⁶ Because a WFOE cannot obtain a business scope for training easily, the typical university WFOE has a consulting business scope instead, which does not require any special approvals.

For the purpose of receiving funds for services rendered, which is sometimes used to receive donation/sponsorship funds and to transfer money in the form of service fees, the WFOE can be established as a consulting WFOE.

A general consulting WFOE may conduct the following business:

Educational consulting; business management consulting; investment consulting; economics information consulting; market planning; cultural information consulting (excluding agency services); organizing cultural exchanges (excluding performance agency services); conference services; overseas study agency; technology research and development; technology consulting; technical services; provision of cultural commodities and souvenir to clients.

On the other hand, a consulting WFOE should not conduct any activities that are reserved by law and policy for educational institutions. Specifically, a WFOE may not conduct the following activities: (1) issue degrees to students; (2) collect tuition directly from the students; (3) teach; (4) conduct research in social and humanities science; or (5) act as a sales agent, investment broker, or other specialized agency role when conducting consulting services.

The WFOE must choose a location where it is registered, but it can support programs of the foreign universities in different cities in China. However, if the WFOE needs to lease an office and carry out business activities on a regular business in another city, it should register a branch in that city or set up another WFOE, depending on its needs.

The formation of a WFOE in China involves an intensive process with significant paperwork. The process consists of the following steps: (1) name self-

⁵⁶ Circular on Duly Carrying Out the Work in Relation with the Examination, Approval, and Registration of Foreign Invested for-Profit Non-Degree Language Training Institutions. It was issued by the MOE, MOFCOM, and SAMR on July 24, 2019, and took effect on the same day.

filing⁵⁷; (2) record filing with the local office of the MOFCOM; (3) registration with the Local SAMR for enterprise establishment and the business license; (4) post-establishment registrations, including carving company chops (i.e., seal or stamp), opening bank accounts, and registrations with other authorities such as tax and foreign exchange. The entire process typically takes two to three months.

III. Operation of Chinese-Foreign Cooperation Education

A. *Operational Readiness Overview*

Gaining the MOE approval for a Chinese-foreign educational venture is a major and indispensable milestone; reaching it, however, is just the beginning. There are many essential tasks between approval and the arrival of the first students. The following sections will discuss many of the steps necessary for operational readiness. As is typical in China, this general framework can have many local variations depending on the character and influence of the foreign institution's Chinese partner and the attitudes of municipal and provincial authorities. With MOE approval secured, however, the variations are likely to affect *how* not *whether* the major steps toward operational readiness can be achieved.

In addition, when the foundations are in place—MOE approval, civic registration, fiscal and human resources capabilities—the partner institutions can turn their attention to the specific tasks associated with offering higher education, including curriculum development and student recruitment and pricing. While these activities must take place within the Chinese national, provincial and local jurisdictional frameworks that apply to all enterprises, there are a number of requirements distinctive to higher education, which are explained in the next sections.

B. *U.S. Approvals and Accreditation of Chinese-Foreign Degree Programs*

It is important to note that operational readiness is likely not just a question of preparation in China but will likely also require home country and perhaps even home campus preparations. Before turning to the China side, let's consider home country implications, assuming a U.S. institution.

Chinese regulations on JV higher education programs require that graduates be awarded a diploma from the foreign institution identical to the degree offered by the foreign institution to its students at home.⁵⁸ Moreover, this degree must be recognized as fully valid and accredited by the foreign jurisdiction.⁵⁹ In the United States, satisfying this expectation requires that the governing authorities within the partnering institution take the formal steps necessary to approve the awarding of the institution's degree for completion of the program in China. Chinese authorities

57 According to the Notice of the Fluent Transition After Cancellation of the Administrative Approval of Enterprise Name Pre-Registration by the State Administration for Market Regulation on April 1, 2019, the WFOE itself could file for the company name without any approval.

58 2003 Cooperative Education Regulations, art. 34.

59 This expectation assumes that the program offered in China has a direct analogue at the home institution, which may not be the case.

will expect to see facsimile copies of the diplomas to be awarded as well as evidence of governing board approval. Given faculty governance norms in American higher education, securing this institutional approval may require considerable discussion, so this should begin at an early stage of the project.

U.S.-side readiness also involves conversations with an institution's regional accreditor. Accreditation in the United States is decentralized and effectively delegated to six self-governing member organizations that cooperate closely with the Department of Education to ensure regionally accredited institutions meet U.S. eligibility standards for federal programs. Embarking on a new program in China with a Chinese partner that leads to an accredited U.S. degree will require that the partnering institution comply with the accreditation standards established by its regional accreditors. In general, accreditors will expect that the quality control and educational effectiveness policies and procedures in place on the U.S. campus are applicable to the JV program in China. This quality assurance is necessary to warrant the awarding of a degree of a U.S.-accredited institution. Depending on the accreditor and the nature of the educational partnership, the U.S. institution may only be required to give notice of the intended program, or it may be required to seek formal approval, which entails a vote by the regional accreditor's membership delegates.⁶⁰ In either case, extensive documentation will be required.

Accreditors emphasize that approval of a U.S. degree for a program in China does not constitute accreditation of the Chinese partner institution. Indeed, accreditors may require that explicit disclaimers be published in official bulletins, recruiting materials, and websites to prevent any misunderstandings on that point. The situation may seem paradoxical: the U.S. degree is from a regionally accredited institution but the program in China is not itself accredited. This situation places great responsibility on the U.S. institution for assuring academic quality and compliance with accreditation standards, even though it cannot exercise full control of the educational program given its geographical locus in China, the jurisdiction of Chinese education authorities, and the body of Chinese regulation pertaining to JV programs.

C. U.S. Education Cooperation Models

The paradox created by this regulatory duality must be navigated by carefully choosing the mode of cooperation under which U.S. accreditation will be sought. Several forms are available in the conceptual armature and nomenclature of U.S. accreditors, none of which offers a perfect fit for what U.S. institutions will want to accomplish in China and none of which fully resolves the paradox. The options fall across two dimensions: relationship type (branch, site) and degree type (joint, dual):

- *Branch Campus v. Additional Site.* In relationship terms, the obvious fact is that education is taking place far from the U.S. institution's primary and

⁶⁰ For example, Middle States Commission on Higher Education and Southern Association of Colleges and Schools Commission on Colleges have "Substantive Change" policies that require the U.S. institution to obtain prior approval from the Commission for the establishment of additional locations and branch campuses outside of the United States. See <https://www.msche.org/policies/>, last visited at May 7, 2021; <http://www.sacscoc.org/pdf/081705/SubstantiveChange.pdf>, last visited on May 7, 2021.

historically established campus. A formal description of the relationship between the U.S. partner institution and the legally independent Chinese joint venture has to be established, which will be consistent with the goal and requirement of awarding an accredited U.S. degree. The categories available are “branch,” which is generally an independent, self-sufficient operating entity under the ultimate jurisdiction of the U.S. institution’s governing board, or a “site,” which is generally a remote location with facilities and services adequate to supporting program goals at a level of quality consistent with home institution standards.⁶¹

- *Dual Degree v. Joint Degree.* In degree terms, the important fact is that educational content is a joint responsibility under the partnership agreement rather than the sole responsibility of the U.S. institution (particularly if a Chinese degree is involved), which would not be authorized to operate independently in China. U.S. accreditors recognize two variants on the traditional single institution degree.⁶² A joint degree is a single diploma signed by two cooperating institutions that is distinct from the degrees either institution offers on its own, though the fields of study may be the same. A dual degree program awards two separate diplomas, each duly authorized and accredited, with each institution recognizing specific credits earned at the counterpart institution as meeting its own degree requirements.

The limited number of cases to date suggest that U.S. accreditation practice will recognize Chinese JV universities as “sites” for U.S. educational programs, since the U.S. institutions do not have the level of control entailed by the “branch” designation. And since the relevant regulatory requirements applicable to JV universities require the awarding of a degree as nearly identical as possible to the U.S. institution’s other degrees, a dual degree framework is the nearly inevitable form, since a joint degree would be clearly differentiated from the U.S. institution’s other degrees.

Regardless of these formal categories, U.S. institutions may have internal reasons for presenting the relationship between their Chinese JVs and with their U.S. flagship operations as more or less integrated. For example, under former president John Sexton, New York University (NYU) began to present itself as a networked global campus with major branch campuses in Abu Dhabi and Shanghai and a variety of study away sites all connected to the main campus in New York City. In its operations and branding, NYU has emphasized the integration of NYU Shanghai within the larger institution. On the other hand, Duke University has chosen to recognize more independence for its affiliated JV university in China, Duke Kunshan University. Formally, both are recognized by their regional accreditors as operating at an approved remote site and as participating in a dual degree program with their JV campus. And in China, it is the JV university and not the U.S. partner institution that is licensed to operate.

61 Chinese regulators do not like the terms “branch” or “branch campus” due to the education sovereignty concern. In the MOE application documents and other official documents, this term should not be used, and a more acceptable term could be “joint venture university” or “joint venture institute.”

62 If there is no Chinese degree involved, it is possible for the U.S. HEI to have 100 percent teaching responsibilities.

While the JV universities are designed to capitalize on the reputations and know-how of their US partners, fostering some mutually beneficial ambiguity, when it comes to contractual obligations, employment and immigration law, taxation and regulatory compliance, institutions must strive for clarity and consistency on such basic questions as: Whose students are they? Which institution is responsible for their health and safety? Which institution is responsible for ensuring academic integrity and responsible conduct? What regulatory regime – US or China – applies on such matters as sexual misconduct and confidentiality of student records? These matters are best addressed in detailed operating agreements between the US institution and their legally independent affiliated campus in China.

Finally, it should be recognized that no matter how independent and capable the JV institution may be in China, the US partner institution will need a significant infrastructure to provide academic and administrative oversight and assistance to the Chinese campus. Careful attention must be given to trans-border financial transactions, immigration and visas, individual and institutional tax obligations, IT interfaces, and student records. Set up and maintenance of these capabilities requires dedicated staff as well as a variety of professional legal, tax and accounting services.

D. JV University Registrations in China

There are several steps, including additional registrations, following MOE approval of a Chinese-foreign JV university.

1. Civic Organization Registration Management Bureau Registration

As discussed above in section III.A, gaining MOE approval is the most important foundational task and a prerequisite for all that follows. The second most important foundational task is registration with the Civic Organization Registration Management Bureau. The JV entity must take a recognized legal form before it can secure a bank account, hire employees, or actually engage in the activities the MOE has authorized. There are several organizational forms available to educational endeavors, none of which is precisely parallel to the U.S. 501(c)(3) nonprofit form that is typical in American higher education.

In the United States, there is a tendency to equate nonprofit with tax exempt. However, in China, there is no organizational form that guarantees tax exemption, though tax exposure and opportunities for relief are affected by organizational form. Registration is processed through the relevant provincial civil affairs bureau and must be renewed annually. As part of the registration process, the entity will file its Articles of Association, which defines its purpose and scope of operation together with its internal governance and administration.

With registration achieved, a Certificate of Civic Organization Legal Person will be issued, essentially a business license. Additional steps follow with the certificate as a prerequisite.

2. *Organization Code Certificate*

Obtaining an Organization Code Certificate, which provides a national identification number, establishing a bank account, tax registration and registration with the State Administration of Foreign Exchange are the next steps.

3. *Banking*

Banking in China is highly regulated, and there are several large Chinese banks as well as several international banks operating in China. Proximity and service orientation are important criteria because foreign currency transactions are likely to be involved in an international educational endeavor. Such transactions require approval of the State Administration of Foreign Exchange and may require walking paperwork from office to office. The taxation systems, both national and local, are closely entwined with the banking system as a means of insuring that taxes are appropriately withheld and paid when foreign currency payments are made.

E. Employment

A foundational task of establishing a Chinese-foreign educational program involves employment. Typically, there are two options for employment of the faculty or staff members. One option is having the CEI hire them directly. The advantage of this option is that there is no permanent establishment (PE) concern for the foreign university resulting from having its employees on the ground in China for substantial periods. The disadvantage is that the employment relationship is subject to China labor laws, which are employee friendly, and it is not easy to do a termination without a stipulated ground. In this case, the new organization must adopt clear employment policies published in an employee handbook that conforms to Chinese labor law and becomes part of individual employment contracts. In addition, the organization must establish appropriate accounts with social agencies to remit required social contributions. This approach is more frequently used for hiring local Chinese.

Another option is to keep the employment relationship with the foreign university and seconding the faculty or staff members to work at the new organization. The advantages of this option are that many foreign faculty and staff members prefer to keep their employment benefits with the home university and the employment relationship will still be subject to foreign laws, which permits “at will” employment status. For this option, it is important to draft the secondment agreement carefully to make sure the new organization has control of the secondees to avoid the PE concern for the foreign university.

F. Data Communication Services

In general, universities operating in China obtain their data communication services through the China Education and Research Network, or CERNET. A JV university will need to register with this service provider and establish connectivity to this network in order for the university to have access to global websites within the framework of national regulation.

G. Curriculum and Degree Majors

In principle, schooling of Chinese-foreign Cooperative Education must abide by Chinese laws, implement China's educational policy, conform to China's public morality, and not harm China's national sovereignty, security, and social public interests.⁶³

MOE approval of a JV university provides general authorization to operate as a recognized institution of higher education. Subsequent approvals are required for particular majors and degree programs. Applications are accepted once a year, in July, with a decision rendered by the following spring. Applications for specific majors require documentation to justify the need and demand for the major, the qualifications of the institution and its faculty to offer the major, the course syllabi that will constitute the major, and a demonstration of the career prospects of graduates of the major. A list and description of the teaching materials and periodic reports on student enrollment, curriculum, faculty, teaching quality, financial status, etc. are also required.⁶⁴

The MOE is the authority that evaluates Chinese-foreign Cooperative Education in terms of schooling and teaching quality. Problems have come to the MOE's attention including the oversupply of courses in business, management, and computer science; the insufficient inclusion of core foreign courses and faculties; and the provision of courses that are in violation of Chinese laws, etc.⁶⁵ In 2018, the MOE terminated 234 CEIs and CEPs for "low teaching quality and professionalism," showing its commitment to enhance the supervision and exit mechanism of Chinese-foreign Cooperative Education.⁶⁶

H. Student Recruitment

The recruitment and admission of undergraduate Chinese students takes place in a hybrid form that takes into account the context of the Chinese national system of college entrance, which includes the famous *Gaokao* entrance exam and other requirements determined by provincial authorities, and the JV university's own holistic criteria that closely follow the U.S. university's approach at home. The hybrid model is designed in principle to reward merit (as demonstrated by the *Gaokao* and related tests) and to find the right students to match the JV university's holistic admissions criteria. The new institution will have to seek authority to recruit and enroll students province by province and will be given a recruitment quota by major,⁶⁷ which is a legal ceiling and a practical floor.⁶⁸ Student recruiting

63 2003 Cooperative Education Regulations, art. 5.

64 2004 Cooperative Education Measures, art. 44.

65 Notice of the MOE on Further Regulating the Order of Chinese-Foreign Cooperative Education issued Apr. 6, 2007, effective on the same day.

66 Notice from General Office of the MOE on Approval of Termination of Some Chinese-Foreign Cooperative Education Institutions and Programs on June 19, 2018, and took effect on the same day.

67 Once students are matriculated at the JV university, they are free to choose any major and are not restricted by the original admissions quota.

68 Practically speaking, it is acceptable if the enrollment is below the approved quota. However, in the long term, a low enrollment rate may cause the Ministry to revoke the approval or not permit a renewal.

materials, such as publications and websites and admissions criteria, all must be approved by the education bureau of the province where the new institution resides.

I. Tuition and Fees Pricing

Chinese-foreign cooperative education is characterized as a “public welfare undertaking” in the 2003 Cooperative Education Regulations. It is the MOE’s policy to prohibit charging indiscriminate and high fees in the name of Chinese-foreign cooperative education, and prevent the tendency of industrialization of education.⁶⁹ Notwithstanding, the 2004 Cooperative Education Measures explicitly allow investors to have a reasonable return.⁷⁰

The provincial price management bureau approves the tuition and all fees charged to students that are Chinese citizens. Proposed pricing must be justified in terms of the cost of delivering the educational services, market demand, and relevant market benchmarks. Maximum prices are approved for several years; institutions generally do not raise their prices each year as is typically the case in the United States. The prices charged to foreign students are not regulated but are filed with the price management bureau and are typically higher than the prices charged to Chinese citizens.

Once operational, the new university will have ongoing interactions with a variety of regulatory agencies at the local, provincial, and national levels. The scope ranges from transactions processing through annual reports, audits, and periodic inspection and review visits. Managing these interactions in a coordinated and efficient way takes expert staffing and forethought.

J. Tax and Permanent Establishment Issues

The first and foremost thing to keep in mind as U.S. colleges and universities rapidly internationalize is that while many colleges and universities are tax-exempt entities in the United States, their tax-exempt status does not automatically carry over to their operations outside the United States. Chinese tax authorities are becoming increasingly more sophisticated in uncovering alleged tax violations and collecting additional taxes and fines. Adding to the complexity of complying with higher education regulations, a tax notice issued in 2018 titled Circular of the State Administration of Taxation on Certain Issues relating to the Implementation of Tax Treaties (Bulletin 11) has resulted in a groundbreaking tax development for CEIs and CEPs.

According to Bulletin 11, CEIs without legal person status, and premises used to carry out academic and teaching activities in connection with a CEP, will constitute a permanent establishment of the foreign university in China. It appears from Bulletin 11 that the Chinese tax authorities have taken the view that a Non-Independent CEI or CEP will result in a per se fixed place of business PE for a foreign university engaging in either of these two forms of Chinese-foreign cooperative education activities.

69 Opinions on Current Sino-Foreign Cooperative Education, arts. 1, 6.

70 2004 Cooperative Education Measures, art. 31.

Bulletin 11 does not provide any guidance on how a foreign university's PE will be taxed in China. Reported tax cases and other available guidance suggest that

- Once a foreign university is deemed to have a PE in China, there are two ways that the PE can be taxed:
 - a. based on its actual profit from the activities constituting the PE or
 - b. based on the deemed profit approach using its revenues or costs/ expenditures derived from or generated in China;
- Taxation on a "deemed profit basis" can result in a foreign nonprofit university being taxed in China, even where it is not making an actual profit from its activity in China and is using the funds consistent with its nonprofit mission;
- To be taxed on an actual profit basis requires the foreign university to keep accurate accounting records and books for its activities in China.

An area that is often overlooked by foreign taxpayers who are found to have PE in China is the implication of its PE status on its employees' individual income tax (IIT) liabilities in China. Under most tax treaties between China and other countries, an individual who is employed by a non-Chinese employer to work in China under a temporary assignment is exempt from IIT in China in any calendar year, if all of the following three conditions are met:

- The individual stays in China in the aggregate for 183 days or less during the calendar year;
- The individual's income is not paid by or on behalf of a Chinese employer; and
- The individual's income is not borne by the PE of the overseas employer.

If a foreign entity is found to have a PE in China, the 183-day exemption is *not* available and the foreign employees who travel to China on behalf of the foreign entity that has a PE will be subject to IIT, even if they spend less than 183 days in China. In fact, the Beijing local tax bureau reported a case whereby the foreign shareholder of a Chinese-foreign JV company was ordered to pay RMB 23 million (roughly USD 3.6 million) of IIT on behalf of its employees after it was found to have a PE in China. A recently issued tax notice titled Announcement of the Ministry of Finance and the State Administration of Taxation on Relevant Individual Income Tax Policies for Non-Resident Individuals and Resident Individuals without Domicile (Announcement 35) stipulates that the PE of a foreign entity shall be treated as a Chinese employer for IIT purpose. It further provides that, for the PE adopting a deemed profit taxation approach or having not paid any enterprise income tax due to no business income, the wages and salaries obtained by its nonresident employees without a domicile in China (usually foreign employees) from working for the PE shall be deemed as being paid or assumed by the PE, regardless of whether such wages and salaries have been recorded in PE's accounting records. In this case, once the foreign university is found to have a PE in China under a Non-Independent CEI or CEP, its employees who travel to China would not be

able to enjoy a treaty benefit for IIT exemption, since their income will be treated as being borne by the PE. Under Announcement 35, employees' income derived from working in China will be subject to IIT, even if the employees stay in China for less than ninety days. In light of Bulletin 11 and Announcement 35, foreign universities with a Non-Independent CEI or CEP in China need to pay special attention to its employees' IIT liabilities in China.

Separately, foreign universities are only exempt from value-added tax (VAT) for the income derived from offering "degree education" in Chinese-foreign cooperative education according to a tax notice titled Announcement of the State Administration of Taxation on Clarifying Several Issues concerning Collection and Administration of Value-added Tax on Chinese-Foreign Cooperative Education and Others published in 2018. A positive development is that the draft VAT Law released in 2019 proposed to extend the VAT exemption scope to educational services provided by schools, and other educational institutions, without specifying "degree education." Therefore, there is a possibility that, with the introduction of the VAT Law, income derived by foreign universities from "nondegree education" in CEI or CEP will be exempt of VAT in the future. Foreign universities are advised to keep an eye on the development and introduction of the China VAT Law.

Due to the outbreak of COVID-19, the delivery of online courses internationally has been a bridge mechanism for quite a few foreign institutions during school closures and may quickly grow in popularity worldwide for the foreseeable future. In terms of VAT taxation for online courses provided by non-Chinese universities to students in China, the latest development focuses on (1) whether a non-Chinese university will be subject to VAT on tuition collected from online courses provided to students in China and (2) if taxable, which tax bureau in China to file and pay the VAT with.

Generally speaking, tuition collected for courses conducted before March 31, 2021 can enjoy VAT exemption in China under the preferential VAT policies issued by the Chinese tax authority in response to COVID-19. No VAT filing is needed to claim this VAT exemption. This preferential VAT policy did not extend beyond March 31, 2021, and there is no change to the current VAT law, thus legally speaking, tuition collected for courses conducted after March 31, 2021 will be subject to VAT and local surcharges in China.

For cross-border services where the service recipient in China (i.e., the students) needs to pay a service fee to the overseas service provider, VAT payment works on a withholding basis. This means that the payor in China will need to withhold VAT and local surcharges from the total service fee and settle these taxes with the Chinese tax authority either before or after (depending on the amount of remittance) remitting the service fee. Therefore, legally speaking, Chinese students are obliged to withhold and settle VAT for the tuition paid to the foreign universities for the online classes. However, this is rarely the case in practice.

The relevant VAT regulations do not clarify what happens when the withholding agent fails to withhold, and if the taxpayer chooses to file and pay the VAT on its own, which tax bureau the taxpayer should file with. Generally speaking, the tax filing should be done with the tax bureau where the income is

derived, but as with the case of online transactions, this would be impossible as the consumers/students can be all over China. Based on our experience, some local tax authorities may require that there must be students from the local city enrolled in the program for the tax bureau to accept the VAT filing/payment; and some local tax authorities are more relaxed and said that as long as the non-Chinese university has an authorized agent in the city, the tax bureau can accept the VAT filing/payment.

K. Immigration and Visa Rules

According to the Exit and Entry Administration Law and the Regulation on Foreigner Exit and Entry Administration (the 2013 Visa Regulations), there are currently twelve types of visas issued by the Chinese government to aliens entering China. Table 2 is a brief introduction to the seven types that are most relevant to education activities.

Table 2: Introduction of Visas in China

Type	Description
F (Visiting Visa)	The F visa is issued to aliens who come to China for academic and cultural exchanges, visits, and research activities. The key supporting document for the F visa application is a letter of invitation issued by an entity in China.
L (Tourist Visa)	The L visa is issued to aliens who come to China for sightseeing. The key supporting document for the L visa application is the applicant's travel itinerary. Foreign citizens may apply for a single-entry, double-entry, or multiple-entry L visa that is valid for six months or one year. Aliens who come to China for group travel can be issued Group L visas.
M (Trading Visa)	The M visa is issued to aliens who come to China for commercial and trade activities. The key supporting document for an M visa application is a letter of invitation issued by the applicant's commercial or trade partner within China.
R (Specialist Visa)	The R visa is issued to foreigners whose specialized skills are urgently needed in China. The key supporting document is the Confirmation Letter for Top Level Overseas Qualifying Personnel issued by the State Administration of Foreign Expert Affairs. Aliens in possession of an R Visa will still need to procure work and residence permits to work and live in China.
S Visa (Private Visa; S1 and S2 Visas)	The S1 visa is issued to the spouses, parents, and children under the age of eighteen or parents-in-law of aliens residing long term (more than 180 days) in China as well as for aliens who reside in China for other personal matters. The S2 visa is for family members of aliens staying short term (less than 180 days) in China for work as well as for persons staying in China for other personal matters.

X (Student Visa; X1 and X2 Visas)	The X1 visa is issued to aliens who come to China for long-term study (more than 180 days). The X2 visa is issued to aliens who come to China for short-term study (less than 180 days). Both X1 and X2 visas require an admission notice from a Chinese educational institution. X1 visa holders must apply for a residence permit with the local public security authorities within thirty days of entry into China.
Z (Work Visa)	The Z visa is issued to aliens coming to China for work. The key supporting document for a Z visa application is the applicant's Chinese work permit or a document confirming his or her expertise. Z Visa holders must apply for a residence permit with the local public security authorities within thirty days of entry into China. In accordance with a 2014 China-U.S. visa arrangement, U.S. citizens may be eligible for a ten-year multiple entry visa.

The 2013 Visa Regulations emphasize that the visa holder can only engage in the activities corresponding to the visa he or she has.

Foreign faculty may hold either an F visiting visa or L tourist visa to enter into China for a short-term trip related to a Chinese-foreign joint educational program. Faculty members may be able to obtain a multiple-entry F visa in order to teach in China for more than three months. Under the 2013 Visa Regulations, the F visiting visa is more appropriate than an L tourist visa, if the faculty member is engaged in teaching or research activities in China for a term of less than three months. If the activities are deemed related to business or trading, the Chinese authorities may issue an M trading visa rather than an F visa. Although it is not uncommon in practice that faculty and staff members use an L visa to come into China for meetings or conferences, an F or M visa will likely be more appropriate for compliance purposes. If a faculty member intends to stay in China for more than three months to teach or to conduct research, the faculty member should apply for a Z work visa. An F or M visa may be considered to be inappropriate for such a stay.

For students, both X1 and X2 visas require an admission letter from a Chinese educational institution. Generally speaking, an international student studying in China with an X1 visa may do an internship in China. For foreign students studying in overseas universities and international students holding an X2 visa to do an internship in China, the most legitimate way would be applying for an S2 visa marked with an "internship" stamp. The S2 visa, as mentioned above, is normally issued to those who intend to visit China for short-term private matters, including visiting their immediate family members who are non-Chinese working or studying in China. The S2 visa marked with an "internship" stamp that we describe here is a new pilot project that just started to be implemented in specific areas such as Shanghai, Zhongguancun District of Beijing, Guangdong FTZ, Hangzhou, Sichuan FTZ, Chongqing, Anhui Province, Changchun New Area, and Tianjin, etc.

This S2 visa cannot be applied for at the Chinese embassy/consulate at the students' home country. There are two ways of application, both of which, however, are subject to the discretion of the visa official in charge, who reviews and grants approval on a case-by-case basis, and are not easy to acquire in practice:

1. The local invitation entity could apply on behalf of the student online through a platform administered by the local Exit-Entry Administration Bureau. Once it has been approved, the student may directly get an S2 visa at the airport when they arrive in China.
2. The students may first come into China holding a different visa, such as L visa or M visa, and apply for “switching” the visa to an S2 visa marked with an “internship” stamp inside China at the local Exit-Entry Administration Bureau.

For both approaches above to work, assistance of a top-ranking domestic university and/or sponsor company would be really helpful. If such assistance cannot be procured, we note that in practice some students did enter China with an F or M visa (more often an M visa) by describing their short-term internship as “field study.” No compensation can be obtained for this kind of “field study.”

In addition to the 2013 Visa Regulations, Chinese authorities have issued certain implementing rules clarifying applicable targets of certain visa types. For example, the Circular on Relevant Handling Procedures for Foreigners Entering China for the Accomplishment of Short-Term Work Assignments (Trial) (Trial Procedures)⁷¹ provides that if foreigners come to China for the following work activities for less than ninety days, they need to apply for a short-term Z visa and residence permit (if staying for more than thirty days): (1) completion of technical work, scientific research, management or provision of guidance; (2) training in a sports agency in China; (3) filming; and (4) engaging in foreign-related commercial performances.⁷² However, the Trial Procedures have not been strictly enforced in practice.

Also, the Visas System for Overseas Qualifying Personnel Implementing Procedures (Overseas Qualifying Personnel Visa Rules) further clarify that R visas are, broadly speaking, available to two groups: (1) top-level overseas qualifying personnel and (2) overseas qualifying personnel whose talents are urgently needed for China national development. More specifically, this refers to scientists, leading figures in science and technology, international entrepreneurs, and specialist or highly skilled professionals.⁷³ The Overseas Qualifying Personnel Visa Rules greatly simplified the application procedures and shortened the processing time for R visas, with the aim of attracting more foreign talent to China.

If the foreigners are illegally employed or engage in activities that are not consistent with their visa types, the Chinese authorities may impose a fine on the foreigners ranging from RMB 5,000 to RMB 20,000 (approx. USD 700–3,000). In

71 Trial Procedures were jointly issued by the Ministry of Human Resources and Social Security, Ministry of Foreign Affairs, Ministry of Public Security, and Ministry of Culture on November 6, 2014, and were made effective on January 1, 2015.

72 To avoid doubt, being sent to a branch, subsidiary, or representative office in China to complete a short-term work assignment or participating in sports event in China are not deemed as short-term work here.

73 Overseas Qualifying Personnel Visa Rules were jointly issued and made effective by the State Administration of Foreign Expert Affairs, the Ministry of Foreign Affairs, and the Ministry of Public Security on November 28, 2017.

serious situations, the foreigners may even be subject to detention for five to fifteen days. Entities that illegally employ foreigners or assist foreigners to violate the visa rules may also be exposed to fines, penalties, confiscation of illegal earnings, and detention orders.

L. State Foreign Exchange Administration (SAFE); Foreign Exchange Restrictions

Although the internationalization of the RMB is a continuing trend, RMB is still not freely convertible into other currencies. China still applies foreign exchange controls through the SAFE in relation to foreign investment in China and cross-border transactions. For every transaction involving foreign currency, a genuine and lawful ground is necessary.

China divides cross-border payments into two categories: (1) current account items, such as the foreign exchange incomes and expenditures incurred in international trade transactions; and (ii) capital account items, such as foreign currency loans or equity investments.

1. *Current Account Items.* Current account transactions normally only require proof to be shown to the remitting/receiving bank in China of a genuine and lawful underlying transaction. There is a quota for both Chinese individuals and entities per year to make and receive payment in foreign currencies under the current account: USD 50,000 for Chinese individuals, USD 50,000 for Chinese registered entities to pay overseas entities, and USD 5,000 for Chinese registered entities to pay overseas individuals. Payment within such quota can be remitted easily, since the bank will generally only review the personal ID card of the individual or the transaction contract and/or invoice of the entity when making the remittance. For payment beyond such threshold, the underlying transaction needs to be examined by the bank with more supporting documentation pursuant to SAFE's instructions.
2. *Capital Account Items.* Capital account transactions are usually subject to stricter regulation and administration and may, in some cases, require SAFE's approval.

Due to capital flight concerns, China has strengthened its foreign exchange controls. Chinese banks now require more supporting documentation for large amount payments for service fees and may review invoices and contracts. This has significantly impacted the education-related service fee transfers from Chinese universities to foreign universities and makes it more complicated for Chinese individuals or entities to make large donations to foreign universities.

There is a requirement that a single purchase or payment of foreign exchange and RMB/foreign currency disbursement in an amount equivalent to or greater than USD 5 million for capital account transactions must be first reported to the Beijing SAFE via the SAFE internal information platform as a large transaction. Also, such purchase or payment is subject to approval of the SAFE, the People's Bank of China (PBOC), the National Development and Reform Commission (NDRC), and the MOFCOM. If the transaction amount exceeds USD 50 million, a stricter level of scrutiny applies, involving direct monitoring and review by the

central SAFE. Splitting up transactions into smaller amounts to circumvent such reporting requirement is forbidden.

M. Health and Safety

Safety and health are important topics for the operation of CEIs and CEPs in China. The Education Law generally provides that the educational premises, facilities, and equipment must conform to relevant standards.

The Implementing Regulations for the Private School Law⁷⁴ provide that in the case of an educational institution's failure to take timely measures when there is a serious potential safety hazard on its facilities, to the extent that a severe casualty accident occurs, the cooperative parties of the CEIs will not be allowed to obtain reasonable returns from the CEIs.⁷⁵

The PRC Civil Code⁷⁶ also requires educational institutions to be liable for personal injury suffered by a person with no capacity for civil acts (i.e., a minor under the age of eight or an adult with limited capacity) during the course of studying or living at the educational institution, unless the educational institution can prove the fulfillment of its education or management responsibilities. For personal injury suffered by a person with limited capacity for civil acts during the course of studying or living at the educational institution, the education institutional shall be liable in the case of its failure to fulfill its education and management responsibilities.⁷⁷

In practice, the cooperative education agreement for a CEI usually will contain provisions to address this topic such as that

- The CEI shall be responsible to ensure as part of a systematic health, safety, security, and environment (HSSE) management system that
 - the campus buildings are designed, constructed, maintained, and operated in accordance with the HSSE standards within the education industry, which shall not be less than the HSSE standards required by applicable Chinese law; and

74 The Implementing Regulations for the Private School Law, issued Mar. 5, 2004, effective Apr. 1, 2004.

75 According to article 45 of the Implementing Regulations for the Private School Law, the amount of returns should be in proportion to the surplus of the CEIs that is determined based on (1) items and rates of fee collected, (2) the proportion of expenses used for educational and teaching activities and improvement of conditions of the operation of CEI to fees collected, and (3) the level of school operation and quality of education. The exact amount or scope of returns that should be withheld is subject to severity of the accident occurred.

76 The PRC Civil Code, May 28, 2020, effective Jan. 1, 2021.

77 According to article 9 of the Measures for the Disposal of the Student Injury Accidents and court cases, the education and management responsibilities of an educational institution include without limitation (1) ensuring the school premises, site, and other educational, teaching, and daily facilities meet relevant safety standards; (2) ensuring drugs, foods, drinking water, etc. supplied by the education institution to students meet relevant national and/or industrial safety standards; (3) launching necessary education on safety, self-protection, and self-rescues training programs for students; and (4) taking immediate measures to provide relief to the injured students when injury accidents take place.

- an emergency response program is established under which the president of the CEI shall promptly advise the board of trustees and each of the cooperative parties of any accidents arising out of or in connection with the operations of the CEI that causes casualties or serious injuries or that may have a material negative effect on the environment; and
- a report on all HSSE matters shall be made by the Board president at least quarterly for safety matters and annually for other matters.
- The president, executive vice president, or any of the trustees may require a special Board meeting to be held to discuss ways to deal with and prevent any accident or incident.

N. IP as a Capital Contribution

An important element in foreign participation in education is the licensing of IP rights to the CEIs and CEPs.

Article 10 of the 2003 Cooperative Education Regulations provides the following:

The Parties may use cash, in-kinds, land use rights, IP rights and other assets as their capital contribution. Investment made in the form of intellectual property rights by the Chinese and Foreign Parties shall not exceed one third of their respective total investment. However, in the case of a foreign education institution invited by the State Council's education administrative department or labor administrative department or a people's government of a province, autonomous region, or municipality directly under the Central Government to cooperatively operate an educational institution in China, its investment in the form of intellectual property rights may exceed one third of its total investment.

Articles 10 and 11 of the 2004 Cooperative Education Measures further provide that

... The Chinese and Foreign Parties shall, according to the principles of fairness and reasonableness, determine through consultation the valued price of the intellectual property rights invested in the operation of an educational institution by the Chinese and Foreign Parties, or through appointing a social intermediary organization that both parties agree to make an evaluation, and shall go through the relevant procedures in accordance with the law.

Where a Chinese or Foreign Party makes investment in the operation thereof with any intellectual property right, the Chinese or Foreign Party shall submit the materials related to such intellectual property right, including a photocopy of the intellectual property right certificate, the validity status thereof, the practical value of the right, the calculation basis for valuation and pricing of the right, the valuation and pricing agreement entered into by the two parties, and other relevant documents.

For foreign invested enterprises in the commercial context, only a transfer of ownership of the IP rights can be used as a capital contribution. For CEIs, each party is permitted to also use IP licenses for its capital contribution, subject to percentage limits on intangible contributions of 33 percent. There is a greater degree of flexibility by the parties in determining their respective contributions in the educational context. For example, foreign universities may use their IP rights as their entire capital contribution, if the statutory conditions are met. As a practical matter there are difficulties in valuing such IP contributions because the valuation process requires the sign-off on the IP valuation by a Chinese valuation company, notwithstanding what the parties may agree regarding valuations. There is a wide range in quality and understanding of international valuation practices by Chinese valuation companies.

Even if the IP rights are not used as a capital contribution, IP licenses remain common to enable the CEIs and CEPs to operate (e.g., for its name and curriculum), and as a way to obtain royalty payments from the CEIs and CEPs in China. Unlike a capital contribution of IP rights, the licensing for the use of a name or curriculum is a commercial matter that can be negotiated between the parties.

O. Trademarks, Copyrights, and Domain Names

The IP rights most relevant to foreign participation in the Chinese education sector are trademarks that protect the name of the school and copyrights that protect the curriculum, syllabi, and teaching materials.

1. Trademarks

China adopted the first-to-file rule, which means that the first entity to validly apply for a trademark obtains it. Prior use is not required. It is essential to file trademark applications in China as early as possible.

For educational institutions, Classes 41 (education and entertainment services) and 16 (paper goods and printed matter) are the core trademark classes. Additionally, defensive filings are advisable for Classes 9 (for software, etc.), 25 (clothing), 35 (for advertising) and 42 (for different kinds of research).⁷⁸ These defensive filings can be used to prevent “trademark squatters” or other bad faith infringers, which are notorious in China, from abusing or squatting on the education institution’s marks.

For educational institutions whose names incorporate the name of the city or region where they were founded, registering the institution name as a trademark is usually problematic because of article 10 of PRC Trademark Law.⁷⁹ Article 10

⁷⁸ A full overview of all Nice Classes is available at <http://www.wipo.int/classifications/nice/en/>, last visited on May 7, 2021.

⁷⁹ PRC Trademark Law (as amended on Aug. 30, 2013, <http://www.wipo.int/wipolex/en/details.jsp?id=13198>). Article 10 provides, “Names of administrative districts at or above the county level and commonly-known foreign place names may not be used as trademarks, except where such names have other meanings or are an integral component of a collective mark or certification mark.”

provides that certain foreign geographical names cannot be used as trademarks due to “lack of distinctiveness.” Educational institutions can overcome this restriction by registering the institution’s name combined with a distinctive logo or as an abbreviated name of the institution.

2. *Copyrights*

For educational institutions, copyright protection is often one of their most important IP rights. Many of the most crucial materials used by educational institutions in China will qualify for copyright protection such as curriculum, books, and materials.⁸⁰

In China, the term of copyright protection is the life of the author plus fifty years. In the case of a work created by a school or university, the term expires on December 31 of the fiftieth year after the work’s first publication. Copyright ownership arises automatically on the date of completion of the works, so it is not mandatory to register the copyright.

Although copyright registration is not mandatory, it is advisable for copyright owners to use the “©” symbol, in combination with the name of the copyright owner and the year of publication on all published works. An explicit demonstration indicating that a work is copyrighted can help if there are disputes about the copyrighted material.

Also, copyright registration with the Copyright Protection Center of China usually will strengthen the position of the copyright owner, since a copyright registration can be used as prima facie evidence of ownership in a dispute.

3. *Domain Names*

Registering a “.cn” domain name can be an issue for foreign education institutions. The China Internet Network Information Center (Center), the registrar for “.cn” domain names, requires that an educational institution has an official Chinese company registration certificate in order to hold a “.cn” domain name in China. The Center also requires a letter of commitment, signed by the legal representative of the Chinese company.

P. IP Licensing in China

When foreign education institutions provide an IP license to their Chinese partners, CEIs or CEPs in China, copyright is the major right that they wish to protect. The most common issues to consider are the following:

- *Adaptations and translations.* The right to adapt is one of the property rights included in copyright. This means that foreign education institutions

Trademarks using place names that have already been registered shall remain valid.”

80 PRC Copyright Law, art. 3 (Feb. 26, 2010, <http://www.wipo.int/wipolex/en/details.jsp?id=6062>).

can allow or forbid their works to be translated. Moreover, if a work is translated, the institution will still own the basic copyright in such materials. However, the translator may at the same time acquire a *secondary* copyright in the translation itself. It is advisable to include a copyright assignment arrangement in an agreement regarding the translation of works.

- *Works created in the course of employment.* According to the China Copyright Law (article 16), works created in the course of employment are in principle owned by the author of the work, not by the employer. It is therefore essential to include a copyright assignment in all employment agreements with the education institution's faculty and staff.
- *Exception for education and teaching.* The China Copyright Law (articles 22 and 23) provides for an exception to copyrights for education and teaching purposes (also called "fair use"). This limited exception means that it is generally permissible to reproduce, without the payment of compensation, part of a work on a limited scale, for education, teaching, and classroom use, as long as the work was already published, the author is mentioned, and such use does not adversely affect the rights of the copyright owner. This means that education institutions can use copyright protected works on a limited basis during their classes.
- *Improvements.* Unless the license agreement grants the licensee the right to improve the licensed IP, the licensee has no right to improve and modify the licensed IP. It is advisable to include a provision on improvements in IP license agreements.

Q. IP Enforcement in China

For educational institutions in China, the major infringements often involve (1) the unauthorized use of trademarks or institution names and (2) unauthorized use of curriculum materials. These are regulated by several laws, including the China Trademark Law, Copyright Law, and Anti-Unfair Competition Law.

Below are common enforcement options against IP infringements.

- *Administrative action.* SAMR and its local branches regulate trademark infringement and unfair competition acts. The National Copyright Administration (NCA) and its local offices regulate cases of copyright infringement. Once a complaint is filed and accepted, the agency can take a range of actions, including visiting the infringer's premises; inspecting and sealing or seizing the infringing goods; and/or confiscating those documents, which relate to infringing acts. Also, the agency can arrange for the destruction of all infringing products and impose a fine.
- *Civil action.* Chinese courts retain the ability to issue preliminary and permanent injunctions, and to order compensation payments for any prejudice the claimant may suffer due to infringement. The maximum

statutory compensations are RMB 5,000,000 for trademark infringement⁸¹ and RMB 500,000 for copyright infringement.⁸²

- *Criminal action.* Criminal action is available for dealing with counterfeit goods and copyright piracy.⁸³ Unfortunately, unauthorized use of a service mark, including an educational service mark, does not constitute a crime in China. The Public Security Bureau (PSB) is responsible for IP-related crimes. The PSB conducts investigations of infringing activities and can transfer a case to the Procuratorate, which decides whether to prosecute the infringer in a People's Court. If an IP owner has initial evidence to prove the infringer's criminal offense, it may directly bring a criminal action before the court, without involving the PSB.

R. *Cybersecurity Regulatory Framework*

China's Cyber Security Law, the fundamental law on the regulation and supervision of cyber activities, became effective on June 1, 2017.⁸⁴ To facilitate the implementation of the Cyber Security Law, a number of supporting rules have been adopted or are pending finalization, including the Measures for Security Review of Network Product and Services,⁸⁵ the Personal Information Specification,⁸⁶ the Provisions on Online Protection of Children's Personal Information,⁸⁷ the Provisions for Security Protection of Critical Information Infrastructure,⁸⁸ the Measures for Security Assessment on Cross-Border Transfer of Personal Information,⁸⁹ and the Data Security Measures.⁹⁰ The Cyber Security Law, together with its supporting rules, promotes a more heavily regulated Chinese Internet and technology sector.

81 PRC Trademark Law, art. 63, <http://www.wipo.int/wipolex/en/details.jsp?id=13198>, last visited on May 7, 2021.

82 PRC Copyright Law, art. 49, <http://www.wipo.int/wipolex/en/details.jsp?id=6062>, last visited on May 7, 2021.

83 PRC Copyright Law, art. 48; PRC Trademark Law, arts. 61, 67 and 68.

84 The Cyber Security Law was issued by the Standing Committee of the National People's Congress on November 7, 2016.

85 Issued by the State Internet Information Office on May 2, 2017, effective June 1, 2017.

86 Issued by the Administration of Quality Supervision, Inspection and Quarantine (whose duties have been merged into SAMR) on December 29, 2017, effective May 1, 2018. The amended version of the Personal Information Security Specification, was issued on March 6, 2020, and took effect on October 1, 2020.

87 Issued by the Cyberspace Administration of China on Aug. 22, 2019, effective Oct. 1, 2019.

88 Issued by the State Internet Information Office on July 11, 2017 but currently is still a draft.

89 Issued by the State Internet Information Office on June 13, 2019 but currently is still a draft.

90 Issued by the State Internet Information Office on May 28, 2019 but currently is still a draft.

S. Network Operators and Data Controllers

1. Obligations of Network Operators

Under the Cyber Security Law, network operators are broadly defined as the owner and administrator of networks and network service providers. This definition covers almost all businesses with operations that use networks in China.

When a foreign education institution via CEI and WFOE, makes use of network or network-related tools to provide services in China, it is very likely that it will be treated as a network operator. Obligations for network operators under the Cyber Security Law include the following:

- *The obligation for network operational security:* establishing an internal security management system; operating procedures and technical measures against security breach incidents; appointing person responsible for network security; retaining a relevant weblog for not less than six months; and adopting data protection measures, including data classification, important data backup, and data encryption.
- *The obligation for network information security:* establishing a robust user data protection system; publishing rules concerning the collection and use of personal data, and expressly stating the purpose, method, and scope of data collection and use; obtaining users' consent for data processing activities; and reporting to relevant authorities if a data security incident takes place or is likely to take place.
- *The obligation to cooperate with authorities:* initiating relevant emergency response plans upon the occurrence of cyber security incidents and reporting to the relevant authorities; and providing technical support and assistance in national security and criminal investigations.

2. Obligations of Critical Information Infrastructure Operators (CIIO)

The Cyber Security Law does not provide a clear definition of critical information infrastructure (CII). One of its implementing rules, the Provisions for Security Protection of Critical Information Infrastructure, which is still at the draft stage, provides that an education institution can be a CIIO if it operates network facilities or has information systems that, if they are destroyed or experience a loss of functionality or data leakage, may result in damages to the national security, the national economy, and people's livelihood or the public interest of China. The risk for a CEI to be considered a CIIO in China is relatively low.

CIIOs are subject to stricter obligations. For example, CIIOs will be subject to certain China data localization requirements and security management obligations. CIIOs also have an obligation to assess network security and report potential risks as well as enter into security and confidentiality agreements with product and service suppliers when purchasing network products and services.

3. *Obligations of Data Controllers*⁹¹

CEIs or the WFOEs that collect and use personal data (including personal data of students and faculties) in China will be subject to Chinese data protection laws and regulations. The Cyber Security Law provides a series of high-level data protection rules. In addition to the Cyber Security Law, a few implementing rules provide further guidance on data handling activities, which include the Personal Information Security Specification (Specification) and the draft of Measures for Security Assessment on Cross-Border Transfer of Personal Information (Data Export Measures). The Specification is a nonbinding national standard and became effective May 1, 2018 (and amendment to which became effective on October 1, 2020). The Specification gives detailed guidance on the collection, use, sharing, and disclosure of personal data. It is highly recommended that data controllers, when engaging in personal data handling activities in China, should be in compliance with this Specification. The Export Measures are currently still a draft. There has been some back-and-forth with respect to the regulatory requirements in connection with the cross-border transfer of personal data in prior versions of drafts. The most recent draft Data Export Measures issued on June 13, 2019, require all network operators to (1) enter into a cross-border data transfer agreement with foreign data recipients, which shall contain standard clauses as provided in the draft; (2) conduct a security assessment before transferring personal data overseas and outline how a security assessment should be performed; and (3) assume ongoing obligations to ensure the security of transferred personal data.

Personal data is classified into two categories in China: (1) personal general data and (2) personal sensitive data. Personal data is broadly defined as information that is recorded in an electronic or other manner and may independently, or in combination with other information, identify an individual or reflect the activity status of an individual. Personal sensitive data means personal data that may cause reputational, physical, or mental damages or discriminatory treatment, if divulged, illegally provided or abused. Personal data that does not fall within the scope of personal sensitive data is automatically deemed personal general data.

If a CEI or a WFOE collects general personal data in China, its key obligations under the current legal regime is to obtain consent from data subjects. In the consent request form, data controllers must specify the type of data collected, the purpose of the data collection, storage time period and location, and data security capability. Chinese law does not expressly require, but encourages, data controllers to obtain an explicit consent for collection of general personal data.

For personal sensitive data, data controllers should obtain explicit consent from data subjects. Personal data of children under the age of fourteen is treated as personal sensitive data, and eligible consent must come from the child's legal guardian. An explicit consent is an affirmative act of the data subject. The valid forms of an explicit consent include giving a written statement, clicking a checkbox to show consent, and sending a consent message.

⁹¹ Data controllers are defined in the Specification as entities or individuals who have the right to decide the purposes and methods of personal data processing.

A notable update is that China's first Personal Information Protection Law will very likely be introduced within the year of 2021. On 29 April 2021, China's National People's Congress released on its official website the second consultation draft of the Personal Information Protection Law ("Draft PIPL").⁹² Key highlights in the Draft PIPL include:

1. providing additional legal bases for processing personal data in addition to consent, such as contractual performance, compliance with applicable laws, processing of publicly available personal data, processing for public health and public interest purpose;
2. providing a legal basis for extraterritorial enforcement, which would cause the law to apply to the entities located outside of China, if they collect personal data of data subjects resident in China with an aim to provide services or products to or analyse or evaluate the behaviour of such data subjects in China;
3. providing multiple pathways for cross-border transfer of personal data, such as security assessment, certification, conclusion of contract containing certain standard contractual clauses, which in a way reshapes the mechanism proposed under the Data Export Measures;
4. reinforcing the obligations of mega basic internet platform services operators; and
5. significantly increasing monetary fines for breaches, which could amount to RMB 50 million or 5% of the company's total turnover in the preceding year.

T. Financing of CEIs

It is critical for CEIs to have sufficient financing to establish successful operations in China. The issue of financing can be tricky because CEIs often face difficulties with obtaining consistent financial support from the Chinese government (typically, from the local government) and are confronted with strict foreign exchange controls of China that can make it difficult to bring foreign capital into China. This section explains three methods for foreign participants to raise money for the establishment and operation of CEIs: (1) partner financing, (2) tuition and fees, and (3) philanthropy.

1. Partner Financing

Pursuant to article 10 of the 2003 Cooperative Education Regulations, a Chinese or foreign education institution may contribute with funds, in kind or in the form of land-use rights, IP rights or other assets to establish a CEI. Specifically, Chinese or foreign education institutions are required to make payments in full within a

⁹² A full copy of this draft PIPL is available at <http://www.npc.gov.cn/flcaw/flca/f80818178f9100801791b35d78b4eb4/attachment.pdf>, last visited on May 19, 2021.

specified time period and are prohibited from withdrawing the registered capital or misappropriating the operating funds during the existence of the CEIs.

In practice, the Chinese education institutions provide the facilities, such as the premises, land, and funds, and the foreign education institutions largely provide its teaching resources and IP and faculty. As a general matter, foreign education institutions have been reluctant to commit capital funding to CEIs. Typically, most of the CEI funding is provided by the Chinese education partner or in some cases, a business or government agency where the CEI is located. In general, where there is a high-quality foreign education partner, either the Chinese or foreign institution may receive capital contributions through contracting with a third-party entity or an individual in accordance with article 8 of the 2004 Cooperative Education Measures. Such third-party entity or individual may, as the representative of either of the Chinese or foreign institution, be a member of the Board of the proposed CEI but not the Chairman. Under these Measures, Chinese companies can provide funds and other facilities for the benefit of the CEI through contracting with either the Chinese or the foreign institution, or both.

Chinese local governments can also play an important role in providing financial support or subsidies in the establishment of CEIs. For example, University of Nottingham Ningbo China, which operates a successful CEI in China, has been strongly supported by the Zhejiang and Ningbo governments. The Ningbo government allocated special funds for the development of the CEI. A potential risk of CEI financial support from the Chinese government is that it may make the CEI an educational institution run by the government and thus the use of governmental funding of CEIs may subject the CEI to an annual audit required by the local government. Although as a practical matter, a CEI is likely to be subject to some form of audit by the Chinese tax authorities. In general, CEIs need to be audited according to Chinese accounting principles and are Chinese taxpayers subject to tax audit.

2. *Tuition and Fees*

Based on articles 38 and 39 of the 2003 Cooperative Education Regulations and article 43 of the 2004 Cooperative Education Measures, all tuition and fees collected by CEIs are major financial sources for CEIs. Tuition and fees are required to be used for educational and teaching activities as well as improving school operations. The standards governing the fees that the CEI can charge are determined in accordance with the relevant provisions of the governmental authorities of the province or municipality in which the CEI is located. Also, tuition and fee rates are required to be disclosed in the recruitment information.

There is currently no national Chinese rule that provides overall guidance on tuition and fees of CEPs and CEIs. Various local authorities, such as Shanghai, Jiangsu, Guangzhou, and Shandong, have different local rules on tuition and fees. As a general rule, the tuition and fees of CEPs and CEIs are guided by the local government, and for those offering diplomas and degrees, their tuition standards require approval from the local MOE and the pricing authorities. For other CEIs and CEPs, tuition standards only require a record filing with the local MOE and the pricing authorities.

3. *Philanthropy*

a. *Contributions to Foreign Universities.*

The legal and practical framework for philanthropy with regard to foreign universities in China has two aspects: (1) seeking funding for the foreign university from Chinese supporters, such as alumni, parents, and friends of the university, and (2) seeking funding for the CEI or CEP to help offset the costs of operations.

The topic of fundraising by foreign universities has become more complex as a result of a combination of factors. The first development was less of a legal concern, but rather a practical concern that arose from a well-known donor family making substantial unrestricted gifts to two U.S. universities several years ago.⁹³ There was considerable criticism by the Chinese public, who complained that the donors were abandoning the educational needs in China. Since this development, there has been a trend by Chinese donors who are making substantial contributions to foreign universities to require some of the funds to benefit China such as programs for scholarships for Chinese students, development of centers in China, and the funding of studies to benefit China.

More recently a combination of the Foreign NGO Law and a tightening of capital outflows due to capital flight and corruption concerns have made it more difficult to make contributions to foreign universities.⁹⁴ If a Chinese donor wants to make a donation or sponsorship in RMB and wishes not to go through the difficulty of applying to make an overseas payment, then the WFOE is the most logical choice as the recipient of the payment. Once the WFOE receives the RMB funding, it can (1) use the funds consistent with the intent of the donation or sponsorship and (2) transfer funds to the foreign institution through a service agreement for any services or benefits to be provided by the foreign institution. To the extent that the funds are not used by the WFOE or paid to the foreign institution pursuant to a service agreement, the remainder of any donation or sponsorship would be treated as revenue of the WFOE. The surplus over expenses would be income that can be distributed as a dividend to its shareholders after paying taxes and other necessary expenses.

93 In 2010, Zhang Lei, a Chinese fund manager who earned an MBA at Yale University, donated USD 8,888,888 to Yale University, which triggered a fiery debate on why the Chinese individual made a donation to a foreign university. Sue Feng, *Chinese Gift to Yale Earns Big Controversy at Home* WALL ST. J. (Jan. 14, 2010), <https://blogs.wsj.com/chinarealtime/2010/01/14/chinese-gift-to-yale-earns-big-controversy-at-home/>. In 2014, a Chinese couple, Pan Shiyi and Zhang Xin, signed a gift of USD 15 million to Harvard University and later made gifts to other colleges in the United State and United Kingdom, with a grand total scholarship fund of USD \$100 million to foreign universities. Zheyang Ni, *SOHO China's \$15M Harvard Gift: Is the Money Better Spent in China* FORBES (July 24, 2014), <https://www.forbes.com/sites/zheyanni/2014/07/24/soho-chinas-15m-harvard-gift-is-the-money-better-spent-in-china/#213df52f2ebd>.

94 Article 21 of the Foreign NGO Law provides that "funding for activities of overseas NGOs in the mainland of China include the following: (1) Legal sources of funds overseas; (2) Interest on bank deposits in the mainland of China; (3) Other funds legally acquired in the mainland of China. Operations of overseas NGOs in the mainland of China shall not involve the acquisition or use of funds other than those stipulated in this article. Overseas NGOs and their representative offices shall not solicit donations in the mainland of China."

If a donor wants to make a donation or sponsorship from onshore in China directly to a foreign institution, there are often considerable administrative difficulties in making such payments from onshore to offshore. Typically, a donor would need to enter into a service agreement to accomplish those objectives.

A potential challenge is that the donor may need to convince the Chinese bank that the contract is appropriate and not a guise for money laundering or capital flight before the bank will approve the payment. Chinese individuals who wish to make donations or sponsorships tend to do so through one of the companies that they own rather than as an individual because of the difficulty for an individual to obtain a tax-deductible donation or sponsorship, whereas a services agreement for a company can be a deductible expense. Describing the funding from Chinese companies as service fees or sponsorship fees, rather than as a gift, may help facilitate the payment of such funds from outside of China.

b. Foundation Formation by CEIs.

For a CEI with an independent legal person status, it may consider setting up an education foundation to raise funds in China. An education foundation enjoys certain tax benefits, including providing tax deduction invoices to its donors.

The Charity Law, which took effect on September 1, 2016, is the first legislation to regulate charitable activities in China. Under the Charity Law, only charitable organizations are qualified to raise funds in China. Unlike the legal framework in many countries in which universities are eligible to receive charitable giving directly, in China, neither the Chinese university that partners to form the CEI or host the CEP is a charitable organization, nor is the CEI or CEP. As such, the Chinese CEI partner and the CEI itself are restricted from raising charitable donations.⁹⁵ Many JV universities in China have set up foundations so they can engage in fundraising activities in China. Examples include the NYU Shanghai Foundation, DKU Foundation and CKGSB Foundation.

Most of the foundations established after September 1, 2016, applied to become charitable organizations at the time of their establishment.⁹⁶ For the first two years after establishment, a foundation is only allowed to raise funds from specific persons, namely, the applicants and directors, and potentially from other entities

⁹⁵ Although the CEI and its Chinese partner are generally not allowed to engage in fundraising activities, they can still receive donations in China. However, unlike a foundation, they cannot issue invoices to enable the donors to receive a tax benefit which is not the most tax efficient.

⁹⁶ Subject to Ministry of Civil Affairs (MCA) requirements, establishing a foundation, whether a public foundation or a nonpublic foundation as classified under the current Foundation Administration Regulation must meet certain requirements, including that it be established for a specific public welfare purpose, it must have a certain amount of initial capital, and have a formal name, articles of association, organizational structure, and full-time personnel qualified for the activities that it conducts. The MCA is responsible for the registration and management of (1) national public foundations; (2) foundations whose legal representatives are non-Chinese residents; (3) nonpublic foundations, with an initial capital exceeding RMB 20 million yuan; and (4) representative offices established in the China mainland by overseas foundations. The local branches of MCA are responsible for the registration and management of local public foundations and nonpublic foundations with initial capital not exceeding RMB 20 million.

having an interest in the foundation. After the first two years, the foundation can apply for the qualification for raising funds from the public.

After obtaining permission for public fundraising from Ministry of Civil Affairs (MCA) or its local branch, the foundation should make a plan for public fundraising that should include the geographical regions, donation options, beneficiaries, the uses of donations, and the costs and expenses of fundraising. This plan should be filed with the MCA registration authority for record.

For those foundations that registered with the provincial MCA, their public fundraising activities are supposed to be conducted within the province where they are located. If the local foundation needs to conduct fundraising activities outside of the province, the foundation may need to report its fundraising activities to the local MCA branch in advance. The Charity Law does not place restrictions on persons or entities from outside of the local foundation's province from donating to the foundation. Another trend is that foundations are establishing support organizations in the United States and other countries that can receive donations from donors in the specific country in order to support the activities of the JV university.

IV. Influence of the China-U.S. Trade War on Education

At the end, it is inevitable to bring up the heated topic—the China-U.S. trade war. Although the trade war initially focused on commercial aspects, it has now expanded to include higher education and scientific research, mainly hindering the cooperation and exchange between these two world powers.

A. U.S. Trade Sanctions

Institutions of higher education from mainland China have been added to either the Entity List⁹⁷ or the Unverified List⁹⁸ administered by the Bureau of Industry and Security (BIS), which is an agency of the United States Department of Commerce.

The BIS has in the past presented a singular reason for putting Chinese universities on its Entity List: engaging in research and development related to nuclear and/or military technologies. For example, National University of Defense Technology was

97 The Entity List contains foreign entities “reasonably believed involved, or to pose a significant risk of being or becoming involved in activities contrary to the national security or foreign policy interests of the United States” as outlined in sections 15 C.F.R 744 and 746 of the Export Administration Regulations (EAR). No person (U.S. or non-U.S.) may export, reexport or transfer any items subject to the EAR to a party on the Entity List without an export license. Here, “items subject to the EAR” include all U.S.-origin items and certain non-U.S. items that contain more than a de minimis percentage of controlled U.S.-origin parts.

98 The Unverified List contains foreign entities whose bona fides (i.e., legitimacy and reliability relating to the end use and end user of the items subject to the EAR) are unable to be verified by the BIS through an end-use check. Entities on the Unverified List cannot receive items subject to the EAR by means of a license exception. Furthermore, before exporting, reexporting, or transferring technology or items subject to the EAR to a listed entity, exporters must (1) file an Automated Export System record for all exports to the entity; and (2) obtain a statement from the listed entity, regardless of whether the export requires a license under the EAR classification. Unlike institutions on the Entity List, those on the Unverified List are not subject to embargo.

listed for its use of American-origin parts in the construction of the supercomputer TianHe-1A and TianHe-2, which was used to conduct “nuclear explosive activities” according to the BIS.⁹⁹ Chinese universities conducting research related to military and nuclear-related technologies involving American-made products may expect the increasing likelihood of their names being added to the Entity List, considering that the United States is alert to technology development in China. On the other hand, U.S. parties seeking to collaborate with a Chinese partner should ensure that any collaboration, partnership, exchange, or any other kind of project with any Chinese institutions must undergo significant due diligence in advance and should also place heavy emphasis on ensuring that the end use or end users of any U.S.-origin products or technology involved in the project will not violate 15 C.F.R. sections 744 or 746 of the Export Administration Regulations.

B. NIH Investigation

In the meantime, U.S. government officials have increasingly voiced their concern about international students’ and scholars’ exploiting America’s academic openness for their nations’ illicit gain. In 2018, the National Institutes of Health (NIH) sent a letter to more than 10,000 research institutions across the United States urging them to ensure their NIH grantees are properly reporting their foreign ties. The head of the NIH said that universities would soon announce action against scientists who broke NIH rules. Meanwhile, there were speeches from U.S. government officials several times, which threatened to limit Chinese students from studying and researching in the United States, so as to prevent China from “steal[ing] the fruits of [US] government-funded research.”¹⁰⁰

In response to the actions of the U.S. government, the MOE issued a Warning on June 3, 2019, at a press conference in Beijing, calling attention to visa restrictions placed by the United States on Chinese students and scholars such as the prolonged review time, shortened validity period, and a rising rate of visa rejections. According to statistics from the China Scholarship Council, in 2018, the Chinese government planned to fund 10,313 students studying in the United States, among which 331 had their trip canceled due to visa issues, accounting for 3.2 percent of the total. From January to March 2019, the Chinese government planned to fund 1353 students studying in the United States, among whom 182 had their trip canceled due to visa issues, accounting for 13.5 percent of the total. Since 2018, United States has revoked or rereviewed the U.S. visas of Chinese people for anti-espionage reasons, which has spread from the field of natural science to social science. Recently, the United States has also canceled ten-year visas for a group of

99 <https://www.federalregister.gov/documents/2015/02/18/2015-03321/addition-of-certain-persons-to-the-entity-list-and-removal-of-person-from-the-entity-list-based-on-a-last-visited-on-May-7-2021>

100 In December 2017, the Trump Administration floated the possibility of limiting visas for STEM (science, technology, engineering, math) students from certain countries (namely China) to stem intellectual property theft. In February 2018, FBI Director Christopher Wray stated before the Senate Intelligence Committee that China’s exploitation of America’s open research and development environment would require “a whole-of-society response” involving not just the intelligence sector, but the academic and private sectors as well, inciting backlash from Asian American civil rights groups. In April 2019, Wray reiterated Washington’s determination to prevent China from “steal[ing] the fruits of [US] government-funded research,” especially in universities and research institutes.

Chinese scholars whose research field is Chinese-U.S. relations.

These actions almost certainly will lead to greater tension in relation to Chinese-U.S. research cooperation. Despite all the controversies on whether the links to China are legal or not, it is noted that “prosecutors in most of the cases have not alleged any technology transfers, and were focused instead on the scientists’ failure to disclose grants.”¹⁰¹ Any university, institution, or person that might be involved needs to at least be more thorough in the reporting of funding sources.

V. Impact of the COVID-19 Pandemic

Due to the outbreak of COVID-19 and the resulting restrictions on border entry, visas, and flights from various countries and regions, many students have to change, delay, or even cancel their plans to study abroad for higher education.

In response, the MOE has allowed, as a special arrangement during the pandemic, some CEIs and CEPs to expand their enrollments by admitting such students under the premise of educational equity.¹⁰² Only students already admitted to undergraduate or graduate programs for fall 2020 abroad were eligible. Admission is merit based, with standards not lower than that of the CEI/CEP foreign partner’s admission abroad, and in an appropriate form of an exam. The enrollment of such students is separate from the national unified enrollment plan, does not take up the original enrollment quota, and does not affect other types of enrollment in the colleges and universities. Only degrees of the CEI/CEP foreign partner may be granted.

For students already enrolled in foreign universities but not able to study abroad due to the pandemic, the MOE has also provided more tolerant measures in regard of accreditation of a degree. According to the press release issued by the MOE on February 12, 2020, and the notice issued by the Chinese Service Center for Scholarly Exchange (CSCSE, the agency delegated by the MOE to conduct accreditation of foreign-related degrees) on April 3, 2020 (“CSCSE Notice”), the MOE/CSCSE confirmed that the accreditation of a degree awarded by foreign universities will not be adversely affected by offering some online courses to students in China that is made necessary as a result of the institution’s efforts to prevent and control the spread of the pandemic. That is to say, the MOE permits foreign universities to offer online courses to Chinese students stuck in China due to the COVID-19, and the online courses will not affect the China recognition/accreditation of the degree granted by foreign universities. There are no registration, approval, or other requirements under Chinese education rules for such offering.

As a follow up to the CSCSE Notice, on March 19, 2021, the CSCSE issued the Supplemental Notice on the Authentication of Foreign Degrees Received by

101 See Ellen Barry and Gina Dakota: China’s Lavish Funds Lured U.S. Scientists. What Did It Get in Return?, the New York Times, Feb 6, 2020. Full text available at <https://www.nytimes.com/2020/02/06/us/chinas-lavish-funds-lured-us-scientists-what-did-it-get-in-return.html>, last visited on May 7, 2021.

102 MOE Takes Active Measures to Address Difficulties in Studying Abroad During the Epidemic released by the MOE: http://www.moe.gov.cn/jyb_xwfb/gzdt_gzdt/s5987/202009/t20200916_488192.html, last visited on May 7, 2021; and the answers to journalists’ questions: http://www.moe.gov.cn/jyb_xwfb/s271/202009/t20200916_488189.html, last visited on May 7, 2021.

Chinese International Students through Online Learning During the COVID-19 Pandemic (“Supplemental Notice”)¹⁰³. The Supplemental Notice restates that the recognition/accreditation of Chinese students’ diploma or degree granted by foreign universities will not be adversely affected by the fact that part or all of the courses were taken online due to the pandemic. But it is understood that this should still be a temporary arrangement, and it is not clear how long this temporary arrangement will be permitted, which may largely depend on how long the global pandemic will last. On the other hand, the Supplemental Notice criticizes some foreign institutions’/intermediary agencies’ drastic expansion of online courses driven by profit-making but using the pandemic as an excuse, and indicates that the CSCSE will not grant an accreditation to such diplomas and degrees.

VI. Conclusion

Since the partial opening up of China’s education sector as part of the WTO accession, there has been considerable activity by foreign HEIs and other parties bringing sought-after education resources to China to help meet the massive need to improve China’s education capabilities. Clearly, education remains a high priority for China and its people, and the government as well, and parents and students are willing to invest considerable resources in education.¹⁰⁴ More than 150 years after the first Chinese students attended schools in New England as part of the earliest foray of Chinese overseas studies¹⁰⁵ and one hundred years after the second wave of Chinese students studying abroad,¹⁰⁶ there is a strong desire by many students in China to obtain a “Western quality” education, whether through overseas study, or by China attracting such resources to China. After an initial flurry of activity accompanying the approvals for some of the early CEIs with legal person status, there has been a tightening of the approvals and a slowdown in the pace of new entrants as well as a recent purging by the MOE of CEPs that have not been as active or successful as had been envisioned when they were approved. These trends by the MOE, together with an overall tightening of control by the CPC and an increased focus on taxation of foreign HEIs, has posed a challenge for current foreign participants and has caused a number of new entrants to hold off on their plans to enter China. At the same time, China has further pushed the reforms and movements in the education sector pertaining to private schools, preschool education, off-campus training, vocational education, etc. It remains to be seen whether there will be a resumption of the rapid growth and wide participation of foreign involvement in China’s education sector or if there will be a pull back of existing participants.

103 CSCSE issued the Supplemental Notice on March 19, 2021: <http://jsj.moe.gov.cn/n2/7001/7001/1566.shtml>, last visited on May 7, 2021.

104 Chinese students are among the most numerous foreign students at many U.S. HEIs and there is a growing trend to send students to U.S. and U.K. secondary schools. In addition, many members of the Standing Committee of the CPC have sent their children to attend universities in the United States and other foreign universities, with the daughter of Xi Jinping having recently graduated from Harvard University.

105 The first Chinese student to graduate from Yale University was Yung Wing, who graduated in 1854 in the same class as the great-great-grandfather of one of the authors of this article, Steven Robinson.

106 In the beginning of the twentieth century, there was a renewed interest in overseas education, led in part by the foreign missionaries in China. Li Da Zhao, one of the founders of the CPC, attended Waseda University in Japan, where his faculty advisor was the grandfather of Steven Robinson.