

China's Ministry of Commerce Establishes Framework for Sanctions Against "Unreliable Entities"

September 28, 2020

On September 19, 2020, with the approval of the State Council of China, the Ministry of Commerce of China (the "MOFCOM") released the Provisions on the Unreliable Entity List (the "Provisions"),¹ establishing a sanctions regime framework. Although no entity has yet been designated an "unreliable entity," the promulgation of the Provisions suggests an escalation in China's ongoing tensions with the United States and creates risks for companies with a wide range of cross-border operations.

As early as May 2019, when the United States began taking actions against Huawei Technologies Co., Ltd., the MOFCOM announced that China would establish an unreliable entity list regime in order to sanction foreign companies and individuals that blocked Chinese enterprises for "non-business purposes." In particular, the MOFCOM noted the need to maintain a "fair and reasonable international commercial order and multilateral business structure." As tensions have increased between China, the United States and others, the Chinese press has described the Provisions as a countermeasure against long-arm jurisdiction of "some countries."²

Covered Persons and Activities. A special unit in the MOFCOM (the "Working Group") will be responsible for identifying foreign entities (which will include foreign enterprises, organizations and individuals) that will be subject to regulation under the Provisions. Under the Provisions, foreign entities involved in international commerce or related activities that engage in the following behavior may be subject to sanctions:

- endangering national sovereignty, security or development interests of China;
- suspending normal transactions with an enterprise, other organization, or individual of China or applying discriminatory measures against an enterprise, other organization, or individual of China, which violates normal market

¹ All quotations from the Provisions herein are from the official translation provided by the Ministry of Commerce of China, available at <http://english.mofcom.gov.cn/article/policyrelease/questions/202009/20200903002580.shtml>.

² "Commentary: China's unreliable entities list a guardian of market order," Xinhua Net, June 3, 2019, http://www.xinhuanet.com/english/2019-06/03/c_138113704.htm.

transaction principles and causes serious damage to the legitimate rights and interests of the enterprise, other organization, or individual of China.

The Provisions do not further clarify the scope of “foreign entities” or prohibited activities. For example, it is unclear whether branches or subsidiaries of foreign entities (in China or elsewhere) or foreign individuals who reside in China will be subject to possible sanctions based on the activities of foreign corporate affiliates.

The Provisions also grant the Working Group the power to investigate whether foreign entities have violated the above prohibitions. Among other powers, the Working Group may interview witnesses and request documents. The Working Group also will provide notification to foreign entities, as well as provide foreign entities with an opportunity to respond to the investigation

In determining whether to include a foreign entity in the Unreliable Entity List, the Working Group will consider the following elements:

- The degree of danger to national sovereignty, security or development interests of China;
- The degree of damage to the legitimate rights and interests of enterprises, other organizations, or individuals of China;
- Whether being in compliance with internationally accepted economic and trade rules;
- Other factors that shall be considered.

Consequences. One or more of the following sanctions may be imposed by the MOFCOM on a foreign entity included in the Unreliable Entity List:

- restricting or prohibiting the foreign entity from engaging in China-related import or export activities;
- restricting or prohibiting the foreign entity from investing in China;
- restricting or prohibiting the foreign entity’s relevant personnel or means of transportation from entering into China;
- restricting or revoking the relevant personnel’s work permit, status of stay or residence in China;

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- imposing a fine of the corresponding amount according to the severity of the circumstances;
 - other necessary measures.

In the event that a foreign entity is restricted or prohibited from engaging in “China-related import or export activities,” a Chinese enterprise or individual must apply for special approval from the Working Group in order to continue transacting business with the listed entity.

The Working Group may designate a grace period during which a foreign entity could “rectify its actions” prior to the imposition of sanctions.

A foreign entity may be removed from the Unreliable Entity List by making an application to the Working Group or at the Working Group’s own discretion. A foreign entity also will be removed from the Unreliable Entity List if it “rectifies its actions” during the grace period designated by the Working Group. All sanctions will cease upon the issuance of a removal notice by the Working Group.

To date, no foreign entities have been designated for inclusion in the Unreliable Entity List. Neither the MOFCOM nor the Chinese media have suggested a further timetable. According to a local press interview with the Head of the MOFCOM’s Department of Treaty and Law, the Provisions do not target any specific countries or entities.³ Whether a foreign entity will be included in the list depends on whether its activities “violate Chinese laws, endanger national sovereignty, security or development interests of China, or violate normal market transaction principles and take blocking, cutting off the supply, or other discriminative measures against Chinese companies and individuals.”⁴ Given the potentially broad interpretation as well as wide reach of the Provisions, companies operating in China that have a global footprint will need to be vigilant and alert in their compliance with the sanctions regimes of multiple jurisdictions.

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Please do not hesitate to contact us with any questions.

³ See “The Head of Department of Treaty and Law of the Ministry of Commerce Answers Reporters’ Questions on the ‘Regulations on Unreliable Entity List’” (“商务部条约法律司负责人就《不可靠实体清单规定》答记者问”), September 20, 2020, <http://www.mofcom.gov.cn/article/ae/sjld/202009/20200903002631.shtml>.

⁴ See “China’s Unreliable Entity List to target ‘very few’ foreign entities: official,” Global Times, September 20, 2020, <https://www.globaltimes.cn/content/1201425.shtml>.

Debevoise & Plimpton LLP, like other international firms in China, is not admitted to practice PRC law. Our views are based on our general experience in dealing with similar matters and consultation of published compilations of Chinese law. We would be pleased to arrange for assistance from licensed Chinese counsel should you require a formal opinion as to any of the matters set forth in this update.

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