

China to Release an “Unreliable Entity List”

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On May 31, 2019, China’s Ministry of Commerce (“MOFCOM”) announced that the Chinese government will soon release an “Unreliable Entity List” (“UEL”) identifying names of foreign companies and individuals that boycott or cut off supplies to Chinese companies for non-commercial purposes. Various media reports have suggested that this measure is intended to respond to recent geopolitical developments, including the placement of Chinese telecommunications company Huawei on the U.S. Department of Commerce’s Entity List, and other foreign governments deciding to restrict Huawei from participating in the provision of 5G wireless service.

MOFCOM will apply a totality of the circumstances test to decide whether to add a foreign entity to the UEL, including its conclusions regarding: (i) the specific discriminatory measures taken by the foreign entity against Chinese companies; (ii) the purpose of these measures; (iii) whether the measures caused serious harm to Chinese companies; and (iv) the potential threat to Chinese national security posed by the boycotts. While it remains unclear what legal procedures and restrictive measures MOFCOM will apply to the UEL-designated entities, MOFCOM officials have announced that China’s Foreign Trade Law, National Security Law and Anti-Monopoly Law provide a legal basis for a UEL designation, and that the measures taken against the UEL-designated entities will be taken under the framework of existing laws and regulations.

What should companies expect and what should they do to prepare?

Multinational companies with significant Chinese business relationships who are also subject to economic sanctions and export controls requirements of the U.S. and other foreign governments should consider taking the following proactive measures to gauge their exposure to a UEL designation:

- **Conduct an internal review of the company’s relationship with Chinese entities and assess risk factors related to compliance with China’s Anti-Monopoly Law.** MOFCOM officials specifically highlighted Article 17 of the Anti-Monopoly Law as a potential provision that MOFCOM could use as grounds to blacklist companies. Article 17 prohibits companies from abusing a dominant market position through (i) refusing to conduct transactions; or (ii) imposing discriminatory conditions against another company without legitimate purposes. Any anti-monopoly review should include the foreign entity’s China subsidiaries and affiliates.
- **Prepare for potential affirmative defenses.** MOFCOM officials have announced that Chinese authorities will conduct a pre-listing investigation before placing any entity or individual on the UEL and give targets an opportunity to assert affirmative defenses. As the proposed UEL intends to sanction discriminatory measures imposed against Chinese companies for non-commercial purposes, companies can assert a “legitimate business purpose” as a viable defense. A “legitimate business purpose” may include breach of contract by Chinese companies or compliance with the target’s domestic laws and orders. If MOFCOM determines that the target company’s domestic laws are discriminatory and pose a threat to China’s national security, the company’s reasonable efforts to maintain business with Chinese companies could be an important factor in evaluating the validity of the defense.
- **Train employees on how to respond to government inquiries and investigations conducted with or without notice.** The State Administration for Market Regulation, China’s primary antitrust enforcement agency, has already begun using dawn raids as a tool for antitrust enforcement. As such, companies should prepare for increased antitrust enforcement activity. As a general matter, the company should implement policies and procedures that employees should follow in responding to government inquiries, and should provide dawn raid training and conduct mock exercises to introduce best practices.
- **Closely monitor developments related to China’s draft export control law.** China released a draft export control law in December 2017 that introduced a blacklisting system similar to the proposed UEL. This draft law was submitted to China’s State Council for review and is expected to be enacted by the end of 2019. If enacted, the law may impose restrictions on transactions with UEL-designated entities, including prohibiting exports of Chinese-origin controlled items to UEL-designated entities, revoking export licenses related to transactions with such entities and imposing a fine that amounts to five to ten times the value of the illegal gains for violation of the new law.

We will closely monitor the development and provide updates as more information is released. If you have any questions regarding China’s proposed “Unreliable Entity List”, please contact [Tiana Zhang](#), [Cori Lable](#) or [Jodi Wu](#).

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