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## **New MofCom Rules Set to Counteract Extraterritorial Application of Foreign Laws**

The Ministry of Commerce (*MofCom*) released Rules on Counteracting Unjustified Extra-territorial Application of Foreign Legislation and Other Measures on January 9, 2021.

### **Coverage**

This new regulation covers counteracting application of certain long arm foreign laws that prohibit or restrict business dealing involving a Chinese business concern and a third party state counterpart. These rules are essentially targeting US laws and sanctions against blacklisted countries like Iran and North Korea.

There is NO reason to conclude that this set of new rules could or would apply to some direct US-China trade relationship, such as [US] entity list and military black list issues.

The focus of these rules is trade. It is unlikely that certain foreign legislation having a long arm feature (e.g., FCPA) would be affected by these rules.

### **Impacts**

#### (i) Reporting

The rules stipulate that each China based entity (including FIEs) has an obligation to report within 30 days after it faces or encounters any application of a foreign law that prohibits or restricts it from dealing with an entity of a third party state. Any failure to report will face administrative sanctions including an administrative fine.

#### (ii) Prohibition Order(s)

If MofCom decides that the long arm application of a foreign law or sanction is unjustified, it could issue an order to prohibit China based entities from accepting application of such foreign law (the *prohibition order*). China based entities who fail to abide by such prohibition order will face administrative sanctions including an administrative fine and/or claims from another China based entity.

#### (iii) Prohibition Order Exemption(s)

China based entities could apply to MofCom seeking to be carved out from any prohibition order. MofCom has 30 days to grant or deny such exemption

application.

### **Possible [Civil] Claims**

If there is a prohibition order and a legal entity person or individual chooses to comply with the foreign law or sanction without securing an exemption (the ***Foreign Law Compliant Person***), an adversely affected China business concern could

- (a) sue such Foreign Law Compliant Person for damages caused by such Foreign Law Compliant Person; and
- (b) sue for damages against a Foreign Law Compliant Person who benefits from a judgment granted under the foreign law that is subject to a prohibition order.

These new rules do not limit the scope of Foreign Law Compliant Persons to be China based entities or individuals only. It could include entities and individuals outside China.

### **Questions to be Addressed**

- There is no definition on who could be “a Foreign Law Compliant Person who benefits from a judgment granted under the foreign law that is subject to a prohibition order”. **This could become a significant risk factor for foreign (primarily US) companies doing business in China.** The development in this connection will be monitored.
- These new rules do not specify which foreign laws should be considered having an application extraterritorially. It is reportedly to be different from the EU legislation which includes an annex naming specific foreign laws.
- There are no specifics on when the 30 day window starts and how detailed such report should be. The reporting requirement could potentially be onerous.

### **Who should be Concerned**

US companies making [US] controlled substance or equipment, or dealing with [US] controlled or restricted technologies, and their affiliates in China.

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Please contact Richard Yao, [richard.yao@fujae.com](mailto:richard.yao@fujae.com), or visit our website, [www.fujae.com](http://www.fujae.com), to view other contents.