



Certainties and Uncertainties Under China's New Unreliable Entity List

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On September 19, 2020, China took a new strategic position in its ongoing trade confrontation with the United States. The Ministry of Commerce of the PRC ("MOFCOM") issued *Regulations on Unreliable Entity List* ("UEL") and drew wide public attention to the beginning of the PRC government's retaliation against the Trump Administration's recent restrictions on Chinese entities including [Huawei](#), [TikTok](#) and [WeChat](#). It is notable that MOFCOM deliberated with more than a year of internal discussion before implementing the UEL.

5 Key Points from the UEL

In our review of the newly-published UEL, 5 elements of the list and related regulations jumped out as critical for any international company with a business presence or interest in China, as follows:

1. China takes an assertive position on its national interests. Section 2 of the UEL targets any foreign entity that harms PRC national security, suspends ordinary transactions with any Chinese company or individual, or substantially harms lawful interests of such Chinese company or individual through discriminative measures. That section sets a strong and clear tone that the PRC government is expanding the concept of its core national interests to include what it considers fair business opportunities for Chinese companies, organizations and citizens.

In theory, that point opens the UEL to be used as a countermeasure where the United States takes measures against particular Chinese companies, such as its Entity List designation of Huawei, its prohibitions on WeChat and TikTok, and perhaps even its Anti-Dumping and Countervailing Duties decisions against Chinese manufacturers and exporters.

2. Individuals may be enforcement targets. The scope of the term "Foreign Entity" under the UEL clearly includes not just any foreign company or organization, but individuals as well. That definition could provide legal ground for the PRC government to issue sanctions-style designations against any individual target worldwide, if an individual takes actions that the PRC government views as harming its national interests (for example, if a management team member of a multinational company is found liable for a violation of the UEL).

3. Significant penalties could substantially impact a multinational company's China business. Section 10 of the UEL provides for the enforcement actions against a liable Foreign Entity:
- (1) Restricting or prohibiting a party from engaging in any import or export activity relating to China;
 - (2) Restricting or prohibiting a party from making any investment in China;
 - (3) Restricting or prohibiting a party's personnel or transportation vehicle from entering China;
 - (4) Restricting or revoking a party's China working visa, stay permit, or residence qualification; or
 - (5) Imposing monetary fines;

Besides the above restrictions and prohibitions, Section 10 also leaves open-ended "any other necessary measures" which may be at the enforcement agency's discretion. If one or more of the measures listed above are taken, the impact to the business in China of the measures' target would be substantial.

4. A combination of enforcement agencies may provide flexibility in enforcement. Instead of establishing a consolidated enforcement agency, the UEL defines the enforcement authority as a "Working Mechanism" participated by central governmental authorities with its substantive office at the MOFCOM. Such formation will provide the governmental authorities with flexibility in carrying out the applicable administrative sanctions, and that flexibility should increase the power of the enforcement under the UEL. At minimum, it will keep non-Chinese parties on their toes in UEL compliance because they may not know where from which agency a potential enforcement action may arise.
5. Parties will have a procedural opportunity to defend themselves in an enforcement case. The UEL provides clear administrative procedures for the Working Mechanism to investigate a case. In that procedure, the target Foreign Entity will have the right to actively participate in the investigation, to make its response, and to defend itself. It is unclear how much a party's response and defense might mitigate the penalty it receives in an enforcement action. However, commentators in China have noted that rules and regulations promulgated by the Chinese government in the past decade have included more procedural rights for enforcement targets.

3 Key Questions from the UEL

At the time of publication, the PRC Government has not implemented rules or guidance to address some details of enforcement under the UEL. We note three key questions bear watching as the definition of the following points will have a significant impact on how the UEL functions and impacts non-Chinese businesses:

1. What if a multinational suspends ordinary transaction with a Chinese company due to statutory policy or law requirement under a foreign jurisdiction? Will that company be held liable under the UEL for following a foreign jurisdiction's law or governmental requirement? Those issues are not clearly defined or addressed under the current UEL language. However, there are no exceptions affirmatively provided in the targeted violations listed in Section 2.
2. Are there any implementation rules for the targeted sanctions-style measures provided for under Section 10? For example, for a Foreign Entity under investigation, would the sanction extend to its existing investment or portfolio companies in China? Would a Foreign Entity's vessels already in China automatically be expelled or temporally seized? How would the fine be calculated, based on revenue generated in China or global consolidated financial data?
3. Would Foreign Entity have right to file administrative re-consideration or, if applicable, an administrative lawsuit, to petition a decision that it has been designated as a target of Section 10 sanctions? If a petition is permitted, would that petition suspend the UEL enforcement decision on the Foreign Entity pending a decision?

We understand the issuance of the UEL constitutes a first step and message sent by China as a response in a trade war with the United States. We expect there will be follow-up implementation rules and even judicial interpretations to be released that will provide further guidance to international companies with business interests in or connection with China. We will, of course, provide updates here as we learn more.

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