

MEMO# 33041

January 13, 2021

China Enacts Countermeasures Against Recent Foreign Sanctions

[33041] January 13, 2021 TO: ICI Global Members

ICI Global Pacific Chapter

ICI Global Regulated Funds Committee SUBJECTS: International/Global

Operations RE: China Enacts Countermeasures Against Recent Foreign Sanctions

In response to a wave of sanctions imposed by the US Government, China recently put into effect several countermeasures.

On 19 December 2020, the Ministry of Commerce (MOFCOM) and the National Development and Reform Commission (NDRC) jointly published the *Measures on Security Review of Foreign Investment*[\[1\]](#) (Security Review Measures) establishing a framework to review foreign investments on national security grounds. The Security Review Measures will take effect from 18 January 2021.

On 9 January, the MOFCOM released the *Rules on Counteracting Unjustified Extraterritorial Application of Foreign Legislation and Other Measures*[\[2\]](#) (Counteracting Rules). Effective immediately, the Counteracting Rules are stated to have been designed to protect Chinese companies from the “unjustified” extraterritorial application of foreign legislation.

With global asset managers making plans to set up majority-controlled or wholly foreign-owned asset management companies in China, the new countermeasures could further complicate their risk and compliance picture. This memo will give a brief explanation of the key provisions of the two sets of policies.

1. Prohibition Against Complying with Foreign Sanctions

Under the Counteracting Rules, Chinese individuals and companies should report to MOFCOM within 30 days (not clear however when the clock will start to tick) if they have been targeted by foreign sanctions. The reporting process will be confidential if requested. The Chinese authorities will review whether such foreign sanction violates international law and the basic principles of international relations, affects China’s national sovereignty, security and development interests, or affects legitimate rights and interests of Chinese individuals or companies. If found in the affirmative, a Prohibition Order will be issued to the effect that such foreign sanction shall not be accepted or observed by domestic individuals and companies if any of the above conditions are met.

The Counteracting Rules leave room for Chinese individuals and companies affected by a Prohibition Order to apply for a potential exemption from compliance from MOFCOM. A

decision on the application will be made within 30 days. Without such exemption, companies that comply with foreign sanctions prohibited by a Prohibition Order can be sued for compensation in Chinese courts. Based on specific circumstances, the Chinese authorities may provide the necessary support to individuals and companies that suffer from significant losses due to non-compliance with foreign sanctions as a result of adherence to the Prohibition Order.

This could possibly put global asset managers in China in legal jeopardy for complying with any US sanctions. For instance, if any of the Chinese companies identified under US Executive Order 13959 (CCMCs) applied to the Chinese authorities for a Prohibition Order against the US sanction, the WFOE or Chinese subsidiaries of a global manager who decided to divest the CMCC securities could be sued and made to pay compensation to the CCMCs.

2. Security Review of Foreign Investments in China

Under the Security Review Measures, not only will firms or projects set up by foreign companies and joint ventures face a security review, any foreign takeovers of Chinese firms or minority shareholders that have sufficient voting rights to affect board or shareholder resolutions will also come under heavy scrutiny. Foreign investors shall make separate filings to the MOFCOM and the NDRC before investing in and obtaining actual control over important financial services firms that are relevant to national security. There is no definition provided so far of what types of business are deemed to be “important” financial services firms. It is expected that relevant authorities including the China Securities Regulatory Commission (CSRC) will follow up and provide further guidance. Nevertheless, the NDRC noted in a media briefing that the issuance of the Security Review Measures should not be seen as a step back from China's ongoing process of opening up its economy.

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endnotes

[1] The Security Review Measures (available in Chinese) are *available at* <https://www.ndrc.gov.cn/xxgk/zcfb/fzggwl/202012/P020201219582032130362.pdf>.

[2] The Counteracting Rules are *available at* <http://english.mofcom.gov.cn/article/policyrelease/questions/202101/20210103029708.shtml>.

should not be considered a substitute for, legal advice.