

On September 19, 2020, the Ministry of Commerce of the People’s Republic of China (the MOFCOM) published the Regulations on Unreliable Entity List (Regulations), which became effective the same day.

Following its first announcement on May 31, 2019, the unreliable entities list (UEL) has attracted the attention the Chinese and non-Chinese media alike. Numerous questions were raised about the UEL’s implication and implementation. The Regulations attempt to address these questions. The MOFCOM has yet to name any unreliable entity.

The Regulations specify the following:

1. Principles for Determining An Unreliable Entity

The Regulations stipulate that foreign enterprises, other organizations or individuals may be included on the UEL if they:

- Cause damage to China’s national sovereignty, security and interest of development, or
- Violate normal market business principles, discontinue normal transactions with or take discriminatory measures against Chinese companies, other organizations, or individuals, and seriously harm the legitimate rights and interests Chinese companies, other organizations, or individuals.

Such principles are similar to previous announcement made by MOFCOM. The Regulations, however, clarify that only “foreign” entity might be named as an unreliable entity, but not its subsidiaries and affiliates formed under the Chinese law.

2. Procedures for Determining An Unreliable Entity

Under the Regulations, MOFCOM should conduct an investigation against the relevant foreign entity to determine whether to place such entity on the UEL. If MOFCOM decides to initiate an investigation, a public announcement will be made. During the investigation, the target entity is given the opportunity to respond and defend itself.

After conclusion of the investigation, MOFCOM will make a decision as to whether to include the target entity on the UEL based on the following factors:

- The level of harm made to China’s national interests, including the interests of national sovereignty, national security and national development.

- The level of damage to the rights and interests of Chinese companies or individuals.
- Whether it complies with internationally accepted economic and trade rules and practices.
- Other factors to be considered.

MOFCOM should make a public announcement if it determines to place the target entity on the UEL, which will include the restrictive measures against the entity (as discussed below). MOFCOM may grant a grace period for the unreliable entity to take corrective actions, which will be specified in the announcement. During the grace period, the restrictive measures will be suspended. If the unreliable entity is unable to make the required corrections during the grace period, the restrictive measures will take effect immediately after the grace period ends.

3. Restrictive Measures Against Unreliable Entities

MOFCOM may take one or more of the following measures against an unreliable entity (the measure(s) will be specified in the announcement):

- Restrict or prohibit the unreliable entity from importing and exporting to and from China (unless an exception is granted to the Chinese companies that trade with the unreliable entity) ;
- Restrict or prohibit the unreliable entity from investing in China;
- Restrict or prohibit the unreliable entity related persons or transportation vessels from entering into the territory of China;
- Restrict or cancel the work or residence permit of the unreliable entity or related personnel;
- Impose a fine; and
- Impose other necessary measures.

4. Removal from the UEL

An unreliable entity may be removed from the UEL under the following circumstances:

- If the entity makes the required corrections in the grace period; or
- If the entity submits an application for removal and MOFCOM grants the removal based on its review. The Regulations do not specify the procedure or criteria for the removal.

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