

On January 9, 2021, the Ministry of Commerce (MOFCOM) of the People's Republic of China (PRC) issued Order No. 1 of the Rules of Counteracting Unjustified Extraterritorial Application of Foreign Legislation and Other Measures (the Rules). The Rules come amid increasing action against various Chinese companies from foreign governments, especially the US, represent the latest salvo in the ongoing trade conflict between the US and the PRC, and appear to be a direct response to Executive Order 13959 issued by then-President Trump on November 12, 2020, imposing sanctions on companies tied to the PRC military. The Rules – bearing striking similarities to the European Union Blocking Statute (EU Blocking Statute) that entered into force in 2018 – also represent the first legislative effort by the PRC to address the impact of US sanctions on Chinese companies and citizens.

2021年1月9日，中华人民共和国商务部（“商务部”）出台了商务部令2021年第1号《阻断外国法律与措施不当域外适用办法》（“《适用办法》”）。该办法是应对外国政府特别是美国政府对多家中国公司持续施压，更是美国和中国之间不断升级的贸易冲突对峙的结果。更确切的说，是对前总统特朗普（Donald Trump）2020年11月12日颁布的、旨在对与军方有关联的中国公司实施制裁的第13959号行政令（“13959号行政令”）的直接回应。该办法与2018年正式生效的第2271/96号欧盟条例（“《欧盟阻断法》”）有着异曲同工之处，也彰显中国政府应对美国制裁对中国公司及公民的影响所做出的首次立法尝试。

Below, we discuss the political and economic context of the Rules, including Executive Order 13959 and the EU Blocking Statute. We analyze the specific provisions drafted by MOFCOM, including the requirements for Chinese citizens and companies to report the extraterritorial application of foreign law. In addition, we consider the potential compliance ramifications of the Rules on non-Chinese companies conducting business in China, including Chinese subsidiaries of US multinationals.

我们下面将探讨《适用办法》的政治和经济背景，包括对13959号行政令和《欧盟阻断法》的解析。我们逐一解析《适用办法》的具体条款，包括中国公民和法人对国外法律的域外适用的报告义务，此外，我们也将充分考量《适用办法》对在中国开展业务的非中国公司（包括美国公司华子公司）合规性的潜在影响。

I. Background and Context

《适用办法》的出台背景

A. Executive Order 13959 and the Trump Administration's "China Policy"

13959号行政令和特朗普政府的“对华政策”

The immediate impetus for the Rules was likely Executive Order 13959, and the underlying trade policy of former President Trump. From the beginning of his administration, then-President Trump used trade policy as a means of pressuring China and identified the increasing sophistication of the Chinese military as a threat to US national security. Throughout his time in office, the President escalated his rhetoric about Chinese trade practices and imposed significant tariffs on Chinese exports. These actions coincided with a concerted effort by the Department of Justice to identify and prosecute Chinese nationals in the US for espionage, intellectual property theft, and other criminal conduct.

《适用办法》出台的导火索可归咎于13959号行政令，以及前总统特朗普过于偏激的贸易政策。从其执政之初，就将贸易政策用作遏制中国发展的一种手段，并认定中国军方日趋成熟的运作模式对美国国家安全可能构成威胁。在其任职期间，不断强化有关中国贸易威胁论，并对中国出口征收高额关税，该等举措也与美国司法部调查和起诉在美的中国公民从事间谍活动，侵犯知识产权及其他犯罪行为的做法不谋而合。

The culmination of this effort came on November 12, 2020- only days after President Trump lost his bid for re-election to former Vice-President Biden – when President Trump issued Executive Order 13959.¹ The order invoked the International Emergency Economic Powers Act and the National Emergencies Act, finding that the PRC was “increasingly exploiting” the US economy to “enable the development and modernization” of the PRC military.²

截止2020年11月12日，可以说到了无以复加的地步，就在前总统特朗普在竞选连任中败给前副总统拜登几天后，前总统特朗普援引了《国际紧急经济权力法》和《国家紧急状态法》颁布了13959号行政令，¹ 断定中国正在“越来越多地利用”美国经济“推动中国军事的发展和现代化”。²

Executive Order 13959 asserted that the PRC required companies, including Chinese civilian companies, to use their commercial activities to support Chinese military and intelligence objectives.³ Meanwhile, according to the order, these same Chinese civilian companies raised capital by selling securities to US investors and, in effect, leveraging US capital to “finance the development and modernization of its military.”⁴ As a result, Executive Order 13959 identified the PRC “military-industrial complex” as an “unusual and extraordinary threat ... to the national security, foreign policy, and economy of the United States.”⁵

13959号行政令还断言，中国要求包括中国民用公司在内的公司，利用其商业活动以扶持中国的军事和情报收集活动。³同时，根据该行政令，该等中国民用公司通过向美国投资者出售证券来筹集资金，实际上是利用美国资金“为其军事发展和现代化提供资金”，⁴为此，13959号行政令将中国的“军工联合体”认定为“对美国国家安全、外交政策和美国经济造成异常和非同寻常的威胁。”⁵

In retaliation for these alleged acts, Executive Order 13959 imposed sanctions on “Communist Chinese military companies” (CMCC) listed by the Department of the Treasury or the Department of Defense, as well as subsidiaries identified by the Department of the Treasury.⁶ The Department of the Treasury has stated that it intends to publicly list as subsidiaries any entity that issues publicly traded securities and that is (1) 50% or more owned by one or more Communist Chinese military companies identified in or pursuant to Executive Order 13959, or (2) determined to be controlled by one or more Communist Chinese military companies identified in or pursuant to Executive Order 13959.⁷ Executive Order 13959 prohibits US persons from investing in securities of these companies and required US persons to divest any existing holdings in these entities.⁸

为了报复上述所声称的行为，13959号行政令对财政部或国防部列明的任何“中国共产党军工公司”（“CMCC”）或财政部认定的“其任何子公司”实施了制裁。⁶ 财政部表示，它打算将任何发行公开交易证券的实体列为其子公司，如符合以下条件：（1）第13959号令认定一个或多个特定的中共军工公司拥有50%或以上的股份；或（2）第13959号令认定由一个或多个中共军工公司控制的。⁷ 第13959号行政令禁止美国人投资这些公司的证券，并要求美国人从这些实体中的任何现有股份中剥离出来。⁸

In other sanctions programs, OFAC’s “50 Percent Rule” generally applies only to the ownership of 50% or more of another entity by one or more blocked persons, which is an objective standard (even if sometimes it is difficult to determine such ownership). OFAC generally does not attempt to extend its sanctions to entities that are merely controlled by a sanctioned entity (a more subjective standard), unless there also is objectively 50% or more ownership.

在其他制裁方案中，OFAC “50%规则”通常仅适用于一个受制裁实体拥有另一实体50%或更多的所有权，这是一个较为客观标准（即使有时很难确定这种所有权）。OFAC通常不会尝试将制裁范围扩大到仅由受制裁实体控制的实体（更主观的标准），除非客观上也拥有50%或更多的所有权。

However, with the CCMC sanctions under EO 13959, OFAC expanded its typical 50% Rule such that it can sanction subsidiaries that are either owned 50% or more by a listed CCMC company or controlled by a listed CCMC company. This at first might seem to impose extremely difficult due diligence obligations on those trying to company with the sanctions, especially trying to ascertain what OFAC might think subjectively is the extent of “control” to trigger the sanctions. However, OFAC has clarified that it will publicly list all subsidiaries who are deemed sanctioned under that expanded ownership/control scope under EO 13959, which makes the necessary due diligence much easier.

然而，据13959行政令制裁CCMC规定，OFAC扩大了其通常的50%规则，使其可以制裁由列入制裁清单的CCMC公司拥有50%或以上或由列入制裁清单CCMC公司控制的子公司。乍看，这似乎给那些试图与制裁相关的公司增添了极其困难的尽职调查义务，尤其是试图确定OFAC可以主观地认为是触发制裁的“控制”程度。但是，OFAC明确表示，它将公开列出根据13959行政令扩大的所有权/控制范围而受到制裁的所有子公司，这使得必要的尽职调查变得简单易行。

1 See Exec. Order 13959, 85 Fed. Reg. 73185 (Nov. 12, 2020), <https://www.federalregister.gov/documents/2020/11/17/2020-25459/addressing-the-threat-from-securities-investments-that-finance-communist-chinese-military-companies>.

2 *Id.*

3 *See id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 FAQ 857, Office of Foreign Assets Control (Dec. 28, 2020), <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/topic/5671>. The Office of Foreign Assets Control (“OFAC”) is a division of the U.S. Department of the Treasury that administers and enforces economic and trade sanctions based on U.S. foreign policy and national security goals.

8 Exec. Order 13959.

In that way, the ownership/control analysis under EO 13959 is broader than the normal OFAC 50% Rule, but it also is easier to comply with because OFAC will conduct the analysis itself and list the names publicly.

这样，尽管13959行政令所指所有权/控制权分析比通常OFAC 50%规则要宽泛，但由于OFAC将会自己进行分析并公开列出被制裁子公司的名单，因此更易于遵守。

B. The EU Blocking Statute

《欧盟阻断法》

In crafting a response to Executive Order 13959, MOFCOM officials likely looked to the EU Blocking Statute, Council Regulation No. 2271/96, which seeks to shield European companies that do business with Iran and Cuba from the extraterritorial impact of US sanctions. The EU Blocking Statute was enacted in 1996, in response to the measures that the US took concerning Cuba, Iran, and Libya. In 2018, the European Commission began the process to update the blocking statute, based on President Trump's decision to withdraw the US from the Joint Comprehensive Plan of Action, and re-impose sanctions on Iran.⁹ The Blocking Statute entered into force on August 7, 2018.

为了应对13959号行政令，商务部貌似借鉴了第2271/96号欧盟条例，即《欧盟阻断法》，旨在保护与伊朗和古巴有业务往来的欧洲公司免受美国制裁的域外影响。该《欧盟阻断法》于1996年颁布，以应对美国对古巴、伊朗和利比亚采取的制裁措施。鉴于特朗普前总统2018年决定美国从《联合全面行动计划》中撤出并重新对伊朗实施制裁，⁹欧盟委员会重新更新《欧盟阻断法》，并于2018年8月7日正式生效。

The EU Blocking Statute has four components. The statute nullifies the effect in the EU of any non-EU court ruling based on a third country's extraterritorial sanctions laws identified in the Annex to the blocking statute (e.g., US laws concerning Cuba and Iran), allows European companies to recover in court damages for sanctions-related actions caused by extraterritorial application of specified foreign laws, requires companies to disclose the financial consequences of the extraterritorial application of foreign law, and permits the EU to sanction European companies that comply with identified foreign sanctions laws.¹⁰ However, the blocking statute also created a statutory safe harbor for legitimate business decisions by companies, based on a credible fear of significant damage to economic interests in the US.¹¹

《欧盟阻断法》主要包含四个组成部分。该条例可宣布根据欧盟条例附件中所确定的第三国域外制裁法（主要指美国针对古巴和伊朗的制裁法）所做出的任何非欧盟裁决在欧盟境内无效，允许欧洲公司向法院因域外适用特定外国法而受制裁提出损害赔偿，要求公司披露域外适用外国法律的财务结果，并允许欧盟有权制裁因遵守特定外国制裁法¹⁰的欧洲公司。然而，出于对其在美国经济利益可能受到重大损害的合理担忧，《欧盟阻断法》也为公司的业务合法决策创设了法定的“安全港”。¹¹

II. The Main Contents of the Rules

《适用办法》的主要内容

A. Statutory Purpose and Scope of Application 立法目的和适用范围

The Rules borrow heavily from the EU Blocking Statute. In identifying the purpose of the Rules, MOFCOM did not mince words, stating that the Rules were formulated for the purpose of “counteracting the impact on China caused by unjustified extra-territorial application of foreign legislation and other measures on China, safeguarding national sovereignty, security and development interests, and protecting the legitimate rights and interests of Chinese citizens, legal persons and other organizations of China.”¹²

《适用办法》在很大程度上借鉴了《欧盟阻断法》的相关做法。商务部在制定《适用办法》的立法目的时，开宗明义，此法的目标就是为了“阻断外国法律与措施不当域外适用对中国的影响，维护国家主权、安全、发展利益，保护中国公民、法人或者其他组织的合法权益。”¹²

By its terms, the Rules apply to two specific circumstances. First, the Rules block the “extraterritorial application of foreign legislation and other measures” – an implicit reference to the efforts of the US to apply its sanctions regime to non-US companies seeking to conduct business in sanctioned markets.¹³

就其具体条款而言，《适用办法》适用于两种特定情形。其一，该办法阻断“外国法律和措施的域外适用” – 隐射美国试图将其制裁制度适用于在受制裁市场开展业务的非美国公司。¹³

Second, the Rules apply to “situations where the extra-territorial application of foreign legislation and other measures, in violation of international law and the basic principles of international relations,” unjustifiably prohibit or restrict the “citizens, legal persons, or other organizations of China from engaging in normal economic, trade, and related activities with a third State (or region) or its citizens, legal persons or other organizations.”¹⁴

其次，《适用办法》适用于“违反国际法和国际关系基本准则的情形”，以及不当禁止或限制“中国公民、法人或其他组织与第三国（公民、法人或其他组织）从事正常的经贸以及相关活动的情形”。¹⁴

⁹ See *EU to start Iran sanctions blocking law process on Friday*, REUTERS (May 17, 2018), <https://www.reuters.com/article/us-iran-nuclear-eu-response/eu-to-start-iran-sanctions-blocking-law-process-on-friday-idUSKCN11I20A>.

¹⁰ See Council Regulation (EC) No. 2271/96, November 22, 1996, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31996R2271>.

¹¹ See *id.*

¹² See Order No. 1 of the Rules of Counteracting Unjustified Extraterritorial Application of Foreign Legislation and Other Measures (“the Rules”), Article 1, <http://english.mofcom.gov.cn/article/policyrelease/questions/202101/20210103029708.shtml>.

¹³ See *id.*, Article 2.

¹⁴ See *id.*

The Rules are crafted to counter the laws and measures of other countries that limit the ability of Chinese companies to do business with **third countries**, including, for example, Iran and North Korea, etc., rather than to address those instances where a US or foreign law applies to business with China or Chinese companies.

《适用办法》用于反制那些限制中国公司与第三国（如，伊朗和朝鲜等）开展业务能力的外国法律与措施，而不是针对美国或外国法律适用于与中国或中国公司开展业务的情形。

An interview published by MOFCOM's official website confirmed this approach, stating that the primary purpose of the Rules was to limit the application of "secondary sanctions" on Chinese companies rather than "primary sanctions."¹⁵ Nonetheless, given the general wording of the Rules, MOFCOM has significant leeway in their implementation.

商务部公布在官网的访谈确认此解读，本办法的主要目的是限制对中国企业实施“次级制裁”，而非“一级制裁”。¹⁵然而，鉴于《适用办法》的规定比较笼统，商务部在具体实施时仍留有余地。

The Rules appear not to cover overseas subsidiaries of Chinese companies. Subsidiaries of Chinese companies in the US likely will be excluded from the scope of the Rules, as they are typically not considered "Chinese legal persons."

《适用办法》似乎不涉及中国公司在境外子公司，中国公司在美国的子公司应被排除在外，因它们通常不被视为“中国法人”。

The scope of the Rules are particularly significant for US multinationals, because we expect the phrase "Chinese legal person" to apply to their Chinese subsidiaries. Similarly, the phrase "Chinese person" likely applies to Chinese nationals employed by US companies, regardless of where that individual may be located.

该办法的适用范围对美国跨国公司尤为重要，因为我们认为“中国法人”一词涵盖美国公司在华子公司。同理，“中国公民”一词可涵盖美国公司雇用的中国公民，无论其身在哪里。

B. Weight of Departmental Rules 部门规章的权重

China's laws and regulations can be divided into four levels of effectiveness in a descending hierarchy: (1) the Constitution; (2) laws; (3) administrative regulations, judicial interpretations, and military regulations; and (4) local government rules and departmental rules.

中国的法律法规按其效力等级高低可以分为四个等级：

(1) 宪法；(2) 法律；(三) 行政法规、司法解释、军事法规；(4) 地方政府规章、部门规章。

Typically, departmental rules refer to the general terms of normative documents formulated by various departments under the State Council.

通常来说，部门规章是指国务院各部门制定的规范性文件的总称。

The Rules that have been promulgated by MOFCOM are so-called departmental rules, which differ from "Administrative regulations" formulated by the State Council itself.

《适用办法》由商务部颁布，即“部门规章”，而有别于国务院本身制定的行政法规。

Departmental rules are low-level rules, which are sometimes considered as "quasi-regulations." Therefore, they cannot be applied directly by a court, but only used as a reference or supplementary document. This inherent defect will undoubtedly inject more difficulty and uncertainty into any civil lawsuit for compensation.

《适用办法》属于较低位阶的规范性文件，有时被视为“准法规”，因而，法院在判决时通常不能直接适用，可参照适用或作为补充性规范性文件，该先天性缺陷无疑为民事赔偿诉讼增加了难度和不确定性。

C. Non-Retroactivity 无溯及力

Generally, Chinese laws, regulations, and departmental rules shall have only a prospective effect and must not be applied retroactively in such a way as to apply to pending or existing disputes and cases, unless otherwise provided by law.

作为一般性规则，中国法律法规及部门规章仅指向未来，不得追溯既往，也不得适用于未决或现有的纠纷和案件，除非法律另有规定。

The Rules took effect on the date of promulgation (January 9, 2021), and are silent as to their retroactivity. We understand that the Rules should be prospective unless they provide for retroactivity. As such, the Rules cannot apply to any disputes or cases before their effective date. In addition, the Rules are relatively general and vague, and, in the absence of more detailed rules, guidelines, or interpretation may lead to unexpected obstacles or difficulties in their implementation.

《适用办法》于发布之日、2021年1月9日生效，对其追溯力只字未提。我们理解《适用办法》应指向未来，除非该办法本身规定其具有追溯力，因此，《适用办法》不能适用于其生效前的任何争议或案件。此外，《适用办法》的规定比较原则、措辞相对笼统，缺乏更详尽的实施细则或指南或进一步解释，在具体实施中可能也会遇到不可预料的障碍或困难。

15 See <http://english.mofcom.gov.cn/article/newsrelease/significantnews/202101/20210103031442.shtml>.

D. Method of Operation

Despite the Rules' clear purpose, the methods and mechanisms for achieving that purpose remain unclear. The Rules create a "working mechanism" for responding to the improper extraterritorial application of foreign law.¹⁶ However, the Rules are silent about the nature of that mechanism. Instead, the Rules state that the working mechanism will be "led" by the competent commerce department of the State Council,¹⁷ i.e., MOFCOM. In addition, it charges the "working mechanism" with identifying the "unjustified extraterritorial application" of foreign laws, taking the following factors into account:

《适用办法》虽规定了明确的目的，但实现目标的方法和机制仍有待于进一步完善。然而，《适用办法》为应对外国法律“不当域外适用”建立“工作机制”。¹⁶但该办法对这种机制的性质只字未提。相反，《适用办法》指出，工作机制将由国务院商务主管部门（即商务部）牵头，¹⁷基于以下三个因素来判断外国法律或措施是否“不当域外适用”：

- Any violation of international law and "basic principles" of international relations;
是否违反国际法和国际关系“基本准则”；
- Any potential impact on the "sovereignty, security and development interests" of China;
对中国“主权，安全与发展利益”可能产生的影响；
- Any possible impact on the "legitimate rights and interests of the citizens, legal persons, or other organizations of China"; and¹⁸
对“中国公民，中国法人或其他组织的合法权益”可能产生影响；和¹⁸
- Other factors that shall be taken into account.
其他应当考虑的因素。

This final, miscellaneous factor gives MOFCOM certain discretionary power or flexibility to determine if extraterritorial application of foreign laws is "unjustified."

该最后的“兜底条款”还赋予商务部一定的自由裁量权或灵活性，以裁定外国法律的域外适用是否“不当”。

If, after weighing these factors, the working mechanism finds an "unjustified extraterritorial application" of foreign law, the Rules empower it to enjoin Chinese persons and legal persons from recognizing or complying with the foreign law or measures.¹⁹

在综合考量上述因素后，如工作机制查明外国法律或措施“在域外的不当适用”，则《适用办法》授权它禁止中国公民和法人承认或遵守外国法律。¹⁹

E. Enforcement and Reporting Measures

执行和报告制度

While the Rules are relatively silent on operational details, they provide a detailed menu of enforcement and reporting measures that could have significant compliance consequences for companies doing business in the PRC.

《适用办法》虽未规定实施细则，但它规定了详细的执行和报告制度，这可能会对在中国开展业务的公司产生重大的合规难题。

First, the Rules require Chinese citizens and legal persons to truthfully report any instance where "foreign legislation and other measures" limit or bar "normal economic, trade and related activity" with a third country, or its "citizens, legal persons, or other organizations."²⁰ Any person or entity that encounters such circumstances must make a "truthful report" to MOFCOM within 30 days.²¹

首先，该办法要求中国公民和法人如实报告“外国法律与其他措施”禁止与第三国或其“公民，法人或其他组织”进行“正常的经贸活动”的情形。²⁰遇到这种情况的个人或者实体，必须在三十日内向商务部作出“如实报告”。²¹

If the concerned party fails to truthfully report, MOFCOM may give the party a warning, order the party to make corrections within a specified time limit, and may impose a fine against the party depending on the seriousness of the circumstances.²² This report requirement will undoubtedly increase the compliance burden for the companies concerned and administrative costs for MOFCOM, because a large number of companies may be involved.

但未按照规定如实报告有关情况的一方，可以被处以警告，责令限期改正，并可以根据情节轻重处以罚款。²²因涉及的企业数量可能较多，这无疑会无形中增加相关企业的合规负担和商务部的行政成本，

If a company complies with the Rules, and reports "significant losses" from another party's compliance with US sanctions or other extraterritorial foreign laws, the "relevant government department" can provide necessary support.²³ However, this relief may not be feasible due to the lack of detailed implementing rules.

如果一家公司遵守该办法并报告了因他方遵守美国制裁法或其他域外外国法而遭受“重大损失”，则“相关政府部门”可以提供必要的支持。²³然而，救济也因缺乏具体的实施细则可能难以兑现。

¹⁶ See the Rules, Article 4.

¹⁷ *Id.*

¹⁸ See *id.*, Article 6.

¹⁹ See *id.*, Article 7.

²⁰ See *id.*, Article 5.

²¹ *Id.*

²² See *id.*, Article 13.

²³ See *id.*, Article 11.

The Rules also create a private right of action for any party that complies with an injunction issued by the yet-to-be constituted “working mechanism.”²⁴ If any “party” complies with a foreign law or measure within the scope of an injunction, and imposes on the “legitimate rights and interests of a citizen, legal person, or other organization of China,” the injured party may bring a private suit in the People’s Court to recover compensation.²⁵ In other words, if any company complies with US sanctions to the detriment of a Chinese person or company, the injured party can seek damages for its losses before the court.²⁶ However, the Rules are not laws and regulations and, therefore, cannot be applied directly by the court, which may impede the success of any lawsuit.

《适用办法》还为遵守尚未成立的“工作机制”发出的禁令的当事方创设了私人诉权。²⁴如果任何“当事方”在禁令范围内遵守外国法律或措施，而侵犯“中国公民，法人或其他组织的合法权益”，则受害方可依法向中国法院提起损害赔偿之诉。²⁵换言之，如果任一公司因遵守美国的制裁规定，而损害中国公民或公司的合法权益，则受害方可以向中国法院起诉要求赔偿损失，²⁶但《适用办法》本身不属于“法律法规”的范畴，通常不被法院直接适用，可能会对诉讼产生不利影响。

On their face, the Rules appear to be a direct and unavoidable challenge to the international scope of US sanctions and OFAC enforcement of those sanctions. However, MOFCOM included two provisions in the Rules to mitigate their potential impact on PRC-US relations. The Rules do not apply to international treaties or other agreements made by the PRC.²⁷ In addition, the Rules contain an exemption process, similar to the exemption process set forth in the EU Blocking Statute.²⁸ The process allows Chinese citizens and legal persons to apply to MOFCOM, identifying the reasons for and the scope of the exemption sought.²⁹ The Rules require MOFCOM to make a decision on the application within 30 days, or in a timely manner in the case of an emergency.³⁰

从表面上看，《适用办法》似乎是在国际范围内对美国制裁制度和OFAC的制裁执法形成不可避免的直接挑战。然而，商务部在本办法中增加了两项措施，从而弱化对中美关系的潜在影响。《适用办法》不适用于中国缔结或者参加的国际条约或其他协定规定的外国法律与措施域外适用情形。²⁷本办法设立类似于《欧盟阻断法》的豁免程序，²⁸允许中国公民和法人向商务部有关部门提出豁免申请，以确定豁免的原因和适用范围，²⁹要求商务部在三十天内对豁免申请作出决定，或在情况紧急的情况下，须立即决断。³⁰

III. Comments and Significance

评述及影响力

While the precise contours of the “working mechanism” remain unclear, even in their current form the Rules represent a significant step by MOFCOM to counter US sanctions and OFAC enforcement, and require careful consideration by US multinationals that conduct business in China and third-country companies that conduct business in both China and the US.

尽管“工作机制”的确切轮廓尚不清楚，但即使以目前的形式，《适用办法》仍成为商务部反制美国制裁和OFAC执法的重要步骤，在中国开展业务的美国跨国公司和在中美两国开展业务的第三国公司需严正以待，并给予高度重视。

For Chinese companies that do not do business in the US, the Rules potentially offer significant freedom, flexibility, and political cover from the international reach of US sanctions. By staking out a position against the extraterritorial application of foreign law, and the resulting harm to Chinese economic interests, the PRC has given *de facto* approval to efforts by Chinese companies to engage in markets and with entities subject to US sanctions.

对于在美国没有业务和实体的中国公司而言，《适用办法》为应对美国制裁的国际影响可能提供了极大的自由度，灵活性和政治庇护。通过阻断外国法律域外适用以及维护中国经济利益，中国事实上某种程度上已准许中国公司在受美国制裁的市场与受制裁实体进行商业活动进行尝试。

Chinese subsidiaries of US corporations likely will face the most significant impact. Absent an exemption by MOFCOM – which has yet to articulate the criteria for approval – these entities will face a Hobson’s choice: comply with the Rules and expose their US parent to potentially ruinous investigations and fines by OFAC, or ignore the Rules and face fines and civil liability in the People’s Court due to incompatible regulations from both sides.

美国公司在中国的子公司可能会面临最重大的抉择。在得不到商务部的豁免的情况下，目前尚不清楚符合豁免的具体标准和条件，这些实体将面临进退两难的选择：因双边的相关规定并不兼容，如遵守《适用办法》，可能会致使其美国母公司面临OFAC的严苛调查或罚款，而假如无视《适用办法》，又有可能面临中国法院处以的罚款和民事责任。

24 *Id.*, Article 9.

25 *Id.*

26 *Id.*

27 See the Rules, Article 15.

28 See *id.*, Article 8.

29 See *id.*

30 See *id.*

Chinese employees of US companies will face a similar dilemma. Even if a US company does not have a Chinese subsidiary, if that company employs a Chinese citizen, that citizen must comply with the Rules. Doing so could expose the employer to civil and criminal liability in the US for the Chinese employee's actions. This potential outcome highlights the importance of the exemption provisions of Article 8. US companies should begin exploring what steps they can take to address these complicated compliance challenges, such as "ring fencing" or "recusal policies."³¹

美国公司的中国员工将面临类似的困境。即使一家美国公司在中国没有子公司，但该公司因雇用中国公民，该中国公民也必须遵守《适用办法》，那么就有可能致使雇主因其中国雇员的行为在美国承担民事和刑事责任。这种潜在的后果凸显了第8条中的豁免条款的重要性。美国公司应开始研究可以采取哪些步骤来应对这些复杂的合规挑战，比如，采取“围栏”或“撤换”政策。³¹

The Rules also may have significant implications for existing commercial contracts between US companies and their Chinese counterparties. Many commercial contracts include provisions or language that require compliance with US exports controls and economic sanctions and excuses non-performance if performing under the contract would run afoul of US sanctions. In light of the penalty provisions of the Rules, it is imperative for companies to review and update their contracts to ensure compliance with the Rules.

《适用办法》可能会对美国公司与其中国合同相对方之间的现有商业合同产生重大影响。许多商业合同里均包含要求遵守美国出口管制和经济制裁、如因履行该合同将导致违反美国制裁规定，则可不履行合同义务的相关规定或措辞，公司必须重审或修改这些合同条款，以确保与《适用办法》的规定吻合一致。

Finally, in considering the long-term potential impact of the Rules, it is important to consider two facts. First, the absence of any clear operational details gives MOFCOM significant flexibility in shaping how the "working mechanism" will function. Second, the exemption process gives MOFCOM the opportunity to offer safe harbor from the working mechanism for multinationals that provide significant value to the Chinese economy.

最后，在考量《适用办法》潜在长期影响时，不能忽略以下两点因素。首先，由于该办法未出台明确的具体实施细则，因此，商务部在确定“工作机制”的操作方式上具有较大的灵活性。其次，关于豁免程序的规定，使商务部仍有机会在工作机制中对中国经济举足轻重地位的跨国公司提供必要“安全港”。

Taken together, these facts suggest that while the PRC is prepared to use the Rules to accelerate the ongoing trade dispute with the US, Chinese leaders retained sufficient flexibility to reward Washington DC for reducing trade tensions under the Biden administration.

综上所述，上述分析表明，尽管中国准备利用《适用办法》与美国的贸易争端进行博弈，但中国领导人也希望留有足够回旋余地，以期华盛顿在拜登新政府的领导下，可能采取新的举措，以缓解双方僵持已久的贸易紧张局势。

³¹ "Ring-fencing" and "recusal policies" refer to the processes whereby particular individuals are excluded from certain business and decisions by company policy in order to ensure compliance with the law, particularly their home country laws. For example, non-US companies can comply with certain US sanctions by "ring-fencing" or recusing their US citizen employees from business with sanctioned parties. Similarly, non-Chinese companies may be able to comply with certain aspects of the MOFCOM Rules by recusing their Chinese-citizen employees from certain business or decisions.

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