

Anti-Foreign Sanction Law

What MNCs Need to Know about

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Since its promulgation on 10 June 2021, the PRC Anti-Foreign Sanction Law (“AFS Law”) has shown its teeth by targeting at certain foreign individuals and enterprises who deemed as being in violation of AFS Law. Under this circumstance, it is advisable for multi-national companies (“MNCs”) operating business in China to have a deep dive into the AFS Law and its implications. This article aims to provide a high-level overview of the AFS Law and our preliminary suggestions on how MNCs may wish to react on it from the PRC law compliance perspective.

1. Brief Introduction on AFS Law

1.1 PRC Anti-sanction Law System

To fight back against the discriminatory and restrictive measures against the Chinese citizens and organizations to contain or suppress China (“**Concerned Discriminatory and Restrictive Measures**”) which are in violation of international law or the basic norms governing international relations, the Chinese government has promulgated a series of laws and regulations to form its anti-sanction law system, which are:

- a. Provisions on the List of Unreliable Entities (“Provisions on Unreliable Entities”);
- b. Measures for Blocking Improper Extraterritorial Application of Foreign Laws and Measures (“Measures for Blocking”); and
- c. AFS Law. The first two regulations are summarized below in tabular forms for your reference.

| Promulgation Authorities | Provisions on Unreliable Entities | Measures for Blocking |
|--------------------------|--|--|
| Ministry of Commerce | | |
| Effective Date | 19 September 2020 | 9 January 2021 |
| Applicability | Any foreign enterprise, other organizations or individuals interrupts normal transactions with, or takes discriminatory measures against Chinese enterprises, other organizations or individuals. | The extraterritorial application of foreign laws and measures under circumstances of any Chinese citizen, legal entity or other organization is improperly prohibited or restricted from conducting normal economic and trade activities and relevant activities with any third country (region) or its citizen, legal entity or other organization. |
| Implication 影响 | UBeing listed on the "List of Unreliable Entities" and imposed with one or more restriction measures, including: <ul style="list-style-type: none"> • restricting or prohibiting foreign entities from engaging in import or export activities related to China, or investment activities within China; • restricting or prohibiting the entry of the foreign entity's relevant personnel or transportation vehicles into the territory of China; • restricting or cancelling the work permit, stay or residence qualification of the foreign entity's relevant personnel in China; • imposing a fine corresponding to the seriousness of the case against the foreign entity; and • other necessary measures | Issuing an injunction against the relevant Chinese enterprises, other organizations or individuals for not recognition, enforcement or compliance with the relevant foreign laws and measures |
| Current Practice | Up till now, the Chinese government has not listed any enterprises on the "List of Unreliable Entities". | Up till now, the Chinese government has not issued any injunction against recognition, enforcement or compliance with the relevant foreign laws and measures against any Chinese enterprises, other organizations or individuals. |

1.2 Position of AFS Law in PRC Anti-sanction Law System

After the promulgation of the AFS Law, it is believed that the integrate legal system of anti-foreign sanction laws has well been established.

Compared with the Provisions on Unreliable Entities and Measures for Blocking, AFS Law stands in a much more important position from the following perspectives:

- it enjoys higher legal hierarchy as it was adopted by the Standing Committee of the National People's Congress of China (NPC), NPC is the highest legislation authority in China;
- it firstly from the statue law point provides legal grounds for other Chinese authorities in addition to the Ministry of Commerce to take

corresponding countermeasures towards the Concerned Discriminatory and Restrictive Measures; and

- its scope of targets and applicability are much wider covering both Chinese parties and also foreign parties, which we will further illustrate in Section 1.3 below.

On the other hand, as a higher-level law, Article 10 of AFS Law prescribes that, the relevant laws, administrative regulations and departmental rules may provide for other necessary countermeasures. Hence, the countermeasures or handling measures under the Provision on Unreliable Entities and the Measures for Blocking, as the departmental rules promulgated by the Ministry of Commerce, could be deemed as the supplements to AFS Law.

1.3 Targets of AFS Law and Countermeasures

- a. Targets of AFS Law Per Article 4 and Article 5 of the AFS Law, it has two types of targets:
 - i. individuals and organizations directly or indirectly participating in the formulation, decision, or implementation of Concerned Discriminatory and Restrictive Measures ("Direct Targets"), and
 - ii. individuals and organizations related to the aforesaid targets ("Related Targets"), including:
 - a. spouses and direct relatives of the targeted individuals,
 - b. senior management or actual controllers of the targeted organizations,
 - c. organizations in which the targeted individuals serve as senior managers, and
 - d. organizations actually controlled or participated in the establishment or operation by the targeted individuals and organizations.
- b. Countermeasures of AFS Law

In addition to having the Direct Targets be listed on the "Anti-sanction List" (反制清单 in Chinese), AFS Law also provides three types of commonly used countermeasures, namely travel ban, asset freeze, and prohibition or restriction of transactions and cooperation which may be imposed against both the Direct Targets and the Related Targets:

- i. denial of visa issuance, denial of entry, deregistration of visa or deportation,
- ii. seizure, distraining or freezing of movable or immovable property and other types of property within the territory of China, and
- iii. prohibiting or restricting the organizations or individuals within the territory of China to carry out relevant transactions, cooperation or other activities with them.

In addition, AFS Law also provides that for any act endangering the sovereignty, security and development interests of China, other necessary countermeasure may be taken according to relevant laws, administrative regulations, and departmental rules. This leaves room for the competent authorities to take other kinds of countermeasures when necessary.

2. Key Dos and Don'ts under AFS Law

2.1 Dos - To Implement or Cooperate with the Chinese Government to Implement the Countermeasures

In accordance with Article 11 of the AFS Law, any individual and organization within China, including MNC's local subsidiaries, shall implement the relevant countermeasures against the Direct Targets and the Related Targets adopted by the Chinese government, such as cooperating with the Chinese government on asset freeze actions against the Direct Targets and Related Targets, and refraining from conducting transactions and cooperation with the Direct Targets and Related Targets. Failing to do so may result in being punished by the Chinese authorities pursuant to applicable PRC laws and may be restricted or prohibited from engaging in relevant activities.

Article 14 of AFS Law also leaves room for the extraterritorial effect of AFS Law, such as implementing any countermeasures (such as assets freeze orders or transaction restriction orders) issued by the Chinese government on the headquarters or affiliates of foreign entities outside of China. However, in practice, the enforceability of such extraterritorial effect may also be challenged due to the competence of the jurisdiction.

2.2 Don'ts - Not to Implement or Assist in Implementing the Concerned Discriminatory and Restrictive Measures

AFS Law specifies that any individual and organization shall not directly implement or assist in the implementation of the Concerned Discriminatory or Restrictive Measures imposed by any foreign country against any Chinese individuals or organizations.

If an MNC (including its China based entities), infringes the legal rights or interests of a Chinese citizen or organization by directly implementing or assisting in implementing the Concerned Discriminatory or Restrictive Measures, other than facing the risk of being punished under AFS Law, it might also be sued and claimed for compensation of damages by the Chinese citizen/organization affected.

3. Current Practice on Implementation of AFS Law

3.1 Aiming on Both Political Targets and Enterprises

Up till the date of 1 March 2022, according to the publicly available information, there have not been many real enforcement actions taken by Chinese government under AFS Law. From the limited announced enforcement cases, we see that the Chinese government has taken countermeasures under AFS Law against fifteen (15) U.S. citizens (most of whom are U.S. politicians, those being imposed with two or more restrictive measures are repeatedly counted), and one (1) U.S. entity (i.e., International Republican Institute) who are all deemed as having involved in U.S. discriminatory sanctions against Xinjiang entities and individuals and/or having interfered China's internal affairs related to Hong Kong. The countermeasures imposed include prohibiting relevant personnel and their families from entering into China (including Hong Kong and Macao Special Administrative Regions), freezing their assets in China, and prohibiting themselves and its affiliates from trading with Chinese citizens and entities.

Notably, the PRC Foreign Ministry announced on 21 February 2022 that the Chinese government decided under the AFS Law to impose countermeasures against two US military contractors, i.e., Raytheon Company and Lockheed Martin Space Systems Company for their weapon sales to the Taiwan Region.

3.2 Pending for Interpretation by Implementing Rules

The AFS Law only sets out general principles for the Chinese government to adopt countermeasures against Concerned Discriminatory and Restrictive Measures taken by a foreign government. How the Chinese law enforcement authorities interpret the Concerned Discriminatory and Restrictive Measures and what kinds of acts fall into its regulation scope remain to be seen. This leaves room for the Chinese government to promulgate specific implementing rules and take enforcement actions consistent with the objectives of the AFS Law.



4. Suggestions to MNCs

Given its novelty and the enforcement cases for reference are quite limited, the implications of the AFS Law may need specific legal analysis depending on the particular facts and circumstances. Based on our understanding of the relevant laws and rules as well as the problems that might be commonly encountered during MNCs' business operation, we hereby provide some compliance suggestions for reference.

4.1 Re-evaluate and Amend the Internal Compliance Policy to Ensure Compliance with AFS Law

For MNCs doing business in China, it is high time to re-evaluate their current compliance policies and consider how to incorporate compliance requirements under the various applicable sanctions laws of China into the existing global compliance programs and how to address the potential conflict rules between the requirements of foreign countries and China, such as the U.S. sanctions v.s. the AFS Law.

Especially, to be able to assist in implementation of the countermeasures taken by the Chinese government as required by the AFS Law, MNCs may wish to adopt compliance mechanisms to cut off or block corporate connection with the sanctioned Direct Targets or the Related Targets.

4.2 Refrain from Trading with Direct Targets and Related Targets

MNCs are suggested to conduct trade control due diligence against their supplier/customers with reference to the Anti-sanction List before proceeding with business with them. To comply with the AFS Law, MNCs may wish to disconnect the sanctioned Direct Targets and Related Targets from their own business and supply chains to reduce the risk of being regarded rejecting to implement the countermeasures and be exposed to liabilities under the AFS Law.

4.3 Revisit Template Trading Contracts to Comply with AFS Law

We suggest that MNCs review the provisions of their sanction compliance and liability exemption clauses or commitment letters of sanction compliance from PRC law perspective by fully and comprehensively evaluating the impact of the AFS Law, including:

- a. adding the AFS Law and other PRC sanction laws into the scope of laws and regulations to which the counterparty undertakes to comply;
- b. revising the contents of the relevant compliance management schemes in the commercial contract templates which contradict the AFS Law; and
- c. building in contractual mechanisms such as if the counterparty were added to the Anti-sanction List during certain contract terms, MNCs shall be free to terminate the contractual relationship.

4.4 Conduct Staff Training on AFS Law and Related Rules and Regulations

We also recommend that MNCs strengthen the awareness on the AFS Law and other relevant Chinese legal requirements and compliance red lines of their employees working in both Chinese and foreign subsidiaries by providing proper staff trainings to mitigate the potential incompliance risks under the AFS Law.

4.5 Keep An Eye on China's Legislation and Enforcement Actions on Anti-Foreign Sanction

As we advised above, in view of the obvious principle and framework characteristics of the AFS Law, it gives enough space for the Chinese government to formulate implementation rules in the future. Therefore, it is advisable for MNCs to keep an eye on the latest developments of the AFS Law, especially relevant implementation rules, other related laws and regulations, and typical cases.

On the other hand, MNCs are recommended to follow up with enforcement actions of the AFS Law, such as the Anti-sanction List and countermeasures against the Direct Targets or Related Targets that may be released by the Chinese government from time to time.