

Legal Commentary

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PRC Anti-Foreign Sanctions Law

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On June 10, 2021, the Standing Committee of the National People's Congress adopted the Anti-Foreign Sanctions Law (the “**Anti-Sanctions Law**”). The law fills in certain legislative gaps and provides higher legal authority to impose countermeasures in response to foreign sanctions and restrictive measures, which has been the subject of recently promulgated administrative rules such as the *Provisions on Unreliable Entity List* and the *Rules on Counteracting Unjustified Extra-territorial Application of Foreign Legislation and Other Measures*. However, the Anti-Sanctions Law leaves many questions unanswered and has caused considerable concern among both Chinese and foreign financial institutions. This article introduces certain key aspects of the Anti-Sanctions Law and provides Han Kun's market observations.

Countermeasures against “discriminatory” foreign sanctions and measures

The Anti-Sanctions Law reiterates China's position that it reserves the right to impose countermeasures in response to foreign nations whose sanctions or restrictive measures on Chinese individuals and organizations are deemed “discriminatory” and where such foreign sanctions or restrictive measures contain or suppress China, violate international law, and/or interfere with China's internal affairs (Art. 3).

Han Kun observation: The Anti-Sanctions Law does not define “discriminatory” in this context. Based on legislative intent, we believe foreign unilateral sanctions imposed on Chinese individuals and entities in relation to China-specific issues would be deemed discriminatory (such as matters relating to Xinjiang, Hong Kong, Taiwan, and COVID-19). In addition, we cannot rule out that measures under the U.S. Export Administration Regulations or other similar foreign regulations may be deemed “discriminatory” under the catch-all clause in the Anti-Sanctions Law.

Covered persons

The Ministry of Foreign Affairs and other relevant authorities are empowered to publish a list of individuals and organizations that are directly or indirectly involved in the formulation, decisions on, or implementation of foreign discriminatory measures (Arts. 4 and 9). These “covered persons” are individually subject to countermeasures under the Anti-Sanctions Law. In addition, the Chinese authorities may impose countermeasures on persons related to covered persons, such as an individual's spouse and immediate family members or an organization's senior executives and controllers (Art. 5).

Han Kun observation: It is unclear whether non-state actors may be deemed covered persons for merely implementing foreign discriminatory measures. For example, a foreign financial institution could be considered a covered person where it freezes the accounts of a Chinese person in accordance with U.S.-imposed sanctions. However, if narrowly interpreted, the term “implementation” would only apply to governmental officials and institutions, e.g., the U.S. authority’s staff and offices.

What countermeasures may be imposed?

The Anti-Sanctions Law expressly calls for countermeasures that include various enforcement actions in China, including: (1) refusing to issue visas, banning entry into China, invalidating visas, and deportation; (2) sealing up, seizing, and freezing assets in China; (3) prohibiting or restricting from conducting business with Chinese domestic organizations or individuals; (4) other necessary measures (Art. 6).

Han Kun observation: If strictly enforced, the countermeasures could cause a foreign company or individual to be completely shut out of the China market. Because of this severe potential impact, we believe the Chinese government will apply countermeasures in a targeted and prudent manner.

Decisions final

Decisions to designate covered persons and impose countermeasures are final (Art. 7).

Han Kun observation: Decisions are final with respect to covered person designations and the imposition of countermeasures, which means covered persons generally lack a right to appeal these decisions. Despite this, we believe covered persons may approach the competent authorities and apply to suspend the designation by, for example, explaining a change of circumstances.

Questions raised by the Anti-Sanctions Law

The Anti-Sanctions Law leaves many questions unanswered (e.g., the ambiguities discussed above in Section 1) and has so far caused considerable concern, especially among Chinese and foreign financial institutions whose operations are subject to the laws of both their home jurisdictions and places of operation. The following are merely a few examples of pressing questions that have arisen due to the Anti-Sanctions Law:

- Can “standard compliance clauses” still be put into joint venture contracts, because the detailed U.S.-style language could be deemed as plain violation of the Anti-Sanctions Law?
- How should foreign-invested Chinese subsidiaries respond when foreign sanctions requirements conflict with countermeasures under the Anti-Sanctions Law?
- Does the Anti-Sanctions Law apply to Hong Kong?
- Could criminal penalties be imposed on Chinese subsidiaries for failure to abide by the Chinese countermeasures?

Because the Anti-Sanctions Law is quite new, legal interpretations and market practices are developing. If you have any questions regarding the Anti-Sanctions Law, please contact your usual Han Kun attorney contacts or the firm’s Corporate Compliance Practice Group.

Important Announcement

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