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TECHNOLOGY MAY-RATHON

China's Anti-Foreign Sanctions Law: Considerations and Implications of the Blocking Statute

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Presenters



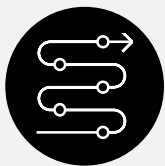
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Agenda



Navigating the Biden Administration

- Background
- Trump Administration Actions
- Biden Administration Actions
- Anticipated Landscape



The New Chinese Blocking Statutes

- Overview
- Who will be subject and exempt?
- Practical considerations for MNCs

Navigating the Biden Administration

The background is a dark blue space filled with a complex network of glowing lines and dots. The lines are thin and radiate from various points, creating a sense of depth and movement. The dots are small and brightly colored, appearing in shades of blue, purple, and red. The overall effect is that of a digital or data landscape, with the lines and dots forming a grid-like structure that recedes into the distance.

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Setting the Stage

The United States government (the Executive and Congressional branches) – has taken an assertive stance with respect to the People’s Republic of China (“PRC” or “China”):



Executive orders designed to manage China’s engagement in the U.S.



Regulations that limit China’s access to U.S. products, technology and markets



Policies designed to draw inferences regarding China’s actions – e.g., designations regarding “foreign adversaries”



Outreach to allies and partners to share intelligence and other information regarding the Chinese government’s actions as well as the actions of various Chinese companies



Changes in laws and regulations by allies and partners that impact China’s ongoing global engagements

Setting the Stage



These actions have elicited reactions from the Chinese government

- Not inconsistent with other governments' reactions when the U.S. applies restrictions to global or domestic activities
- Policy and regulatory changes in China
- Shifts in approach to the new Administration
- Preparation of a list of negotiating points to discuss with the Biden Administration

Select Trump Administration Actions from 2017-2021

Designation of critical U.S. policy objectives

- 1** Diversify the U.S. supply chain
- 2** Consistent use of sanctions and entity list designations
- 3** Expand domestic capacity to develop more resilience, independence and reliability – both unilateral and multilateral
- 4** Expand and encourage the growth of the U.S. industrial base (both defense and commercial)
- 5** Manage blocking statutes

Select Trump Administration Actions from 2017-2021

Designation of critical U.S. policy objectives

6

Identify key emerging technologies that address U.S. national and economic security interests

7

Manage adversarial relationships that create chokepoints for key U.S. systems – whether defense, intelligence, power, energy, financial, public welfare or communications

8

Identify and use existing legal authorities to achieve policy objectives – the Defense Production Act critical and strategic materials designations, Section 232, Section 301, Section 201, Section 1237 of the NDAA of 1999

Use of Executive Orders to Meet the Objectives

Select Action (by date signed)	Title	Date
EO 13797	Establishment of the Office of Trade and Manufacturing Policy	April 29, 2017
EO 13806	Assessing & Strengthening the Manufacturing and Defense Industrial Base and Supply Chain Resiliency of the United States	July 21, 2017
EO 13858	Strengthening Buy American Preferences for Infrastructure Projects	January 31, 2019
EO 13859	Maintaining American Leadership in Artificial Intelligence	February 11, 2019
EO 13873	Securing the Information and Communications Technology and Services Supply Chain	May 15, 2019
EO 13881	Maximizing Use of American-Made Goods, Products and Materials	July 15, 2019
EO 13904	Ensuring Safe and Lawful E-Commerce for United States Consumers, Business, Government Supply Chains and Intellectual Property Rights Holders	January 31, 2020
EO 13913	Establishing the Committee for the Assessment of Foreign Participation in the United States Telecom Sector (former Team Telecom)	April 4, 2020

Use of Executive Orders to Meet the Objectives

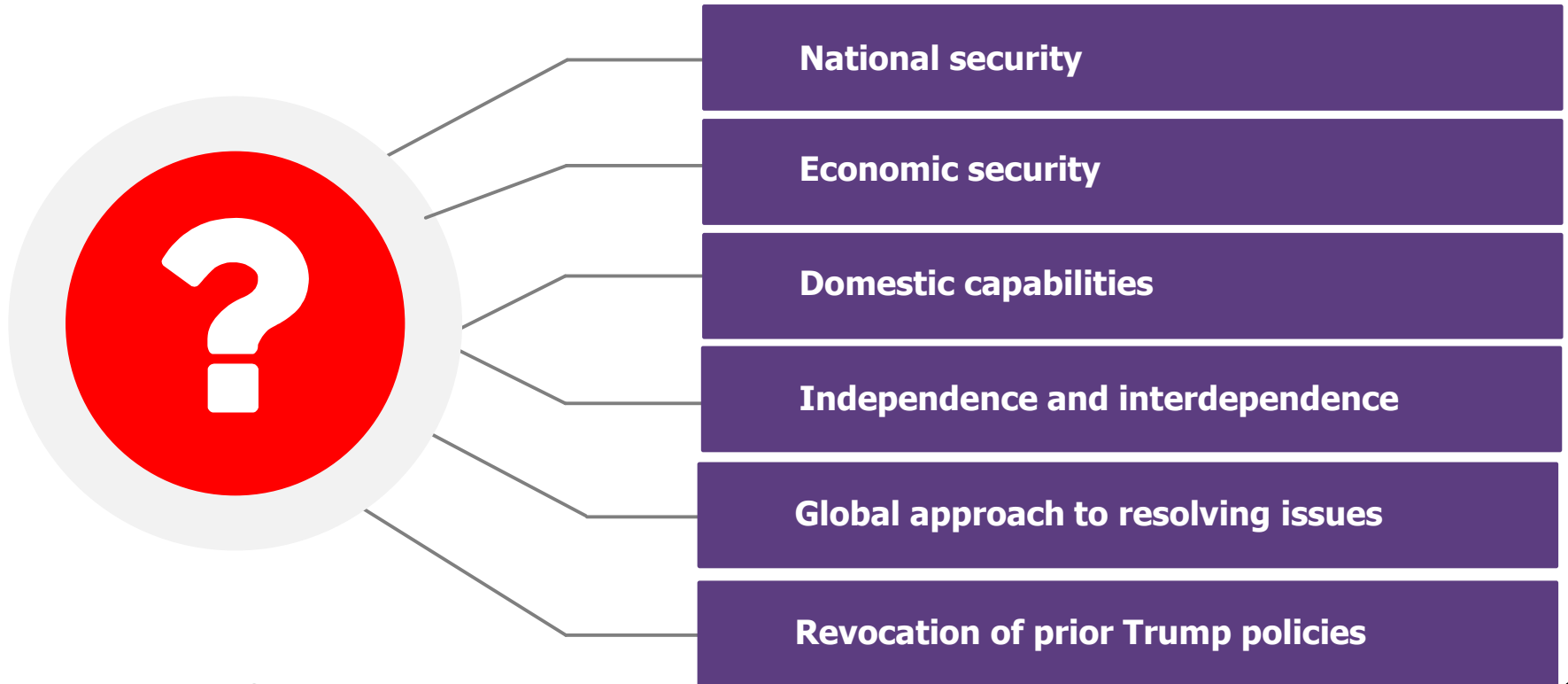
Select Action (by date signed)	Title	Date
EO 13920	Securing the United States Bulk Power System	May 1, 2020
EO 13936	The President's Executive Order on Hong Kong Normalization	July 14, 2020
EO 13942	Addressing the Threat Posed by TikTok, and Taking Additional Steps to Address the National Emergency with Respect to the Information and Communications Technology and Services Supply Chain	August 6, 2020
EO 13943	Addressing the Threat Posed by WeChat, and Taking Additional Steps to Address the National Emergency with Respect to the Information and Communications Technology and Services Supply Chain	August 6, 2020
EO 13953	Addressing the Threat to the Domestic Supply Chain from Reliance on Critical Minerals from Foreign Adversaries and Supporting the Domestic Mining and Processing Industries	September 30, 2020
EO 13959	Addressing the Threat from Securities Investments that Finance Communist Chinese Military Companies	November 12, 2020
EO 13960	Promoting the Use of Trustworthy Artificial Intelligence in the Federal Government	December 3, 2020
EO 13971	Addressing the Threat Posed by Applications and Other Software Developed or Controlled by Chinese Companies	January 5, 2021

Use of Executive Orders to Meet the Objectives

Select Action (by date signed)	Title	Date
EO 14007	President's Council of Advisors on Science and Technology	January 27, 2021
EO 14014	Blocking Property With Respect to the Situation in Burma	February 10, 2021
EO 14017	America's Supply Chains	February 24, 2021
EO 14024	Blocking Property With Respect To Specified Harmful Foreign Activities of the Government of the Russian Federation	April 15, 2021
EO 14028	Improving the Nation's Cybersecurity	May 12, 2021
EO 14032	Addressing the Threat From Securities Investments That Finance Certain Companies of the People's Republic of China	June 3, 2021
EO 14033	Blocking Property and Suspending Entry Into the United States of Certain Persons Contributing to the Destabilizing Situation in the Western Balkans	June 8, 2021
EO 14034	Protecting Americans' Sensitive Data From Foreign Adversaries	June 9, 2021

Biden Administration Actions

Biden administration has continued many Trump policies and orders – often altered process/timing



Biden Administration Actions Since January 20, 2021



Key Actions

- EO 13992 (Revocation of Certain Executive Orders Concerning Federal Regulations)
- Presidential Actions
 - January 20, 2021 (Modernizing Regulatory Review Memorandum)
 - January 20, 2021 (Regulatory Freeze Pending Review Memorandum)
- Statements on the expanded use of the Defense Production Act authorities

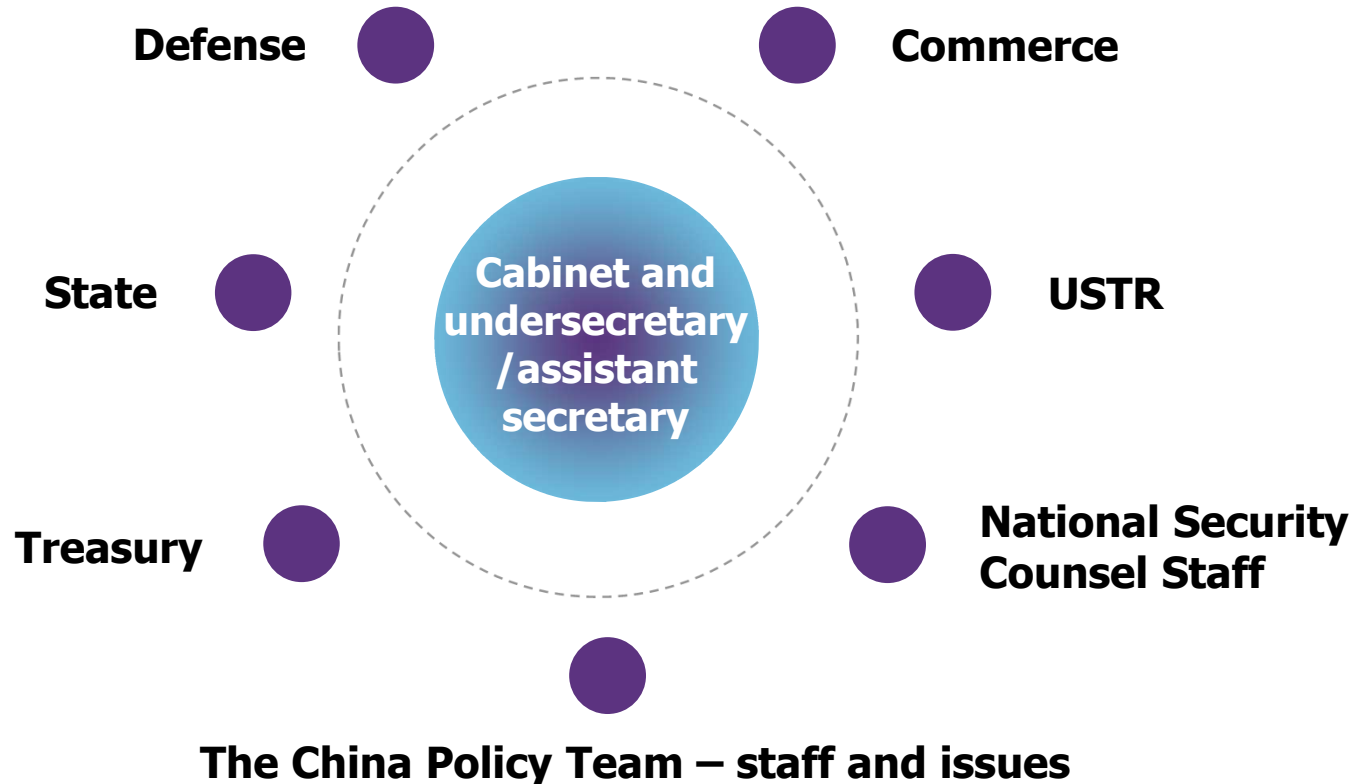
Prior Policies and Executive Orders that Remain in Place

- Although policy changes have occurred, a number of policies remain in place and appear slated to do so for the foreseeable future
 - Buy American provisions
 - The Department of Justice China Initiative
 - Growth of the U.S. industrial base
 - A focus on critical and emerging technologies
 - Addressing chokepoints in the supply chain
 - Executive Orders related to supply chain concerns, foreign investment reviews, and public securities

Prior Policies and Executive Orders that Remain in Place

- Certain policies appear poised to continue, though with different processes and often more broadly emplaced
 - CCMC securities EO amended to remove reliance on section 1237
 - New “CMIC’s” list expanded
- Tariffs will remain “for now”
- EO ordering study of means to ensure protection of US citizens’ personal data (replaced the Tiktok and WeChat orders)
- Further threats of Executive Orders regarding Hong Kong and internal China activities

Factors that Could Change the U.S.-China Relationship



Managing Potential Changes

- Expectations fulfilled
 - Largely continuing rhetoric and policies but more “studies” and less change
 - Continuation of Entity List, CCMC/CMIC, and HKAA
 - Human rights moving center stage
 - The Biden doctrine is human rights centric
 - Willing to upend existing relationships based on internal human rights agenda; external NGO influences
 - Continued use of FDI—Magnachip CFIUS review
- Question for MNCs – How will the Chinese government react?

China's Blocking Statutes

The background of the slide is a dark, abstract digital landscape. It features a dense field of vertical lines of varying heights, each topped with a small, glowing dot. The lines and dots are primarily in shades of blue, purple, and red, creating a sense of depth and movement. The lines appear to be connected at their base, forming a grid-like structure that recedes into the distance.

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Blocking Statute on January 9 – An Overview

Rules on Counteracting Unjustified Extra-territorial Application of Foreign Legislation and Other Measures

- Issued by China's Ministry of Commerce ("**MOFCOM**") on January 9
- Took immediate effect – but no public cases
- Vague and general in nature
- Aimed at blocking effect of extraterritorial laws impacting Chinese trade with entities in third jurisdictions

How Does the Blocking Statute of January 9 Work?

- Working Mechanism
- Prohibition Order
- Reporting obligation
- Confidentiality of reports
- Unclear scope of coverage – subsidiaries of MNCs in China, overseas Chinese subsidiaries, JVs in China?
- Compensatory damages via court proceedings

Blocking Statute of June 10 – An Overview

PRC Law to Counter Foreign Sanctions

- Issued by Standing Committee of the National People's Congress on June 10
- Took immediate effect
- Vague and general in nature
- Broad reach

How Does the Blocking Statute Work?

- Competent departments of the State Council (“State Council”)
 - May decide to include in a countermeasure list the individuals and organizations directly or indirectly involved in the development, decision-making, and implementation of the discriminatory restrictive measures against China or PRC nationals/organizations.
 - May decide to adopt countermeasures.
 - The decisions made by State Council is final, but may be suspended, modified or removed by the State Council if the relevant circumstance changes.
- Coordination and information sharing among the relevant work among gov’t dep’ts.

How Does the Blocking Statute Work? (cont'd)

Obligation to Abide by the Countermeasures

- Organizations and individuals within the territory of the PRC shall implement the countermeasures adopted by the State Council.
- Prohibition against organizations and individuals within the territory of the PRC from complying with or implementing discriminatory measures taken by foreign countries against Chinese citizens and organizations

What Foreign Sanctions may be blocked?

- Violate international law or the basic principles of international relations;
- Contain or suppress China under various pretexts or pursuant to its own laws;
- Directly or indirectly involved in the development, decision-making, and implementation of the discriminatory restrictive measures against China or PRC nationals/organizations; and
- Meddle in China's internal affairs.
- Conduct, assist in, or support acts that compromise China's sovereignty, security, or development interests, and necessary countermeasures need to be adopted.

Who may be included on the Anti-Sanctions List or subject to the Countermeasures?



Foreign persons ✓

MNC?

Management of MNC?

Spouses or immediate family of individuals?

Actual controller of MNC?

Affiliated companies?



Chinese persons ✓

What are exemptions and penalties for violation?

Exemptions

- None
- No judicial appeal
- Countermeasures may be suspended, modified or removed by the State Council.

Penalties for Violation

- Failure to abide by the countermeasures would be punished by the State Council, including being restricted or prohibited from carrying out relevant activities.
- PRC individuals or organizations may sue the organizations or individuals implementing or assisting in the implementation of the foreign discriminatory restrictive measures and claim for the compensation.

Practically, what does this mean for MNCs?

- What corollary consequences might there be MNCs following foreign sanctions?
 - Anti-Sanctions List and other Countermeasures
 - Social Credit System
 - Unreliable Entities List
- How is China likely to enforce the Blocking Statutes?
- What industries are likely to be impacted?
- Should companies look at lobbying their governments?

What can MNCs do to mitigate the risks?



- Consider conflict of laws between U.S. and China and assess compliance risks under both laws
- Look for possible reaction from foreign governments, especially Biden administration
- Watch for detailed implementing regulations



- Watch for issuance of Prohibition Orders from MOFCOM
- Consider impact on China-based subsidiaries and personnel
- Consider reporting obligations and risk of penalties and private lawsuits
- Review compliance clauses in existing contracts
- Consider amending termination rights

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QUESTIONS?

Biography



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Giovanna M. Cinelli is the leader of the international trade and national security practice. As a practitioner for more than 30 years, she counsels clients in the defense and high-technology sectors on a broad range of issues affecting national security and export controls, including complex export compliance matters, audits, cross-border due diligence, and export enforcement, both classified and unclassified. She handles complex civil and criminal export-related investigations and advises on transactional due diligence for regulatory requirements involving government contracts, export policy, and compliance, as well as settlement of export enforcement actions before the US departments of State, Commerce, Treasury, and Defense, and related agencies. Giovanna has conducted dozens of export investigations and has negotiated six consent agreements before the Department of State.

Biography



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Lesli Ligorner has more than 20 years of experience serving clients on a wide range of labor and employment matters, with more than 15 of those years spent on the ground in China. She has been advising a broad range of financial services, life sciences, telecommunications, media, and technology, and general manufacturing clients on the full suite of employment and compliance issues in China, including involving hiring and termination, establishment and enforcement of company policies, the Foreign Corrupt Practices Act (FCPA) and local anticorruption compliance, export controls, and discrimination and harassment policies. She regularly conducts trainings and internal investigations. Lesli is admitted to practice in New York and New Jersey.

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