

January 16, 2021

Update on Communist Chinese Military Companies (CCMCs) Sanctions: Amended Executive Order, New OFAC Guidance, Expanded Criteria for CCMCs, and Additional CCMCs Identified

On November 12, 2020, President Trump issued an Executive Order titled “Addressing the Threat from Securities Investments that Finance Communist Chinese Military Companies” (the “Order”), which went into effect on January 11, 2021 (after a 60-day grace period).¹ The Order prohibits U.S. persons² from engaging in transactions in publicly traded securities (or any securities that are derivative or otherwise designed to provide investment exposure to such publicly traded securities) of any identified “Communist Chinese Military Companies” (“CCMCs”). In the Order, President Trump cited the national security threat posed by the People’s Republic of China’s (the “PRC”) national strategy of Military-Civil Fusion, and, specifically, the threat posed by PRC companies that sell securities to U.S. investors and then invest this capital to finance the development and modernization of the Chinese military.

There has been considerable attention on and uncertainty about these sanctions as well as concerns regarding the potential harms that these sanctions may inflict on U.S. investors.³ It is also currently unclear what the views of the incoming Biden Administration (which will take office on January 20, 2021) are with respect to the CCMC sanctions.

This memorandum updates our prior memoranda of November 18, 2020⁴ and January 4, 2021 to cover additional developments.⁵

First, on January 1, 2021, the Senate overrode the President’s veto of the 2021 National Defense Authorization Act (“2021 NDAA”), a spending bill that includes a significant expansion of the identification criteria for CCMCs.⁶ The House had previously overridden the veto and, as a result, the Senate’s override vote enacted the 2021 NDAA into law on January 1, 2021.⁷ The relevant provisions of the 2021 NDAA build on the Order’s focus on the PRC’s Military-Civil Fusion and significantly expand the criteria for identification as a CCMC to include Chinese entities that the U.S. Secretary of Defense determines to be a “Military-Civil Fusion Contributor.” The 2021 NDAA lists seven broad classes of entities that are considered to be Military-Civil Fusion Contributors and also provides the Secretary of Defense with the discretion to add other classes of entities determined to be Military-Civil Fusion Contributors to the Department of Defense’s (“DoD”) CCMC list. Prior to the enactment of the 2021 NDAA, the criteria for identification as a CCMC had been limited to companies determined to be owned or controlled by, or affiliated with, the PRC government or the People’s Liberation Army, or owned or controlled by an entity affiliated with the defense industrial base of the PRC.

Second, the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") has released additional guidance and its first two general licenses under the CCMC sanctions. Specifically:

- On January 6, 2021, OFAC issued additional guidance clarifying the application of the Order. This guidance adds to the six Frequently Asked Questions ("FAQs") that OFAC had previously issued to define key terms and explain the scope of the Order's prohibitions. Among other things, guidance states that U.S. persons can continue to invest in funds that hold CCMC securities if the fund is complying with the Order and in the process of divesting such CCMC securities.
- On January 8, 2021, OFAC published an updated version of its Non-SDN Communist Chinese Military Companies List (the "CCMC List") which lists the CCMCs that are subject to sanctions under the Order. OFAC's CCMC List, originally published on December 28, 2020, now provides a chart of CCMCs, "aka" names, other "issuer names" (e.g., CCMC subsidiaries with names that "closely match" a listed CCMC), and relevant security tickers.⁸
- Also on January 8, 2021, OFAC issued General License Number 1 under the CCMC sanctions program, which authorizes U.S. person transactions through January 28, 2021 that involve the publicly traded securities of entities "whose name closely matches" the name of a listed CCMC, but that have not themselves been listed on OFAC's CCMC List.⁹
- On January 14, 2021, OFAC issued General License Number 2 under the CCMC sanctions program, which authorizes all transactions and activities by securities exchanges operated by U.S. persons related to CCMC securities (for CCMCs not identified on OFAC's CCMC List as of 12:01 am January 14, 2021) through the applicable 365-day divestment period.¹⁰

Third, on January 13, 2021, President Trump issued an Executive Order to amend the Order.¹¹ The amendments clarifies that U.S. persons are required to divest any CCMC securities that they possess by November 11, 2021 (if the relevant CCMC was one of the original 31 entities identified in the annex of the Order) or 365 days after the date that the entity is identified as a CCMC. The amended Order continues to permit U.S. person transactions in the publicly listed securities of a CCMC that are solely to divest, in whole or in part, from such securities during the applicable one-year divestment period. Notably, the Order as amended does not make specific reference to the CCMC-related provisions of the 2021 NDAA, including the 2021 NDAA's expanded criteria for CCMC identification. On January 14, 2021, OFAC issued additional FAQs and guidance to reflect the amendments to the Order.

Fourth, on January 14, 2021 DoD identified an additional nine aviation, technology, and semiconductor companies as CCMCs, including the Commercial Aircraft Corporation of China, China National Aviation Holding Company, Xiaomi Corporation, and GOWIN Semiconductor Corp., among others.¹²

To date, the U.S. government has identified 44 PRC companies as CCMCs, including the three principal telecom companies in the PRC: China Telecommunications Group, China Mobile Communications Corp., and China United Network Communications Group (collectively, the “PRC Telecom Companies”). Consistent with guidance issued on January 6, 2021, OFAC has identified four subsidiaries of four CCMCs—the PRC Telecom Companies and China National Offshore Oil Corp. (“CNOOC”)—as having names that “closely match” the name of a listed CCMC such that U.S. person trading in these subsidiaries’ securities is prohibited as of the dates the prohibition goes into effect for their respective parent companies.¹³ The four subsidiaries are: China Telecom Corporation Limited (NYSE: CHA), China Mobile Limited (NYSE: CHL), China Unicom (Hong Kong) Limited (NYSE: CHU), and CNOOC Limited (NYSE: CEO).

In a series of remarkable back-and-forth decisions related to OFAC’s recent guidance, the New York Stock Exchange (“NYSE”) on December 31, 2020 announced its intention to delist the PRC Telecom Companies’ subsidiaries’ securities as of January 11, 2021.¹⁴ The NYSE then reversed course on January 4, 2021, announcing that after further consultation with regulators regarding OFAC’s guidance, it had decided not to move forward with delisting.¹⁵ However, after publication of an OFAC FAQ specifically noting these subsidiaries as “closely matching” the names of listed CMCCs, the NYSE again reversed course and stated that these subsidiaries’ securities would, in fact, be delisted as of January 11, 2021.¹⁶ The NYSE’s actions are indicative of the ambiguities surrounding the scope and implementation of the Order that persist even following OFAC’s most recent guidance.

Background on the Order

1. Identification as a CCMC

Under the Order, a CCMC means any person that is: (1) currently listed on the DoD list of CCMCs operating directly or indirectly within the United States (as defined by the National Defense Authorization Act for Fiscal Year 1999, as amended (the “Act”)) and listed in the Annex of the Order¹⁷; (2) identified at a future date by the Secretary of Defense or Secretary of the Treasury as a CCMC under the Act; or (3) any person publicly listed by the Secretary of the Treasury as a subsidiary of a CCMC.

DoD has been required to maintain classified and unclassified versions of a list of CCMCs and share such list with Congress and relevant U.S. government agencies annually since 1999, pursuant to the Act. Earlier this year, DoD issued the first public version of its CCMC list. Specifically, on June 24, 2020, DoD sent a public letter to U.S. Senator Tom Cotton that included an attachment listing 20 companies headquartered in the PRC that DoD determined to be CCMCs operating directly or indirectly in the United States.¹⁸ On August 28, 2020, DoD published a list of another 11 companies that DoD had determined to be CCMCs. These 31 entities were identified in an Annex to the Order and are now subject to the Order’s prohibitions after expiration of the initial grace period. On December 3, 2020, DoD identified an additional four companies as CCMCs.¹⁹ To date, DoD has publicly identified a total of 44 PRC companies as CCMCs for

purposes of the Act (and therefore, by reference, also for purposes of the Order) and these companies are also listed on OFAC's CCMC List, which was most recently updated on January 8, 2021.

2. *Identification Criteria for a CCMC Under the Act Prior to the 2021 NDAA Amendments*

Prior to the 2021 NDAA amendments, the Act defined the criteria for identification as a CCMC as:

- “[A]ny person identified in the Defense Intelligence Agency publication numbered VP-1920-271-90, dated September 1990, or PC-1921-57-95, dated October 1995, and any update of those publications for the purposes of [the 1999 Act];” and
- [A]ny other person that: (i) is owned or controlled by, or affiliated with, the People's Liberation Army or a ministry of the government of the People's Republic of China or that is owned or controlled by an entity affiliated with the defense industrial base of the People's Republic of China; and (ii) is engaged in providing commercial services, manufacturing, producing, or exporting.”²⁰

For purposes of the Act, the term “People's Liberation Army” means the land, naval, and air military services, the police, and the intelligence services of the PRC, and any member of any such service or police force.

Pursuant to the Act, changes to the DoD CCMC list are to be made in consultation with the Attorney General, the Director of National Intelligence, and the Director of the Federal Bureau of Investigation.

3. *Expansion of CCMC Identification Criteria in the 2021 NDAA*

The 2021 NDAA amendments significantly expand the criteria under which an entity can be identified as a CCMC and added to the DoD list under the Act. The 2021 NDAA defines the criteria for identification as a CCMC as:

- An entity (the criteria state specifically that natural persons cannot be CCMCs) that is:
 - “[D]irectly or indirectly owned, controlled, or beneficially owned by, or in an official or unofficial capacity acting as an agent of or on behalf of, the People's Liberation Army or any other organization subordinate to the Central Military Commission of the Chinese Communist Party; **or “[I]dentified as a military-civil fusion contributor to the Chinese defense industrial base; and**
 - engaged in providing commercial services, manufacturing, producing, or exporting [emphasis added].”²¹

- The definition of “military-civil fusion contributor” for purposes of the 2021 NDAA includes:
 - “Entities knowingly receiving assistance from the Government of China or the Chinese Communist Party through science and technology efforts initiated under the Chinese military industrial planning apparatus.”
 - “Entities affiliated with the Chinese Ministry of Industry and Information Technology, including research partnerships and projects.”
 - “Entities receiving assistance, operational direction or policy guidance from the State Administration for Science, Technology and Industry for National Defense.”
 - “Any entities or subsidiaries defined as a ‘defense enterprise’ by the State Council of the People’s Republic of China.”
 - “Entities residing in or affiliated with a military-civil fusion enterprise zone or receiving assistance from the Government of China through such enterprise zone.”
 - “Entities awarded with receipt of military production licenses by the Government of China, such as a Weapons and Equipment Research and Production Unit Classified Qualification Permit, Weapons and Equipment Research and Production Certificate, Weapons and Equipment Quality Management System Certificate, or Equipment Manufacturing Unit Qualification.”
 - “Entities that advertise on national, provincial, and non-governmental military equipment procurement platforms in the People’s Republic of China.”
 - “Any other entities the Secretary [of Defense] determines is appropriate.”²²

Additionally, the 2021 NDAA shortens the term “Communist Chinese Military Company,” to “Chinese Military Company.”

4. The Order’s Prohibitions

The Order, after a 60-day grace period, which ended on January 11, 2021 for the 31 entities identified in the Order annex, broadly prohibits U.S. persons from engaging in any transaction in publicly traded securities, or any securities that are derivative of, or are designed to provide investment exposure to such publicly traded securities, of the CCMCs. “Transaction” is defined for purposes of the Order (as amended) to mean “the purchase for value, or sale, of any publicly traded security.” To the extent that a U.S. person holds publicly traded securities of a CCMC’s identified in the Order after January 11, 2021, the Order requires divestment by U.S. persons over the course of a wind down period that permits purchase and sale of CCMC

securities for the sole purpose of divestment by such U.S. person until November 11, 2021, after which time U.S. persons will be prohibited from possessing or trading in CCMC securities (of the 31 CCMCs identified in the annex of the Order; for those CCMCs added later, the wind down period extends 365 days from their date of identification, after which time U.S. persons are prohibited from possessing such CCMC securities).

With respect to any entity identified and listed as a CCMC after the date of the Order, the Order prohibits U.S. persons, wherever located, from transacting in that newly-listed entity's publicly traded securities (or any securities that are derivative or otherwise designed to provide investment exposure to such publicly traded securities) after 60 days from the date of the entity's listing as a CCMC. The Order further allows U.S. persons to engage in purchases and sales of such securities for the sole purpose of divestment 365 days from the date of the relevant CCMC identification.

As noted above, after some debate within the Trump Administration according to public reporting²³, the amended Order also *requires* U.S. persons to divest any CCMC securities that they possess by November 11, 2021 (or 365 days after the date that the relevant entity is identified as a CCMC) and permits U.S. person transactions in publicly traded CCMC securities prior to that date. For the four CCMC entities identified by DoD on December 4, 2020, the Order's prohibitions take effect February 1, 2021 and the wind down period ends December 3, 2021.

The Order also prohibits any transaction by a U.S. person or within the United States that evades or avoids, has the purpose of evading or avoiding, causes a violation or, or attempts to violate the prohibitions of the Order. The Order also prohibits any conspiracy (not limited to U.S. persons or within the United States) to violate the prohibitions of the Order.

The Order defines the term "U.S. person" to include "any [U.S.] citizen, permanent resident alien, entity organized under the laws of the United States. . . or any person [located] in the United States." For purposes of the Order, the terms "security" and "securities" "include" the broad definition of the term "security" under the U.S. Securities Exchange Act, which encompasses American depositary receipts ("ADRs") and reads as follows:

any note, stock, treasury stock, security future, security-based swap, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate

for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.²⁴

The Order also states that any “note, draft, bill of exchange, or banker’s acceptance which has a maturity at the time of issuance of not exceeding 9 months, exclusive of days of grace, or any renewal thereof. . .shall be a security for purposes of the [Order].”

As broad as the Securities Exchange Act definition is, it is not all-encompassing and excludes, for example, certain derivatives, namely swaps and futures based on broad-based indices (covering 10 or more securities). While OFAC has not spoken to this issue, there appears to be a reasonable argument that the Executive Order does not cover such instruments.

OFAC Guidance and Implications

On January 14, 2021, OFAC published four additional FAQs regarding: securities exchanges operated by U.S. persons, U.S. person divestment of CCMCs required, a revision of the term “transaction” to track the amended Order, and activities permitted to effect divestment. We provide details regarding these additional FAQs below.

Permitted Activities for Securities Exchanges Operated by U.S. Persons (FAQ 871). OFAC clarified that General License No. 2 permits all transactions and activities by securities exchanges operated by U.S. persons related to CCMC securities (for CCMCs not identified on OFAC’s CCMC List as of 12:01 am January 14, 2021) through the applicable 365-day divestment period.²⁵ This appears to provide that for CCMCs other than the 35 on OFAC’s CCMC List (the 31 identified in the Order Annex and the four identified on December 3, 2020) as of January 14, 2021, U.S. person exchanges will be able to engage in transactions and activities involving the securities of CCMCs during the applicable 365-day wind down period.

U.S. Person Divestment of CCMC Securities Required (FAQ 872). OFAC made clear that, in light of the amended Order, U.S. persons must divest of any CCMC securities that they hold by the end of the 365-day wind down period and that, after the end of the wind down period, U.S. persons will be prohibited from holding or trading in CCMC securities.²⁶

Amending the Definition of “Transaction” (FAQ 873). OFAC revised the definition of “transaction” for purposes of the CCMC sanctions to match the definition in the amended Order.²⁷ The definition of “transaction” for purposes of the CCMC sanctions program is now “the purchase for value, *or sale*, of any publicly traded security” [addition emphasized].

Amending the Definition of “Transaction” (FAQ 874). OFAC clarified that transaction (including purchases for value and sales) entered into on or before the end of the applicable 365-day divestment period, solely to divest, in whole or in part, from CCMC securities, is permitted.²⁸ OFAC also referred to a previously issued

FAQ (FAQ 865, described below), which clarified the permissibility of market intermediaries and other participants engaging in ancillary or intermediary activities that are necessary to effectuate divestiture of CCMC securities during the relevant wind down periods.

January 6, 2020 FAQs:

On January 6, 2021, OFAC published three additional FAQs regarding: U.S. persons' ability to offer for sale or service as transfer agent for trades in CCMC securities not involving U.S. persons; clarification that the prohibitions in the Order apply to subsidiaries of CCMC companies that have names that "closely match" a CCMC; and market intermediaries and other participants' ability to facilitate divestment from publicly traded CCMC securities and U.S. person ability to continue to transact in investment funds in the process of divestment. We provide details regarding these additional FAQs below.

U.S. Persons' Ability to Custody, Offer for Sale, Serve as a Transfer Agent, and Trade in Covered Securities (FAQ 863). OFAC made clear that U.S. person activities related to the following services with respect to CCMC securities are permitted under the Order (so long as such support services are not provided to U.S. persons in connection with transactions otherwise prohibited under the Order): clearing, execution, settlement, custody, transfer agency, back-end services, as well as "other such support services."²⁹

CCMC Subsidiaries with Names That "Closely Match" an Identified CCMC; Compliance Measured by Trade Date (FAQ 864). OFAC clarified that the prohibitions of the Order extend to subsidiaries of listed CCMCs "with a name that exactly or closely matches" the name of a listed CCMC, whether expressly listed or not. This FAQ specifically identified as within the scope of the Order three NYSE-listed subsidiaries of listed CCMCs as having names that "closely match" the name of a listed CCMC. The three companies identified in the FAQ are: China Telecom Corporation Limited (NYSE: CHA), China Mobile Limited (NYSE: CHL), and China Unicom (Hong Kong) Limited (NYSE: CHU). Two days after this guidance was issued, the three entities identified in the FAQ, along with CNOOC Limited, were identified on OFAC's CCMC List in the "issuer name" column in connection with their CCMC parent companies. However, the FAQ did not provide any criteria to determine whether or not a given subsidiary name may "closely match" the name of an identified CCMC.³⁰

Likely in recognition of the practical difficulties in implementing this "close match" criteria, on January 8, 2021, OFAC issued General License Number 1, which authorizes U.S. person transactions through January 28, 2021 that involve the publicly traded securities of entities "whose name closely matches" the name of a CCMC, but that have not themselves been listed on OFAC's CCMC List.³¹ This General License therefore does not apply to the four CCMC subsidiaries already identified on OFAC's CCMC List. It remains to be seen how OFAC will address this issue in the longer-term.

FAQ 864 also clarifies that compliance with the Order is measured by trade date, not settlement date.

Activities of Market Intermediaries and Other Market Participants Related to Divestment of Publicly Traded Securities of CCMCs (FAQ 865). This FAQ permits divestment-related activities by market intermediaries and other participants that are necessary to effect divestiture during the relevant wind-down periods or that are otherwise not prohibited under the Order. Notably, this FAQ also clarifies that U.S. persons (including investors) may continue to transact in investment funds that are seeking to divest publicly traded CCMC securities during the relevant wind-down periods. While OFAC has not issued guidance as to how to ascertain whether a fund qualifies, it would be prudent for investors to receive some indication from the fund that it is divesting from any CCMC interest in accordance with the Order. The FAQ provides that such divestment must be completed by November 11, 2021.³²

December 28, 2020 and January 4, 2020 FAQs:

As discussed in our prior memorandum,³³ on December 28, 2020, OFAC published five FAQs designed to answer some of the questions raised by the Order, including the application of the Order to CCMC subsidiaries, certain financial instruments, and investments in U.S. and non-U.S. funds holding CCMC securities, the definition of “publicly traded securities,” and discrepancies in the names of entities identified by DoD as CCMCs and the names of issuers of publicly traded securities. On January 4, 2021, OFAC published an additional FAQ addressing whether U.S. persons must divest from the securities of the CCMCs identified in the Order prior to the end of the initial grace period on January 11, 2021.

Publicly Traded Securities of CCMC Subsidiaries (FAQ 857). Because the Order itself suggests that its prohibitions will only apply to CCMC subsidiaries identified by DoD or the Treasury Department as CCMCs or *publicly listed* by the Treasury Department as a subsidiary of a listed CCMC, it was unclear whether OFAC would apply its 50 percent rule (providing that entities owned 50 percent or more, in the aggregate, by OFAC-sanctioned persons must themselves be treated as OFAC-sanctioned persons, whether or not such entities have been explicitly sanctioned by OFAC) in the context of the Order. OFAC’s guidance clarifies that the 50 percent rule will not automatically apply (*i.e.*, that the Order’s prohibitions will apply to any subsidiary of a CCMC only after such subsidiary is publicly listed by OFAC); however, OFAC also states its intention to publicly list both CCMC subsidiaries that would fall under the scope of its 50 percent rule *and* entities it determines to be controlled by a CCMC.³⁴ This FAQ suggested that the private sector could rely on OFAC’s CCMC List to diligence which entities are subject to the Order’s prohibitions, but the subsequent OFAC guidance (FAQ 864) stating that entities with names that “closely match” a listed CCMC’s name are subject to the Order’s prohibitions reintroduces considerable uncertainty. As noted above, such uncertainty is mitigated in the short term by General License 1; however, that authorization is set to expire January 28, 2021.

Regardless, OFAC has put the public on notice that CCMC subsidiaries may well be subject to public listing (and therefore the Order’s prohibitions) in the future.

Scope of Covered Financial Instruments (FAQ 860). The Order's prohibitions apply to any transaction in any securities that are derivative of, or are designed to provide investment exposure to publicly traded CCMC securities. While OFAC's guidance does not define "designed," it does provide that the financial instruments captured by this prohibition include, but are not limited to, derivatives (e.g., futures, options, swaps), warrants, ADRs, global depository receipts ("GDRs"), exchange-traded funds ("ETFs"), index funds, and mutual funds, to the extent such instruments also meet the definition of "security" as defined in the Order.³⁵

This is consistent with U.S. Secretary of State Mike Pompeo's press statement that the Order's prohibitions apply broadly to "all transactions by U.S. persons, including individuals, institutional investors, pension funds, university endowments, banks, bond issuers, venture capital firms, private equity firms, index firms, and other U.S. entities, including those operating overseas. This should allay concerns that U.S. investors might unknowingly support CCMCs via direct, indirect, or other passive investments including those linked to educational, ETFs, venture funds, private equity, Real Estate Investment Trusts, commodities, endowments, pensions, or any other investment funds tracking bonds, loans, lease lines, debt or equity indices that include securities of CCMCs or subsidiaries publicly listed by the U.S. government."³⁶

Investments in U.S. or non-U.S. Funds Holding CCMC Securities or Derivatives (FAQ 861). OFAC's guidance states that the Order's prohibitions apply to U.S. persons' investments in U.S. and non-U.S. foreign funds, such as ETFs or other mutual funds that hold publicly traded securities of a CCMC, noting that any transaction in publicly traded securities, or any securities that are derivative of, or are designed to provide investment exposure to such publicly traded securities of, any CCMC is prohibited regardless of such securities' share of the underlying index fund, ETF, or other derivative of a CCMC publicly traded security.³⁷ Accordingly, U.S. persons are prohibited from investing in any U.S. or non-U.S. fund that holds any CCMC security whatsoever; subject to the exception in FAQ 865, discussed above, that U.S. persons can invest in funds that hold CCMC securities and are in the process of divesting such securities. Given the prevalence of some of the CCMC securities in Asian markets, this interpretation presents significant due diligence challenges for investors, advisors, and funds seeking investment exposure in such markets.

Defining Publicly Traded Securities (FAQ 859). OFAC's guidance states that, for the purposes of the Order, OFAC intends to interpret the term "publicly traded securities" to include securities (as defined in section 4(d) of E.O. 13959) denominated in any currency that trade on a securities exchange or through the method of trading that is commonly referred to as "over-the-counter," in any jurisdiction.³⁸ This FAQ removes the possibility that the Order would apply only to securities traded on a public exchange.

Discrepancies between the Names of CCMCs Identified by DoD and Names of Issuers (FAQ 858). In some cases, the names of the entities identified by DoD and CCMCs did not exactly match the names of issuers of publicly traded securities. OFAC's guidance states that the Order applies with respect to publicly traded securities or any publicly traded securities that are derivative of, or are designed to provide investment exposure to, such securities) of an entity with a name that exactly or "closely matches" the name of an entity

identified as a CCMC.³⁹ In other words, ambiguity in the DoD identification will not be a bar against the application of the Order. To assist the public in identifying the CCMC entities, OFAC updated the CCMC List on its website containing the names of the CCMCs identified by DoD along with other identifying information, such as aliases, issuer names, and equity tickers.⁴⁰ As noted above however, OFAC's subsequent guidance extending the scope of the Order to subsidiaries, whether expressly listed or not, if the subsidiary's name exactly or closely matches the name of a CMCC and related General License create considerable uncertainty regarding the application of the Order to CCMC subsidiaries not yet identified on the CCMC List.

Divestment From CCMC Securities by January 11, 2021 Not Required (FAQ 862). OFAC's January 4, 2021 guidance clarifies that U.S. persons (including U.S. funds and related market intermediaries and participants) are *not* required to divest their holdings in publicly traded securities (and securities that are derivative of, or are designed to provide investment exposure to, such publicly traded securities) of the CCMCs identified in the Order by January 11, 2021. The guidance is silent as to whether U.S. persons will be permitted to continue to hold CCMC securities after the end of the divestment wind down period established by the Order (*e.g.*, November 11, 2021 for the CCMCs identified in the Order).⁴¹ However, as noted above, after this FAQ was published, President Trump amended the Order to require U.S. persons to divest from any CCMC securities that they possess at the end of the applicable one-year wind down period.

Significance of CCMC Identification to Exporters of U.S. Origin Goods

Finally, we note that on December 21, 2020, the U.S. Department of Commerce published the first ever Military End User List (the "MEU List") pursuant to the Export Administration Regulations (the "EAR").⁴² The MEU List includes dozens of Chinese companies (many of which are also identified as CCMCs) and imposes restrictions on exports, reexports, and transfers of certain items that are subject to the EAR to these listed entities. As a part of its publication of the MEU List, the Department of Commerce also warned that any CCMC not currently included on the MEU List "would raise a Red Flag under the EAR and require additional due diligence by exporters, reexporters, or transferors."⁴³ Accordingly, investors and others dealing in CCMC securities are not the only persons that need to be mindful of the universe of entities identified as CCMCs.

We will continue to monitor actions taken by the U.S. government related to the Order and provide further updates as appropriate.

* * *

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

H. Christopher Boehning
+1-212-373-3061
cboehning@paulweiss.com

Jessica S. Carey
+1-212-373-3566
jcarey@paulweiss.com

Christopher D. Frey
+81-3-3597-6309
cfrey@paulweiss.com

Michael E. Gertzman
+1-212-373-3281
mgertzman@paulweiss.com

Roberto J. Gonzalez
+1-202-223-7316
rgonzalez@paulweiss.com

Brad S. Karp
+1-212-373-3316
bkarp@paulweiss.com

Xiaoyu Greg Liu
+86-10-5828-6302
gliu@paulweiss.com

Richard S. Elliott
+1-202-223-7324
relliott@paulweiss.com

Rachel M. Fiorill
+1-202-223-7346
rfiorill@paulweiss.com

Karen R. King
+1-212-373-3784
kking@paulweiss.com

Associates Joel H. LeoGrande and Joshua R. Thompson contributed to this client alert.

- ¹ The White House, “Executive Order on Addressing the Threat from Securities Investments that Finance Communist Chinese Military Companies,” (Nov. 12, 2020), available [here](#).
- ² “U.S. persons” means, for purposes of the Order, U.S. citizens, permanent residents, entities organized under U.S. laws, or any person located within the United States.
- ³ Jeremy Mark, “U.S. Investors Face Half-Baked Trump Restrictions on Chinese Securities,” THE ATLANTIC COUNCIL (Dec. 7, 2020), available [here](#).
- ⁴ Paul, Weiss, “President Trump Issues an Executive Order Prohibiting U.S. Persons from Investing in Listed “Communist Chinese Military Companies,” (Nov. 18, 2020), available [here](#).
- ⁵ Paul, Weiss, “New Guidance Clarifies OFAC’s Broad Interpretation of Recent Sanctions Against Communist Chinese Military Companies,” (Jan. 4, 2021), available [here](#).
- ⁶ Connor O’Brien, *Senate Hands Trump His First Veto Override*, POLITICO (Jan. 1, 2021), available [here](#).
- ⁷ Connor O’Brien, *House Votes to Override Trump Veto of Defense Bill*, POLITICO (Dec. 28, 2020), available [here](#).
- ⁸ OFAC, “Non-SDN Communist Chinese Military Companies List” (Jan. 8, 2021), available [here](#).
- ⁹ OFAC, “General License No. 1 Authorizing Transactions Involving Securities of Certain Communist Chinese Military Companies” (Jan. 8, 2021), available [here](#).

- ¹⁰ OFAC, “General License No. 2 Authorizing Securities Exchanges Operated by U.S. Persons to Engage in Transactions Involving Securities of Communist Chinese Military Companies” (Jan. 14, 2021), available [here](#).
- ¹¹ The White House, “Executive Order on Amending Executive Order 13959—Addressing the Threat from Securities Investments that Finance Communist Chinese Military Companies,” (Jan. 13, 2021), available [here](#).
- ¹² Dep’t of Defense, Press Release, “DOD Releases List of Additional Companies, In Accordance with Section 1237 of FY99 NDAA” (Jan. 14, 2021), available [here](#).
- ¹³ OFAC, “Frequently Asked Question 864,” (Jan. 6, 2021), available [here](#).
- ¹⁴ Intercontinental Exchange, “NYSE to Commence Delisting Proceedings in Securities of Three Issuers to Comply with Executive Order 13959,” (Dec. 31, 2020), available [here](#).
- ¹⁵ Intercontinental Exchange, “NYSE Updates Guidance on Delisting Determination for Securities of Three Issuers in Relation to Executive Order 13959,” (Jan. 4, 2021), available [here](#).
- ¹⁶ Jesse Pound, “NYSE Will Delist Three Big China Telecoms, Reversing Decision Once Again,” CNBC (Jan. 6, 2021), available [here](#). The NYSE has not yet announced its intent with respect to CNOOC Limited, the Order’s prohibitions against CNOOC go into effect on February 1, 2021.
- ¹⁷ See U.S. Dep’t of Defense, Press Release, “DoD Releases List of Additional Companies in Accordance with Section 1237 of FY99 NDAA,” (Aug. 28, 2020), available [here](#); Annex to the Order, available [here](#).
- ¹⁸ Office of Senator Tom Cotton, Press Release, “Cotton, Gallagher React to DoD List of Chinese Military Companies,” (Jun. 24, 2020), available [here](#).
- ¹⁹ See U.S. Dep’t of Defense, Press Release, “DoD Releases List of Additional Companies in Accordance with Section 1237 of FY99 NDAA,” (Dec. 3, 2020), available [here](#).
- ²⁰ Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261 § 1237 (1999), available [here](#).
- ²¹ The William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283 § 1260H(d)(1) (2021), available [here](#).
- ²² *Id.* at § 1260H(d)(2).
- ²³ Alexandra Alper, et al., “Trump Administration to Mull Expansion of China Investment Ban –Sources,” Reuters (Jan. 7, 2021), available [here](#).
- ²⁴ Securities Exchange Act of 1934, Pub. L. 73-291 § 3(a)(10), as codified as amended at 15 U.S.C. 78c(a)(10).
- ²⁵ OFAC, “Frequently Asked Question 871,” (Jan. 14, 2021), available [here](#).
- ²⁶ OFAC, “Frequently Asked Question 872,” (Jan. 14, 2021), available [here](#).
- ²⁷ OFAC, “Frequently Asked Question 873,” (Jan. 14, 2021), available [here](#).
- ²⁸ OFAC, “Frequently Asked Question 874,” (Jan. 14, 2021), available [here](#).
- ²⁹ OFAC, “Frequently Asked Question 863,” (Jan. 6, 2021), available [here](#).
- ³⁰ OFAC, “Frequently Asked Question 864,” (Jan. 6, 2021), available [here](#).
- ³¹ OFAC, “General License No. 1 Authorizing Transactions Involving Securities of Certain Communist Chinese Military Companies” (Jan. 8, 2021), available [here](#).

-
- ³² OFAC, “Frequently Asked Question 865,” (Jan. 6, 2021), available [here](#).
- ³³ Paul, Weiss, “New Guidance Clarifies OFAC’s Broad Interpretation of Recent Sanctions Against Communist Chinese Military Companies,” (Jan. 4, 2021), available [here](#).
- ³⁴ OFAC, “Frequently Asked Question 857,” (Dec. 28, 2020), available [here](#).
- ³⁵ OFAC, “Frequently Asked Question 860,” (Dec. 28, 2020), available [here](#).
- ³⁶ U.S. Dep’t of State, Press Statement, “Protecting U.S. Investors from Financing Communist Chinese Military Companies,” (Dec. 28, 2020), available [here](#).
- ³⁷ OFAC, “Frequently Asked Question 861,” (Dec. 28, 2020), available [here](#).
- ³⁸ OFAC, “Frequently Asked Question 859,” (Dec. 28, 2020), available [here](#).
- ³⁹ OFAC, “Frequently Asked Question 858,” (Dec. 28, 2020), available [here](#).
- ⁴⁰ OFAC, “Non-SDN Communist Chinese Military Companies List,” (Dec. 22, 2020), available [here](#).
- ⁴¹ OFAC, “Frequently Asked Question 862,” (Jan. 4, 2021), available [here](#).
- ⁴² U.S. Dep’t of Commerce, Press Release, “Commerce Department Will Publish the First Military End User List Naming More Than 100 Chinese and Russian Companies,” (Dec. 21, 2020), available [here](#).
- ⁴³ *Id.*