

# INTERNATIONAL BUSINESS ALERT

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## Executive Order bars investment in Chinese military-industrial complex companies

On June 3, 2021, President Joe Biden issued an Executive Order titled, "[Addressing the Threat from Securities Investments that Finance Certain Companies of the People's Republic of China](#)." This new order bars U.S. nationals from investing in publicly-traded securities affiliated with the Chinese military, specifically companies that operate in the "defense and related material" and the "surveillance technology" sectors of the Chinese economy, or companies that are owned and operated by someone in those sectors. Accordingly, companies that fall into this designation are sometimes referred to as Chinese Military-Industrial Complex Companies (CMIC).

### New order supersedes President Donald Trump's previous Executive Orders

President Donald Trump made the first move toward barring transactions in publicly-traded securities that support the Chinese military when he signed [Executive Order 13959](#) on Nov. 12, 2020 and later amended the earlier order by issuing [Executive Order 13974](#) in January 2021. The first Executive Order barred investments in 31 specific companies designated as Communist Chinese Military Companies (CCMC). In the January 2021 amendment, the list was expanded to bar 44 CCMCs.

The new order by President Biden supersedes President Trump's two previous orders by expanding the scope of the national emergency initially declared in those orders. Under President Biden's new order, a company

can be designated as a CMIC if it is found by the U.S. Department of the Treasury to operate (or have operated) in the defense and related material sector or the surveillance technology sector of the economy of the People's Republic of China. Beginning Aug. 2, 2021, an initial CMIC prohibition list of 59 companies will apply, many of which were designated on the CCMC list previously. Accordingly, current U.S. owners of securities in those CMIC companies must divest their holdings by June 3, 2022.

President Biden's reasoning for expanding the scope of this national emergency was supported, according to a White House [statement](#) on June 3, by "finding that the use of Chinese surveillance technology outside [of China], as well as the development or use of Chinese surveillance technology to facilitate repression or serious human rights abuses, constitute unusual and extraordinary threats,".

### **Differences between the President Trump and President Biden Executive Orders**

There is a notable difference between the November 2020 order and the new Executive Order issued by President Biden. Under the president's new order, CMIC designations will not be provided by the U.S. Department of Defense, as they were for CCMCs. Rather, according to the order, the treasury secretary will have the authority over CMIC designations. In addition, Treasury will issue related rules to enforce the investment prohibition in consultation with the U.S. Secretary of State, and as it deems appropriate, the defense secretary. Most of the CCMCs are also on the CMIC list, and the additional companies are mostly electronics companies, vehicle makers and aerospace firms. However, some companies originally were on the CCMC list, such as Sinochem, China State Construction Engineering and Grand China Air, but are not on the CMIC list.

It appears that President Biden's Executive Order no longer relies upon the [Strom Thurmond National Defense Authorization Act](#) (NDAA), as amended as its statutory authority, since President Biden's order revoked Section 4 of Executive Order 13974 in its entirety. Notably, President Trump relied heavily upon Section 1237 of the NDAA in issuing his Executive Orders, which granted the Department of Defense the authority to designate companies as CCMCs when "(i) 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 (ii) ... owned or controlled by an entity affiliated with the defense industrial base of the People's Republic of China; and ... engaged in providing commercial services, manufacturing, producing, or exporting." Instead, President Biden's Executive Order appears to rely upon the national emergency declaration under the [International Emergency Economic Powers Act](#) and the [National Emergencies Act](#) and the authority granted under those statutes in the

event of national emergencies. This change is presumably because the definition of CCMC under the NDAA, particularly the meaning of the words “affiliated with,” was subject to judicial challenges filed by several Chinese companies claiming that they are not “affiliated with” the Chinese government.

**Chinese companies challenged the CCMC designation and may further challenge the CMIC designations**

Being designated as a banned company is extremely burdensome to the Chinese companies named on these lists, as they will lose all of their U.S.-based investments. Because of this, Chinese companies have filed several judicial actions seeking injunctions against the CCMC designations. Xiaomi Corp., a Chinese-headquartered, U.S.-listed electronics maker, and Luokung Technology Corp., a Chinese-headquartered, U.S.-listed mapping and cloud software maker, have won injunctions over their CCMC designations after a judge found that the Department of Defense had taken too broad of a view of what being “affiliated” with the Chinese government means. In both actions, the court noted that Xiaomi and Luokung are functionally independent from the Chinese government because they are not state-owned enterprises. Both Xiaomi and Luokung have been removed from the CCMC list and are not included on the CMIC list.

In May 2021, another Chinese company filed suit to try to be removed from the CCMC list. GOWIN Semiconductor Corp. is a technology startup computer chip maker headquartered in China with its principal CEO and president both being U.S. citizens. Just like Xiaomi and Luokung, GOWIN is challenging its designation under the Administrative Procedure Act. GOWIN was labeled as a CCMC even though it has no ties to the Chinese government. Because of its lack of involvement, GOWIN alleged that the Department of Defense and the U.S. Treasury Department acted arbitrarily and capriciously when they named the company as a threat and placed it on the CCMC list without any explanation. While the GOWIN lawsuit is still pending, GOWIN is not designated as a CMIC on the newly enacted list.

Chinese companies may continue to challenge the new CMIC designations, but with the change in criteria focusing more on the sectors in which the business operates (rather than ownership or control by the Chinese government), it might be more difficult for legal challenges to prevail. The Xiaomi and Luokong courts relied on the companies’ private-sector ownership and the lack of “effective control” by the Chinese government, and that finding would no longer be sufficient to exclude those companies from a CMIC designation.

### Conclusion

President Biden's recent Executive Order has now barred U.S. nationals from investing in publicly-traded securities affiliated with the Chinese military, expanding upon Executive Order 13959 issued by President Trump in November 2020. This prohibition of investing in Chinese companies affiliated with the military is aimed to protect the U.S. homeland and U.S. armed forces overseas. The U.S. government considers the U.S. investments in these designated companies were helping China expand and modernize its military. However, several Chinese companies have been successful in filing for injunctions to be removed from the existing CCMC list. This may become an ongoing issue as the new Executive Order goes into effect Aug. 2, 2021.

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