

INTERNATIONAL BUSINESS ALERT

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Department of Treasury publishes “Chinese military-industrial complex” companies list and Department of Defense removes “communist Chinese military companies” designations

Consistent with President Joe Biden’s June 3, 2021 executive order, [“Addressing the threat from securities investments that finance certain companies of the People’s Republic of China”](#) (Executive Order 13959, as amended), the U.S. Department of the Treasury’s Office of Foreign Assets Control (OFAC) has published [the Non-SDN Chinese military-industrial complex companies List](#) (NS-CMIC list). The list, which was published on June 16, 2021, will become effective on Aug. 2, 2021 for those companies listed in the original executive order, or 60 days after any additional companies are added to the NS-CMIC list.

Going forward, U.S. persons would be barred from investing in publicly-traded securities of those companies specifically listed on the NS-CMIC list and “any publicly-traded securities that are derivative of such securities or are designed to provide investment exposure to such” publicly-traded securities.

This NS-CMIC list will likely impose a significant compliance requirement for investors. While the ban here does not apply to public trading of securities and does not prohibit U.S. persons from engaging in other activities with companies listed on NS-CMIC, the bar here is very broad, and applies to any U.S. citizen, U.S. permanent resident and U.S. entities regardless of their location, as well as any person in the U.S. The term “publicly-traded securities” includes any “security,” as defined in section 3(a)(10) of the [Securities Exchange Act of 1934](#), Public Law 73–291 as

codified as amended at [15 U.S.C. 78c\(a\)\(10\)](#), denominated in any currency that trades on a securities exchange or through the method of trading that is commonly referred to as “over-the-counter,” in any jurisdiction. The term “derivative of such securities” includes, but is not limited to, derivatives (e.g., futures, options, swaps), warrants, American depositary receipts (ADRs), global depositary receipts (GDRs), exchange-traded funds (ETFs), index funds and mutual funds to the extent such instruments also meet the definition of “publicly-traded security.” Such restrictions apply regardless of such securities’ share of the underlying index fund, ETF or derivative thereof, in both the U.S. and foreign markets. According to OFAC’s guideline, U.S. persons — including financial institutions, registered broker-dealers, securities exchanges and other market intermediaries and participants — may rely upon information available to them in the ordinary course of business. It will be very important for investors and companies doing business with Chinese businesses to conduct proper due diligence in order to determine whether a securities transaction is prohibited or not.

Notwithstanding the above, the U.S. government is also trying to minimize any adverse consequences to individuals who have either already invested in one or more of the entities now on the list, or whose role is simply helping others relinquish the investment . For example, purchases or sales of publicly-traded securities of CMICs listed in or pursuant to the amended executive made solely, in whole or in part, by a U.S. person are permitted until 12:01 a.m. Eastern Time on the date that is 365 days after the date the entity is listed in the annex to the amended executive order or added to the NS-CMIC List.

Activity by U.S. persons related to the clearing, execution, settlement, custody, transfer agency, back-end services as well as other such support services are considered permissible, to the extent that such support services are not provided to U.S. persons in connection with prohibited purchases or sales. Market intermediaries, including market makers and other participants may engage in ancillary or intermediary activities that are necessary to effect divestiture during the relevant wind-down periods or that are not otherwise prohibited under the amended executive order. Transactions and activities by securities exchanges operated by U.S. persons involving the purchase or sale of publicly-traded securities (or any publicly traded securities that are derivative of such securities or are designed to provide investment exposure to such securities) of any entity listed on the NS-CMIC list are permitted.

U.S. persons are not prohibited from providing investment advisory, investment management or similar services to a non-U.S. person, including a foreign entity or foreign fund, in connection with the non-U.S. person’s purchase or sale of a covered security, provided that the underlying purchase or sale would not otherwise violate the amended executive order 13959. The OFAC guideline further clarifies that U.S. persons employed by non-U.S. entities are not prohibited from being involved in, or facilitating, purchases or sales related to a listed security on behalf of their non-U.S.

employer. This is provided that such activity is in the ordinary course of their employment and the underlying purchase or sale would not otherwise violate the amended executive order (e.g., neither the purchase nor sale of the covered security is for the ultimate benefit of a U.S. person; neither the purchase or sale is a willful attempt to evade the prohibitions of Executive Order 13959, as amended, etc.). U.S. market makers, and non-U.S. market makers who employ U.S. persons, are permitted to engage in activities that are necessary to effect divestiture during the 365-day periods in which divestment transactions are permitted or that are not otherwise prohibited under the amended executive order, including the conversion of American depository receipts (ADRs) of a CMIC into underlying securities of the CMIC on the foreign exchange where the underlying securities are listed.

Further, consistent with the directive in the amended executive order revoking President Donald Trump's original [Executive Order 13959](#) (originally published on Nov. 2020) and [Executive Order 13974](#) (originally published on Jan. 2021), on June 28, 2021, the Office of the Under Secretary of Defense (Acquisition and Sustainment), Department of Defense published the "[Notice of the removal of the designation as Communist Chinese military companies](#)," under which the Secretary of Defense removed the designation of "non-SDN Communist Chinese military companies" (NS-CCMC list) from entities previously listed as such in accordance with the [Strom Thurmond National Defense Authorization Act for Fiscal Year 1999](#) (NDAA). There are currently no entities designated as CCMC under this authority. Going forward, the Chinese military-industrial complex companies (CMIC) List published in accordance with President Biden's executive order will replace the CCMC list.

To learn more details of amended executive order 13959, as amended, and the difference between the NS-CMIC list and the NS-CCMC list, please visit the previously published law alert, "[Executive Order bars investment in Chinese military-industrial complex companies](#)."

For more information please contact [Yuanyou Yang](#) or any member of Porter Wright's [International Business & Trade Practice Group](#).