

June 7, 2021

# President Biden Revamps Communist Chinese Military Companies (CCMC) Sanctions Program

On June 3, 2021, President Biden issued an executive order entitled “Addressing the Threat From Securities Investments that Finance Certain Companies of the People’s Republic of China” (the “EO”),<sup>1</sup> which revises and supersedes President Trump’s Executive Order 13959 that (along with a subsequent amendment) created the “Communist Chinese Military Companies” (“CCMCs”) sanctions program (the “2020 CCMC EO”). As discussed in our prior memorandum,<sup>2</sup> the 2020 CCMC EO prohibited (subject to certain exceptions) U.S. persons from transacting in the publicly traded securities of Chinese companies that the Department of Defense (“DOD”) had identified as CCMCs and that were subsequently listed on OFAC’s CCMC List.

Public reporting indicates that the Biden Administration had a two-fold rationale for revising the 2020 CCMC EO.<sup>3</sup> First, the expansion of the designation criteria to now include companies involved in the Chinese surveillance technology sector is intended to show an increased U.S. government commitment to combatting alleged Chinese repression and human rights abuses.<sup>4</sup> Second, the Biden Administration issued the new EO to put these sanctions on a stronger footing, given that two designations under the prior EO had been successfully challenged (at the preliminary injunction stage) in U.S. courts.<sup>5</sup>

The new EO replaces the prior EO’s criteria for designation in their entirety and eliminates the DOD’s ability to designate companies under these sanctions, placing the authority to make future designations under the EO with the Treasury Secretary (although the Treasury Secretary may consult DOD as she “deems appropriate”). The EO includes an annex with 59 listed companies<sup>6</sup> that will be subject to the EO’s prohibitions after a 60-day wind-down period, *i.e.*, as of 12:01 a.m. EDT on August 2, 2021.

While many of these companies were previously identified as CCMCs, a number of companies that were previously identified as CCMCs are not included in the annex. The annex also includes a number of companies that were not previously designated as

<sup>1</sup> The U.S. Dep’t of the Treasury, Executive Order, “Addressing the Threat from Securities Investments that Finance Certain Companies of the People’s Republic of China, (Jun. 3, 2021), available [here](#) (the “EO”). The U.S. government also refers to the EO as “Executive Order 13959, as amended.”

<sup>2</sup> Paul, Weiss “Update on Communist Chinese Military Companies (CCMCs) Sanctions: Amended Executive Order, New OFAC Guidance, Expanded Criteria for CCMCs, and Additional CCMCs Identified” (Jan. 16, 2021), available [here](#). President Trump’s EO 13959 was issued on November 12, 2020 and he subsequently amended that EO on January 13, 2021.

<sup>3</sup> See David E. Sanger and David McCabe, *Biden Expands Trump-Era Ban on Investment in Chinese Firms Linked to Military*, THE NEW YORK TIMES (Jun. 3, 2021), available [here](#).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> A full list of these 59 companies identified in the EO is available [here](#). Please also see the Appendix to this Memorandum for a listing of these companies and a comparison to the prior CCMC List.

CCMCs (many of which are subsidiaries of previously listed CCMCs). A number of the companies included in the EO's annex are also included on other U.S. government restricted party lists, including, *e.g.*, the Entity List. We have included an appendix at the end of this memorandum detailing the former CCMCs that are not listed in the annex of the EO as well as the new companies added to the annex of the EO.

Notably, because the EO replaced and superseded the 2020 CCMC EO as of the date it was issued (*i.e.*, June 3, 2021) and the prohibitions of the EO do not become effective until August 2, 2021, there is currently a gap in these sanctions, *i.e.*, currently, there are no CCMC sanctions in place.

Also on June 3, 2021, OFAC issued eight new Frequently Asked Questions ("FAQs") regarding the EO and amended another seven existing FAQs related to the 2020 CCMC EO. Among other things, these FAQs provide guidance regarding the EO and clarify that OFAC has now retired its CCMC List and related sanctions program as a result of the EO. OFAC also replaced the CCMC List with a new list that includes the 59 companies identified in the EO's annex, entitled the "Non-SDN Chinese Military-Industrial Complex Companies List" ("the "NS-CMIC List"; such listed companies "CMICs").

## The EO

The EO states that it is addressing (1) the threat posed by the People's Republic of China's (the "PRC") military-industrial complex and its military-civil fusion strategy as well as (2) the threat of the use of Chinese surveillance technology outside of the PRC and the development or use of Chinese surveillance technology to "facilitate repression or serious human rights abuse." The EO therefore expands the focus of the 2020 CCMC EO, which did not specifically refer to surveillance technology as a basis for designation.

Pursuant to the EO, which replaces and supersedes the 2020 CCMC EO, U.S. persons will be prohibited from engaging in the following activities:

- "the purchase or sale of any 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 person listed in the [a]nnex [of the EO]" effective 12:01 a.m. EDT August 2, 2021, or any person that the Secretary of the Treasury designates pursuant to the EO in the future, effective 60 days from such designation.
- Any transaction that evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate the EO.

The EO also revises the 2020 CCMC EO's definition of publicly traded securities to include "any 'security,' as defined by the [Securities Exchange Act] 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." This revision removes an exception in the 2020 CCMC EO's definition of "security" for notes and drafts with a maturity date of less than nine months and also clarifies that this term is meant to cover securities denominated in any currency and over-the-counter securities.

Separately, the EO permits the "purchase or sale of publicly traded securities [of companies designated pursuant to the EO] *made solely to effect the divestment*, in whole or in part, of such securities by a United States person" (emphasis added) prior to:

- For companies listed in the annex of the EO: 12:01a.m. EDT on June 3, 2022; or
- For companies designated pursuant to the EO after June 3, 2021: 365 days after the date of the company's designation.

Notably, the EO revoked President Trump's prior January 2021 EO that amended the original CCMC EO to require U.S. persons to divest their holdings of securities of identified companies within one year. While the EO prohibits purchases or sales (subject to the applicable wind-down and divestment periods) of CMIC securities, it does not require divestment. However, the authorization

for U.S. persons to divest any holdings in CMIC securities expires after a year such that, as a practical matter, the EO presents U.S. persons with the choice of divesting the securities during the one-year wind-down period or holding such securities indefinitely thereafter.

As noted above, the EO also empowers the Secretary of the Treasury (in consultation with the Secretary of State and, as the Treasury Secretary “deems appropriate,” the Secretary of Defense) to designate additional persons pursuant to the EO if the Secretary of the Treasury determines that such persons:

- “operate or have operated in the defense and related materiel sector or the surveillance technology sector of the economy of the PRC” or
- “own or control, or [are] owned or controlled by, directly or indirectly, a person who operates or has operated in any sector described in [the bullet above], or a person who is listed in the [a]nnex [of the EO] or who has otherwise been determined to be subject to the prohibitions [of the EO].”

By focusing on a company’s operation in a particular economic “sector,” the EO aligns with the approach used in the Russia/Ukraine sectoral sanctions program and in other sanctions programs. Designations under this criteria will likely be less vulnerable to litigation challenge than what occurred under the 2020 CCMC EO’s criteria, which saw two successful challenges at the preliminary injunction stage by designated companies.

To be clear, unlike the 2020 CCMC EO, designation under the EO is independent of the list of “Communist Chinese Military Companies” maintained by DOD and therefore only entities designated by OFAC on the NS-CMIC List will become the target of the EO’s prohibitions.

### **New and Revised OFAC Guidance**

In parallel with the publication of the EO, on June 3, 2021, OFAC issued eight new FAQs and amended another seven prior FAQs. We summarize the key portions of all of the new FAQs and the notable revised FAQs below.

New FAQs:

- *Effect of the EO (FAQ 898).*<sup>7</sup> Summarizing the EO and noting the publication of the NS-CMIC List as well as the amendment of all previously issued FAQs related to the 2020 CCMC EO.
- *Entities Subject to the EO and Timing of the EO’s Prohibitions (FAQ 899).*<sup>8</sup> Clarifying that, effective June 3, 2021, the NS-CMIC List replaces and supersedes in its entirety the prior CCMC List, which has been removed from OFAC’s website. Further noting that the prohibitions of the CCMC List go into effect at 12:01 a.m. EDT August 2, 2021 for those companies listed in the EO’s annex and, for those companies identified after June 3, 2021, 12:01 a.m. ET on the date that is 60 days after the date on which the company is listed on the NS-CMIC List.

The FAQ also clarifies that “[o]nly entities whose names exactly match the names of the entities on the NS-CMIC List are subject to the prohibitions in [the EO],” eliminating the ambiguity that presented under the 2020 CCMC EO and prior OFAC guidance

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<sup>7</sup> OFAC, “Frequently Asked Question 898” (Jun. 3, 2021), available [here](#).

<sup>8</sup> OFAC, “Frequently Asked Question 899” (Jun. 3, 2021), available [here](#).

providing that the prohibitions of that order extended to subsidiaries of listed CCMCs “with a name that exactly or closely matches” the name of a listed CCMC, whether expressly listed or not.<sup>9</sup>

- *Identification of Companies Operating in the Surveillance Technology Sector of the PRC (FAQ 900).*<sup>10</sup> Stating that OFAC “expects to use its discretion” to target companies whose operations include or support, or have included or supported: “(1) surveillance of persons by Chinese technology companies that occurs outside of the PRC; or (2) the development, marketing, sale, or export of Chinese surveillance technology that is, was, or can be used for surveillance of religious or ethnic minorities or to otherwise facilitate repression or serious human rights abuse.”
- *Level of Due Diligence to be Performed by U.S. Persons (FAQ 901).*<sup>11</sup> Clarifying that for purposes of assessing whether transactions in publicly traded securities may be prohibited by the EO, U.S. persons (including financial institutions, registered broker-dealers in securities, securities exchanges, and other market intermediaries and participants) may “rely upon the information available to them in the ordinary course of business.” This is a standard similar to OFAC’s guidance regarding diligence expectations in the context of conducting diligence to ensure that any divestment or transfer of Government of Venezuela debt is consistent with the terms of the applicable OFAC general licenses, which notes that “financial institutions or registered broker-dealers in securities may rely upon the information ordinarily available to them for purposes of conducting [such diligence].”<sup>12</sup> In the Venezuela sanctions context, OFAC is clear that if a U.S. broker or financial institution involved in a divestment or transfer or divestment of Government of Venezuela debt has information in its possession leading it to know or have reason to know a trade falls outside the scope of an applicable license, then the U.S. broker or financial institution will be held responsible if it does not take appropriate steps to ensure that the trade is not consummated, absent authorization from OFAC. OFAC stated in this context that it “expects U.S. persons to conduct due diligence on their own direct customers, and OFAC will consider the totality of the circumstances surrounding the processing of the transaction to determine what, if any, enforcement action to take.”<sup>13</sup> We expect OFAC will take a similar approach to enforcement in the context of the CMIC sanctions.
- *U.S. Person Involvement in a Non-U.S. Person’s Purchase or Sale of CMIC Securities (FAQ 902).*<sup>14</sup> Clarifying that U.S. persons are not prohibited from providing investment advisory, investment management, or similar services to a non-U.S. person in connection with the non-U.S. person’s purchase or sale of a covered security, provided that the underlying purchase or sale of CMIC securities would not otherwise violate the prohibitions of the EO. The FAQ states that, as an example, a U.S. individual acting as the fund manager for a non-U.S. investment fund, or a U.S. entity that is the investment adviser or investment manager for a non-U.S. investment fund, is not prohibited from advising on, authorizing, directing, or approving purchases or sales of CMIC securities by the non-U.S. investment fund, provided that the underlying purchase or sale would not otherwise violate the EO.
- *U.S. Persons Employed by Non-U.S. Entities (FAQ 903).*<sup>15</sup> Clarifying that U.S. persons employed by non-U.S. entities are not prohibited from being involved in or otherwise facilitating sales or purchases of CMIC securities on behalf of their non-U.S.

<sup>9</sup> See OFAC, “Frequently Asked Question 864” (Jan. 6, 2021), revoked. OFAC’s General License 1B (available [here](#)), authorizing U.S. person transactions 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, was set to expire on June 11, 2021.

<sup>10</sup> OFAC, “Frequently Asked Question 900” (Jun. 3, 2021), available [here](#).

<sup>11</sup> OFAC, “Frequently Asked Question 901” (Jun. 3, 2021), available [here](#).

<sup>12</sup> OFAC, “Frequently Asked Question 650” (Feb. 11, 2019), available [here](#).

<sup>13</sup> *Id.*

<sup>14</sup> OFAC, “Frequently Asked Question 902” (Jun. 3, 2021), available [here](#).

<sup>15</sup> OFAC, “Frequently Asked Question 903” (Jun. 3, 2021), available [here](#).

employer, so long as any such activity is within the ordinary course of the U.S. person's employment and the underlying transaction would not otherwise violate the EO.

- *U.S. Market Maker Facilitation of Divestment from CMIC Securities (FAQ 904).*<sup>16</sup> Stating that 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 of CMIC securities within the 365-day wind-down period permitted by the EO, 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.
- *Scope of EO's Prohibitions Less Broad than a Complete Prohibition of Dealings with Identified CMICs (FAQ 905).*<sup>17</sup> Clarifying that the prohibitions of the EO are not as broad as the prohibitions of other OFAC sanctions programs or lists (such as, for example, the SDN List) and that the prohibitions of the EO only apply with respect to U.S. persons' dealings in the publicly traded securities of entities on the NS-CMIC List.

Notable Revised FAQs:

- *Updated FAQ 857*<sup>18</sup> explicitly provides that only CMIC subsidiaries themselves listed on the NS-CMIC List are targeted by the EO, *i.e.*, that OFAC's 50 percent rule does not apply to entities designated solely under the EO. As discussed above, this approach also removes the ambiguity associated with the "close name match" guidance that OFAC had issued in connection with the 2020 CCMC EO. That said, in practice it will still be important for U.S. person investors to perform reasonable diligence as a part of their sanctions screening procedure to ensure that the company being screened is not on the NS-CMIC List (*i.e.*, companies should follow their existing practices to address alternate spellings or misspellings).
- *Updated FAQ 861*<sup>19</sup> clarifies that, consistent with prior guidance issued under the 2020 CCMC EO, any purchase or sale by a U.S. person 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 CMIC listed on the NS-CMIC List is prohibited, regardless of such securities' share of the underlying index fund, ETF, or derivative thereof."
- *Updated FAQ 871*<sup>20</sup> clarifies that—consistent with *Updated FAQ 865*<sup>21</sup>, which clarifies that market intermediaries 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 EO—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 CMIC are not prohibited.

## Implications

The EO generally maintains the focus of the 2020 CCMC EO, which is to impose targeted pressure on Chinese companies that have ties to the Chinese military or are otherwise involved in China's civil-military fusion initiative. However, the new EO significantly streamlines the designation process, expands the criteria for designation (to reflect specific concern for Chinese surveillance technology), and narrows and clarifies the prohibitions that attach to designated entities.

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<sup>16</sup> OFAC, "Frequently Asked Question 904" (Jun. 3, 2021), available [here](#).

<sup>17</sup> OFAC, "Frequently Asked Question 905" (Jun. 3, 2021), available [here](#).

<sup>18</sup> OFAC, "Frequently Asked Question 857" (Jun. 3, 2021), available [here](#).

<sup>19</sup> OFAC, "Frequently Asked Question 861" (Jun. 3, 2021), available [here](#).

<sup>20</sup> OFAC, "Frequently Asked Question 871" (Jun. 3, 2021), available [here](#).

<sup>21</sup> OFAC, "Frequently Asked Question 865" (Jun. 3, 2021), available [here](#).

Most notably, OFAC, through FAQ 899, clarified that only “entities whose names exactly match the names of the entities on the NS-CMIC List” will be subject to the prohibitions of the EO. This reverses prior guidance related to the 2020 CCMC EO which had stated that the prohibitions also applied to names that “closely match” those on the list and which had resulted in significant uncertainty. Additionally, FAQ 902, which clarifies that U.S. persons may continue to provide services to non-U.S. persons in connection with those non-U.S. persons’ dealings in CMIC securities, provides significant comfort to U.S. industry participants engaged in the provision of investment services to non-U.S. clients and is consistent with the scope of the EO’s prohibitions. U.S. persons providing such services should continue to be mindful not to facilitate prohibited transactions by U.S. person investors.

The EO is also one of several actions the Biden Administration has taken to retain or expand certain Trump Administration sanctions and export control initiatives targeting China, including the Commerce Department’s publication of an interim final rule earlier this year to implement the 2019 information and communications technology and services (“ICTS”) executive order. U.S.-China relations are likely to continue to be challenging and, given the additional designation authority contained in the EO, there is a meaningful possibility of OFAC adding additional companies to the NS-CMIC List in the future.

U.S. person investors and other market participants that have already taken steps to comply with the 2020 CCMC EO should take a de novo look at their compliance approaches given the significant changes made by the new EO (as well as the additions and subtractions to the list of sanctioned CMIC entities). U.S. persons have the rest of June and July to do so: currently, no CCMC sanctions are in place, and the EO’s new prohibitions will come into effect on August 2, 2021.

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

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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:

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# APPENDIX

## Companies Designated under both the former CCMC EO and the New EO

1. Aero Engine Corp. of China
2. Aviation Industry Corporation of China (AVIC)
3. China Academy of Launch Vehicle Technology
4. China Aerospace Science & Industry Corp. Ltd.
5. China Aerospace Science and Technology Corporation
6. China Communications Construction Company Ltd.
7. China Electronics Corporation
8. China Electronics Technology Group Corp.
9. China General Nuclear Power Corp.
10. China National Offshore Oil Corp. (CNOOC)
11. China National Nuclear Corp.
12. China North Industries Group Corp. Ltd.
13. China Mobile Communications Group Ltd.
14. China Mobile Limited
15. China Railway Construction Corp. Ltd.
16. China Shipbuilding Industry Corp.
17. China South Industries Group Corporation
18. China Spacesat Co. Ltd.
19. China State Shipbuilding Corp. Ltd.
20. China Telecom Corporation Limited
21. China Telecommunications Corp.
22. China Unicom (Hong Kong) Limited

23. China United Network Communications Group Co. Ltd.
24. Hangzhou Hikvision Digital Technology Co., Ltd.
25. Huawei Investment & Holding Co. Ltd.
26. Inspur Group
27. Nanjing Panda Electronics Co. Ltd.
28. Semiconductor Manufacturing International Corp.

Companies Designated Under the New EO That Were Not Designated under the CCMC EO

1. Aerospace CH UAV Co., Ltd
2. Aerospace Communications Holdings Group Company Limited
3. Aerosun Corporation
4. Anhui Greatwall Military Industry Company Limited
5. AVIC Aviation High-Technology Company Limited
6. AVIC Heavy Machinery Company Limited
7. AVIC Jonhon Optronic Technology Co., Ltd.
8. AVIC Shenyang Aircraft Company Limited
9. AVIC Xi'an Aircraft Industry Group Company Ltd.
10. Changsha Jingjia Microelectronics Company Limited
11. China Aerospace Times Electronics Co., Ltd
12. China Avionics Systems Company Limited
13. China Communications Construction Group (Limited)
14. China Marine Information Electronics Company Limited
15. China Nuclear Engineering Corporation Limited
16. China Satellite Communications Co., Ltd.
17. China Shipbuilding Industry Group Power Company Limited
18. China State Shipbuilding Corporation Limited

19. Costar Group Co., Ltd.
20. CSSC Offshore & Marine Engineering (Group) Company Limited
21. Fujian Torch Electron Technology Co., Ltd.
22. Guizhou Space Appliance Co., Ltd
23. Huawei Technologies Co., Ltd.
24. Inner Mongolia First Machinery Group Co., Ltd.
25. Jiangxi Hongdu Aviation Industry Co., Ltd.
26. North Navigation Control Technology Co., Ltd.
27. Panda Electronics Group Co., Ltd.
28. Proven Glory Capital Limited
29. Proven Honour Capital Limited
30. Shaanxi Zhongtian Rocket Technology Company Limited
31. Zhonghang Electronic Measuring Instruments Company Limited

Companies Designated Under the former CCMC EO That Are Not Designated Under the New EO

1. Advanced Micro-Fabrication Equipment Inc. (AMEC)
2. Beijing Zhongguancun Development Investment Center
3. China Construction Technology Co. Ltd.
4. China International Engineering Consulting Corp.
5. China National Aviation Golding Co. Ltd. (CNAH)
6. China National Chemical Corporation
7. China National Chemical Engineering Group Ltd.
8. China Nuclear Engineering & Construction Corporation
9. China State Construction Group Co. Ltd.
10. China Three Gorges Corp.
11. Commercial Aircraft Corporation of China Ltd. (COMAC)

12. CRRC Corp. Ltd.
13. Dawning Information Industry Co. Ltd.
14. Global Tone Communication Technology Co. Ltd. (GTCOM)
15. GOWIN Semiconductor Corp.
16. Grand China Air Co. Ltd. (GCAC)
17. Luokung Technology Corp. (LKCO)<sup>22</sup>
18. NORINCO
19. Sincochem Group Co. Ltd.
20. Xiaomi Corporation<sup>23</sup>

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<sup>22</sup> Luokung had previously succeeded in challenging its CCMC designation at the preliminary injunction stage.

<sup>23</sup> Xiaomi had previously succeeded in challenging its CCMC designation at the preliminary injunction stage.