

EXECUTIVE ORDER 13959: OFAC ISSUES AMENDED LICENSE AND RELATED FREQUENTLY ASKED QUESTIONS

This Update reports on recent developments concerning Executive Order 13959 addressing transactions in the securities of companies designated as Communist Chinese military companies (“CCMC”).¹ Specifically, we discuss the issuance by the Office of Foreign Assets Control (“OFAC”) of General License No. 1A and related Frequently Asked Questions (“FAQ”s).

General License 1A, which is effective as of January 27, 2021, extends the time period originally provided in General License No. 1 to permit “all transactions and activities otherwise prohibited by section 1(a) of Executive Order (E.O.) 13959,” as amended on January 13, 2021,² related to³ publicly traded securities of an entity “whose name closely matches, but does not exactly match” the name of a CCMC covered by the E.O. The relief is extended to May 27, 2021.⁴

License 1A clarifies that the relief does not extend to publicly traded securities or related securities of entities that appear by name on lists published by OFAC as a subsidiary of a person determined to be a CCMC, including entities added to such list on January 8, 2021.⁵

OFAC FAQ 878 (January 27, 2021) reiterates the scope of License 1A as applying only to otherwise prohibited transactions in covered securities of entities whose names closely match, but do not exactly match the name of an identified CCMC.⁶ The FAQ notes that a CCMC can be identified on the OFAC list or publicly designated by the Department of Defense.

OFAC FAQ 879 (January 27, 2021) states that License 1A does not apply to entities included on OFAC’s list as a subsidiary of a CCMC, and notes that, for the entities initially identified on OFAC’s January 8, 2021 list, the E.O. prohibitions begin on March 9, 2021.⁷

COMMENT:

As we discussed in our previous Update, the application of the E.O. to companies that have names that “closely match, but do not exactly match” the name of a listed CCMC is one of the most perplexing features of the E.O. because it requires every market participant to determine whether the name of an entity is similar enough to be covered. If the name closely matches,

¹ Please see our previous Update:

https://www.mmlawus.com/newsitem/pdf/executive_order_13959_expanded_ofac_issues_licenses_and_new_frequently_asked_questions_964.pdf.

² <https://home.treasury.gov/system/files/126/13974.pdf>. Among other things, the amended E.O prohibits possession of covered securities after the end of the applicable “divestment” period.

³ The prohibitions extend to publicly traded securities and any securities that are derivative of, or are designed to provide investment exposure to, such securities.

⁴ https://home.treasury.gov/system/files/126/ccmc_gl1a_01272021_1.pdf (“License 1A”).

⁵ Those companies are: CNOOC Limited, China Mobile Limited, China Telecom Corporation Limited, and China Unicom (Hong Kong) Limited. The E.O. prohibitions apply to those named companies 60 days after their listing on January 8, 2021.

⁶ <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/878>.

⁷ <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/879>.

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then, absent the relief provided by an OFAC license, transactions and other activities are prohibited in that entity's publicly traded securities and any securities that are derivative of, or are designed to provide investment exposure to, such securities. Identifying the universe of affected instruments is therefore a daunting challenge. Although we had hoped that OFAC would limit the scope of the E.O. to entities that are named on its list (or designated by the Department of Defense) as a CCMC or a subsidiary, it is clear now that the OFAC remains of the view that entities with closely matching names but are not listed are nevertheless covered by the E.O.⁸

There has been some speculation that the Biden Administration might rescind or modify this E.O. as it has done with numerous other Executive Orders issued by the prior Administration. The issuance of License 1A after the transition of Administrations suggests that this Executive Order will remain in place or at least is not a priority for the new Administration. However, the continuation of relief for application of the E.O. to entities with closely matching names may suggest that the scope is under review.



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⁸ The extension of the E.O. prohibitions to entities with closely matching names is not a feature the E.O. itself, but was first interpreted to apply to such entities in OFAC FAQ 858 (December 28, 2020), <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/858>.