

EXECUTIVE ORDER 13959 UPDATE: FITS AND STARTS

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As described in previous Murphy & McGonigle Client Alerts, Executive Order 13959 (“E.O. 13959”) is a Trump Administration directive that inhibits investment by United States persons in the securities of companies (and their affiliates) identified by the Department of Defense or the Department of the Treasury as Communist Chinese military companies (“CCMC”s).¹ Most recently, the Biden Administration has encountered some difficulties in implementing E.O. 13959, as discussed in the latest Office of Foreign Assets Control (“OFAC”) “Frequently Asked Questions.”

OFAC FAQ 880 (March 14, 2021) explained that the Department of Defense had added Xiaomi Corporation (“Xiaomi”) to its CCMC list on January 14, 2021.² Therefore, the investment ban would have become effective for the securities of Xiaomi on March 15, 2021. However, on March 12, 2021, the United States District Court in Washington, D.C., issued an order preliminarily enjoining the implementation and enforcement of E.O. 13959 with regard to Xiaomi. The FAQ states that “the prohibitions in E.O. 13959 do not apply with respect to Xiaomi pending further order of the Court.” Xiaomi had objected to its inclusion on the CCMC list as, among other things, depriving it of due process of law. The Department of Justice strongly defended the actions of the Department of Defense.³ The Court, however, rejected the Government’s arguments finding, among other things, that “Xiaomi’s classification as a CCMC exceeded the Department of Defense’s statutory authority under Section 1237 [of the National Defense Authorization Act for Fiscal Year 1999] and the [Administrative Procedure Act],” and that Xiaomi had demonstrated a “high likelihood of success on the merits ... and that, absent relief, they will suffer irreparable harm in the form of reputational and unrecoverable injuries.”⁴

OFAC FAQ 881 (March 14, 2021) describes a glitch in the application of E.O. 13959.⁵ According to this FAQ, on January 14, 2021, the Department of Defense erroneously listed “Luokong Corporation (LKCO)” on the CCMC list. The trading symbol applies to Luokung Corporation. Because the listing misspelled the company’s name, on March 9, 2021, the listing was deleted. However, on that date, Luokung Corporation (LKCO) was added to the list.

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The Biden Administration has encountered some difficulties in implementing E.O. 13959, a Trump administration directive that inhibits investment by United States persons in the securities of companies identified by the Department of Defense or the Department of the Treasury as Communist Chinese military companies (“CCMC”s). This Client Alert covers updates to E.O. 13959.

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¹ Please see: “Securities Market Players Must Consider Recent Actions Focused on Certain Chinese Companies” (December 30, 2020), https://www.mmlawus.com/newsitem/pdf/securities_market_players_must_consider_recent_actions_focused_on_certain_chinese_companies_955.pdf; “Executive Order 13959 Expanded, OFAC Issues

Licenses and New Frequently Asked Questions” (January 19, 2021), https://www.mmlawus.com/newsitem/pdf/executive_order_13959_expanded_ofac_issues_licenses_and_new_frequently_asked_questions_964.pdf; “Executive Order 13959:

OFAC Issues Amended License And Related Frequently Asked Questions” (January 28, 2021), https://www.mmlawus.com/newsitem/pdf/executive_order_13959_ofac_issues_amended_license_and_related_frequently_asked_questions_966.pdf.

² <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/880>.





³ Xiaomi Corp. v. U.S. Department of Defense, Civil Docket No. 21-cv-00280 (RC) (D.D.C.), Brief of the U.S. Department of Justice (February 26, 2021), <https://www.law360.com/articles/1363094/attachments/1>.

⁴ Xiaomi Corp. v. U.S. Department of Defense, supra, at 1 (March 12, 2021) (Opinion of Rudolph Contreras, District Judge), <https://www.law360.com/articles/1364624/attachments/0>.

⁵ <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/881>.

Accordingly, the trading prohibitions of E.O. 13959 go into effect on May 8, 2021 and U.S. persons are prohibited from owning the securities of Luokung Corporation as of March 9, 2022.

These most recent FAQs reflect the challenges which the new administration will need to resolve under the Executive Order. The concern with similar corporate names may have been academic to this point, but FAQ 881 makes quite clear that this is a legitimate issue both for the entity wrongly included on the prohibited list, and also for those companies and individuals who are attempting to avoid engaging in any transaction that would violate the Executive Order. Even more concerning for the Administration may be the Court's order in Xiaomi, which suggests potentially fundamental deficiencies in the process which has been used to identify prohibited companies.

				
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