

## **Executive Order 13959 Update: Government Considering Changes to Designations of Communist Chinese Military Companies**

By: Larry E. Bergmann

### **UPDATE 5/11/21:**

As discussed in our most recent update on Executive Order 13959, recent reported comments by the Department of Justice reflect that the Department is undertaking a review of the implementation of the Executive Order, following Judge Contreras's Order enjoining enforcement of EO 13959 against Xiaomi Corp., [https://www.mmlawus.com/newsitem/pdf/executive\\_order\\_13959\\_update\\_government\\_considering\\_changes\\_to\\_designations\\_of\\_communist\\_chinese\\_military\\_companies\\_1021.pdf](https://www.mmlawus.com/newsitem/pdf/executive_order_13959_update_government_considering_changes_to_designations_of_communist_chinese_military_companies_1021.pdf). Luokung Technology Corp. has now succeeded in obtaining similar relief in an Order by Judge Contreras dated May 5, and which incorporates many of the same conclusions reflected in the earlier Xiaomi decision.

The Department of the Treasury has updated its FAQs, issuing FAQ 893 on May 6, which advises that the prohibitions in EO 13959 do not apply with respect to Luokung pending further order of the Court, <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/893>.

Contemporaneously, the Wall Street Journal has reported that SEC Chairman Gensler was asked during Congressional testimony what he was going to do about investors' shares that are frozen as a result EO 13959. Ping and Osipovich, "NYSE to Delist Chinese Telecom Carriers After Rejecting Appeals," Wall Street Journal, May 7, 2021, <https://www.wsj.com/articles/nyse-to-delist-chinese-telecoms-carriers-after-rejecting-appeals-11620394719?page=1>. He said that he had not been briefed on the issue, but would look into it. Gensler's remark may suggest that EO 13959 is not high on the Administration's current list of concerns, notwithstanding the claim that the Administration is reviewing the process issues which have now throttled efforts to declare two separate issuers as Communist Chinese military companies.

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Press reports show that the Biden Administration is considering changes to the implementation of Executive Order 13959 in light of court challenges by two companies that were designated as "Communist Chinese military companies" ("CCMC"s) under the authority of that Executive Order.<sup>1</sup> The United States District Court in Washington, D.C. issued a preliminary injunction finding that the Department of Defense's designation of Xiaomi Corporation as a CCMC was seriously flawed.<sup>2</sup> The Government acknowledged that the Court's order stayed the designation,<sup>3</sup> and the Department of Justice recently advised the Court that the Government will not appeal the Court's issuance of the preliminary injunction.<sup>4</sup> On April 2, 2021, Luokung Corporation filed a similar challenge to its designation as a CCMC.<sup>5</sup>

<sup>1</sup> See Mejdric, K., "Biden administration considering changes to China securities ban following lawsuits," *Politico*, May 3, 2021, <https://www.politico.com/news/2021/05/03/biden-china-securities-ban-485285> ("Mejdric"). Please see our previous Update, [https://www.mmlawus.com/newsitem/pdf/executive\\_order\\_13959\\_update\\_fits\\_and\\_starts\\_991.pdf](https://www.mmlawus.com/newsitem/pdf/executive_order_13959_update_fits_and_starts_991.pdf).

<sup>2</sup> *Xiaomi Corp. v. Dep't of Defense*, Civil Action No. 21-280 (RC) (March 21, 2021) ("*Xiaomi*"), <https://www.law360.com/articles/1364624/attachments/0>.

<sup>3</sup> Office of Foreign Assets Control ("OFAC") Frequently Asked Questions 880 (March 14, 2021), <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/880>.

<sup>4</sup> *Joint Status Report (April 27, 2021)*, ("[DOJ] recently decided that Defendants will not appeal this Court's preliminary injunction order and opinion, .... In light of this decision, Defendants continue to deliberate as to the appropriate path forward in this litigation, including whether the litigation can be resolved without the need for further briefing. Defendants anticipate concluding these deliberations in coming weeks.")

<sup>5</sup> *Luokung Technology Corp. v. U.S. Dep't of Defense*, [https://www.law360.com/dockets/download/606b042882884d003189410c?doc\\_url=https%3A%2F%2Fecf.dcd.uscourts.gov%2Fdoc1%2F04518434594&label=Case+Filing](https://www.law360.com/dockets/download/606b042882884d003189410c?doc_url=https%3A%2F%2Fecf.dcd.uscourts.gov%2Fdoc1%2F04518434594&label=Case+Filing). The Government did not describe the rationale or the process by which Luokung Corp. was designated as a CCMC. See OFAC FAQ 881 (March 14, 2021), <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/881>.

In his ruling regarding Xiaomi, Judge Contreras essentially questioned the Department's "overall decision-making process" in administering the Executive Order. First, he found that Xiaomi's classification as a CCMC did not meet the statutory criteria to be so designated; accordingly, the Department of Defense exceeded its statutory authority in making the designation, in violation of the Administrative Procedures Act ("APA").<sup>6</sup> Secondly, the Court found that the Department "did not rest its determination that Xiaomi was a CCMC based on substantial evidence as required under the APA."<sup>7</sup>

Although Section 1260H of the "National Defense Authorization Act for Fiscal Year 2021" is designed to bolster and expand the authority of the Secretary of Defense to identify "Chinese military companies,"<sup>8</sup> its impact on the Executive Order is less than clear and, more importantly, the legislation does not address the process flaws that were found in *Xiaomi*.

Because the restrictions on investment in Luokung securities are scheduled to begin on May 8, 2021 as a result of its designation, it is likely that the Court will rule on its motion for a preliminary injunction before then. It will be of great interest to see how the Government deals with these situations and what options it is considering to change the designation process.<sup>9</sup>

				
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In response to challenges, the Biden Administration  
is considering changes to  
"Communist Chinese military companies"  
designations under Executive Order 13959

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<sup>6</sup> *Xiaomi* at 10-13.

<sup>7</sup> *Id.* at 14-16.

<sup>8</sup> <https://www.congress.gov/bill/116th-congress/house-bill/6395/text>.

<sup>9</sup> For example, Luokung asserts that it "do[es] not have any means to challenge the CCMC Designation through any form of administrative process. There is no established process at all, let alone a process that could provide a reasonable opportunity for relief before the CCMC Prohibitions go into effect. Unlike other sanctions programs, no regulations or guidance have been published regarding any process for challenging a CCMC designation or seeking removal from the Section 1237 List." "Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction" (filed April 2, 2021), at 10, [https://www.law360.com/dockets/download/606b042882884d003189410c?doc\\_url=https%3A%2F%2Fecf.dcd.uscourts.gov%2Fdoc1%2F04518434595&label=Memorandum+in+Support+](https://www.law360.com/dockets/download/606b042882884d003189410c?doc_url=https%3A%2F%2Fecf.dcd.uscourts.gov%2Fdoc1%2F04518434595&label=Memorandum+in+Support+).