

EXECUTIVE ORDER 14032 TARGETING CERTAIN CHINESE COMPANIES: MAJOR CHANGES

On June 3, 2021, President Biden issued Executive Order 14032 (E.O. 14032) “Addressing the Threat from Securities Investments that Finance Certain Companies of the People’s Republic of China” termed “Non-SDN Chinese Military-Industrial Complex Companies” (CMICs).¹ E.O. 14032 applies to trading by United States persons in the publicly traded securities of 59 Chinese companies. It substantially expands and narrows two executive orders that had been issued by the Trump Administration, Executive Orders 13959 (November 12, 2020) (E.O. 13959) and 13974 (January 13, 2021) (E.O. 13974, which modified E.O. 13959).² E.O. 13959 has been substantially amended and E.O. 13974 has been revoked in its entirety. In addition, the Office of Financial Assets Control (OFAC) issued 8 new “Frequently Asked Questions” (FAQs) and revised 7 previously issued FAQs that elaborate on certain aspects of the new executive order.³

EXPANSION

E.O. 14032 expands the scope of subject Chinese companies from a solely military focus to the “threat posed by the military-industrial complex of the People’s Republic of China (PRC) and its involvement in military, intelligence, and security research and development programs, and weapons and related equipment production.” Significantly, the scope of the threat extends to the “use of Chinese surveillance technology outside the PRC and the development or use of Chinese surveillance technology to facilitate repression or serious human rights abuse,” finding that such activities “constitute unusual and extraordinary threats ... to the national security, foreign policy, and economy of the United States.”

E.O. 14032 applies initially to 59 Chinese companies identified in the Annex to the executive order. This is a replacement and an expansion of the list of approximately 35 companies covered by the earlier executive orders.⁴ As of August 2, 2021, purchases and sales of publicly traded securities (or certain related securities) are prohibited unless excepted.⁵

NARROWING

E.O. 13974 had prohibited the possession after November 11, 2021 of any publicly traded securities related to the companies that were listed as of January 11, 2021, and a similar prohibition on possession of securities of companies subsequently added to the list. E.O. 14032

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¹ <https://home.treasury.gov/system/files/126/14032.pdf>.

² See “Executive Order 13959 Expanded, OFAC Issues Licenses and New Frequently Asked Questions,” https://www.mmlawus.com/newsitem/pdf/executive_order_13959_expanded_ofac_licenses_and_new_frequently_asked_questions_964.pdf.

³ OFAC has deleted all FAQs that applied to E.O. 13959 and E.O. 13974.

⁴ The principal responsibility for administering E.O. 14032 resides with the Secretary of the Treasury. The earlier Executive Orders placed primary responsibility on the Secretary of Defense.

⁵ OFAC [FAQ 905](https://home.treasury.gov/policy-issues/financial-sanctions/faqs/905) states that the prohibitions apply only with respect to certain purchases and sales of publicly traded securities of designated entities. <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/905>. Revised [FAQ 859](https://home.treasury.gov/policy-issues/financial-sanctions/faqs/859) discusses the term “publicly traded securities.” <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/859>.

revoked that executive order. That means that U.S. persons can continue to own publicly traded securities of the subject companies, but would not be able to trade them after the divestment date had passed.

OFAC FAQ 864 stated that E.O. 13959 applied to companies “with a name that exactly *or closely matches*” the name of an entity on the annex to E.O. 13959 (emphasis added). That statement caused significant uncertainty and confusion among many investors and market intermediaries who attempted to determine whether a name closely matched the name of a listed company. Largely as a result, OFAC issued General Licenses No. 1 (January 8, 2012), 1A (January 26, 2021), and 1B (May 18, 2021) which suspended the application of E.O. 13959 to companies with closely matching names. General License 1B was set to expire on June 11, 2021.⁶ New OFAC [FAQ 899](#) states: “Only entities whose names *exactly match* the names of entities on the NS-CMIC List are subject to the prohibitions” in E.O. 14032 (emphasis added).⁷ Accordingly, those licenses are now superfluous, and FAQ 864 has been withdrawn. It is important to be aware, however, that the OFAC list now contains alternative names and predecessor names of the companies on the CMIC list.⁸ Therefore, one must go beyond the names in the Annex to ascertain all of the names that are relevant to a company that has been designated as a CMIC.

SUBSIDIARIES

Questions arose as to whether E.O. 13959 applied to subsidiaries of companies designated in the annex to that executive order. As noted above, [FAQ 899](#) states that E.O. 14032 applies only to companies whose names exactly match the names in its Annex. OFAC [FAQ 857](#) as revised clarifies that the prohibitions of the executive order “apply to a subsidiary of a [listed CMIC] only if *such subsidiary itself* is publicly listed” on the CMIC List by Treasury pursuant to E.O. 14032 or identified in the Annex to the executive order. [Emphasis added.]

MARKET INTERMEDIARIES

Market makers and other securities market participants had concerns about what activities they could engage in without contravening the earlier executive orders. OFAC [FAQ 904](#) states that U.S. market makers, and non-U.S. market makers that employ U.S. persons, are permitted to engage in activities that are necessary to effect divestiture during the permitted period or that are not otherwise prohibited by E.O. 14032.⁹ Permitted activities include conversion of American Depositary receipts of a CMIC into the underlying securities of the CMIC on the foreign exchange where the underlying securities are listed. Revised [FAQ 865](#) similarly permits market intermediaries to engage in “ancillary or intermediary activities” that are necessary to effect divestiture during the permitted periods.¹⁰ In particular, investors and intermediaries may engage in purchases and sales involving investment funds that are seeking to divest during such periods.

New [FAQ 902](#) addresses activities by U.S. persons that provide investment advice, 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 covered securities.¹¹ The FAQ states that such activities are not prohibited if: the underlying purchase or sale would not otherwise violate E.O. 14032, and the purchase or sale of a covered security is not “*for the ultimate benefit of a U.S. person*” or a willful attempt to evade the prohibitions. [Emphasis added.]¹²

⁶ E.O. 14032 directs that any orders or prohibitions implementing or enforcing E.O. 13974 or the replaced parts of E.O. 13959 are to be rescinded.

⁷ OFAC [FAQ 899](#), <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/899>.

⁸ <https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20210603>. For each CMIC, the expanded listing also contains other identifying information and the listing date, the effective date of the prohibitions, and the purchases/sales divestment date.

⁹ <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/904>.

¹⁰ <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/865>. Revised [FAQ 871](#) similarly provides that “transactions and activities by securities exchanges operated by U.S. person” that are ancillary or intermediary activities necessary to effect divestiture would not be prohibited. <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/871>.

¹¹ <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/902>.

¹² See also [FAQ 903](#), <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/903>.

TIMING

As of August 2, 2021, E.O. 14032 prohibits U.S. persons from purchasing or selling publicly traded securities of the companies listed in the Annex (or other publicly traded securities that provide investment exposure to such companies).¹³ However, such persons may effect “divestment” transactions in such securities until June 3, 2022. Transactions in securities of a company subsequently added to the list are similarly proscribed 60 days after the date the company is added to the list, and divestments can be made until 365 days after the company was added to the list.

That timing results in a curious gap in coverage of the prohibitions. The provisions of Executive Order 13959 relating to the identification and listing of “Communist Chinese military companies”¹⁴ were completely replaced by E.O. 14032.¹⁵ Although E.O. 13959 had become effective on January 11, 2021 for a number of Chinese companies, E.O. 14032 expressly provides that it does not become effective regarding the companies in its Annex until August 2, 2021. It therefore appears that U.S. persons can engage in even non-divestment purchases and sale of the securities of the companies listed in the Annex until that date.

PROCESS

As with the earlier executive orders, E.O. 14032 does not specify the process by which the Secretary of the Treasury may determine that a company: operates or operated in the defense and related materiel sector of the surveillance technology sector of the PRC economy; or has a control relationship with a person who operates or operated in any such sector.¹⁶

It is noteworthy that two companies, Xiaomi Corp. and Luokung Technology Corp., are not on the list in the current Annex.¹⁷ Those companies had successfully challenged their inclusion on the list relating to E.O. 13959 based in part upon a lack of due process of law. The Federal District Court ruled that the companies were likely to succeed on the merits and enjoined enforcement of E.O. 13959 with respect to them.¹⁸

COMMENT

E.O. 14032 answers the question as to whether the Biden Administration would change the scope of the Trump Administration’s focus on Communist Chinese military companies. The answer is yes: the scope has broadened beyond a focus on military-related companies to focus on Chinese companies engaged in surveillance technology used outside the PRC to facilitate repression or serious and human rights abuses. In addition, E.O. 14032 and the related OFAC FAQs address many of the uncertainties that arose from the implementation of the prior executive orders. They may introduce some other questions, however, such as what transactions would be deemed “for the ultimate benefit of a U.S. person” as described in FAQs 902 and 903.

As noted above, E.O. 14032 does not address what a Federal Court found to be a major defect in implementation of the predecessor executive orders, namely, the lack of due process required by the Administrative Procedures Act when a company is added to the list of designated companies. It remains to be seen whether similar challenges will be made to implementation of E.O. 14032.¹⁹

¹³ See FAQ 899.

¹⁴ Sections 1 through 5 of E.O. 13959.

¹⁵ The Annex to E.O. 14032 also replaced and superseded the annex of E.O. 13959.

¹⁶ In making such determinations, the Treasury Secretary must consult with the Secretary of State and may consult with the Secretary of Defense. See OFAC [FAQ 900](#) stating that OFAC “expects to use its discretion” to target companies whose operations support surveillance by Chinese technology companies, or the development, marketing, sale, or export of Chinese surveillance technology that can be used for “surveillance of religious or ethnic minorities or to otherwise facilitate repression or serious human rights abuse.”

¹⁷ OFAC has deleted the FAQs that formerly addressed the application of E.O. 13959 to these two companies.

¹⁸ See “Executive Order 13959 Update: Fits and Starts,”

https://www.mmlawus.com/newsitem/pdf/executive_order_13959_update_fits_and_starts_991.pdf.

¹⁹ This publication is for general information only. It is not a full analysis of the matters presented and should not be relied upon as legal advice.