

traded securities to finance activities of its military, intelligence, and security apparatuses, EO 13959 restricts U.S. persons from investing in U.S. or foreign securities, including funds, such as Exchange Traded Funds (ETFs), index funds, and mutual funds that hold any publicly traded securities of an Office of Foreign Assets Control (OFAC)-listed CCMC (regardless of the CCMC securities' share of the underlying fund or derivative thereof).

Which CMCC securities are restricted?

The restrictions of EO 13959 apply only to CMCC securities that are specifically named by the U.S. Department of Defense and/or U.S. Department of the Treasury, and are implemented primarily by the U.S. Department of the Treasury's OFAC. To date, approximately 35 CCMCs have been specifically named. CCMCs already named by OFAC under EO 13959 include various Chinese entities in the telecommunications, aerospace, chemical manufacturing, and electronics sectors, among others, such as Huawei, China Spacesat, China Mobile Communications Group, and China North Industries Group Corporation (Norinco Group). [View the full list as of Dec. 22, 2020, here.](#)

Both EO 13959 and [OFAC's Frequently Asked Questions](#) (FAQs) published Dec. 28, 2020, indicate that the restrictions apply to securities of OFAC-listed CCMC entities, but not to those of CCMC subsidiaries or affiliates not expressly identified by OFAC. Notably, OFAC's FAQs clarify it intends to publicly list any entity that issues publicly traded securities that is 50% or more owned by one or more CCMCs. But unlike other OFAC sanctions programs, the onus here is on OFAC to expressly name subsidiaries subject to the securities trading prohibitions, rather than on industry to conduct independent diligence and determine which entities might be 50% owned by CCMC entities.

What types of 'securities' and 'transactions' are restricted?

The restrictions apply to financial instruments such as derivatives (including options), ETFs, index funds, mutual funds, and currency, as well as certain notes, drafts, bills of exchange, or banker's acceptances.

Prohibited "transactions" under EO 13959 are defined to include the "purchase for value of any publicly traded security." It is unclear, however (and the current OFAC FAQs do not provide any clarification on this point), whether simply continuing to hold previously acquired securities constitutes a prohibited transaction. OFAC may address this ambiguity with future FAQs or implementing regulations.

Who are 'U.S. persons' that must comply with the restrictions?

For purposes of EO 13959, "United States person" is defined to include "any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States." This definition is consistent with most other OFAC sanctions programs, which typically cover legal entities incorporated in the United States (and natural persons), but do not include, for example, a non-U.S. legal entity that is publicly traded on a U.S. exchange (such as NASDAQ) if that is its only U.S. nexus.

These restrictions are likely to have an impact on non-U.S. entities that engage in international business operations, however. If a non-U.S. entity engages in transactions that relate to the CCMC, where the transaction itself comes within U.S. jurisdiction (for example, is dollar-denominated and must clear through the U.S. financial system), then the non-U.S. person could have some liability and exposure under U.S. sanctions regulations. Another consideration — and it might be too early to say — is that SEC-registered companies (even non-U.S. entities with no U.S. operations) may face pressure from investors or

other business partners to confirm they are not dealing directly or indirectly with CCMC entities' securities (even if it would not be prohibited for them to deal in CCMC securities as non-U.S. persons).

Effective date and wind-down divestment provisions

EO 13959 establishes a wind-down period to allow for divestment of securities related to OFAC-listed CCMCs. In particular, U.S. persons will be permitted to divest securities of CCMCs (held as of Jan. 11, 2021) until Nov. 11, 2021. U.S. exchanges and investors are currently preparing for these new requirements: for example, the NYSE announced that it will delist China Mobile Ltd., China Telecom Corp Ltd., China Unicom Hong Kong Ltd. in early January (**see Jan. 5 update above: NYSE has reversed its plan to delist*). To date, OFAC has yet to issue implementing regulations, but it may impose a post-divestment reporting requirement to take effect after Jan. 11, 2021. Prohibitions on transactions involving entities named in the future will go into effect 60 days after an entity is listed by OFAC.

Practical considerations and compliance complexities

EO 13959 is certain to impact U.S. investors, but it remains to be seen whether it will create ripple effects that will impact non-U.S. institutional investors, fund managers, and brokers. For example, U.S. institutional investors and managers might seek commitments from non-U.S. counterparts that funds and securities do not contain any shares of CCMC entities (even if lawful for the non-U.S. entity to deal in). It also remains to be seen if any affirmative disclosure requirements would be adopted for SEC-reporting issuers in terms of assuring investors that they are not trading in shares of named CCMC entities. Any such disclosure requirements may apply to all issuers, including foreign private issuers that are not "U.S. persons" but that are publicly traded in the United States. However, similar to other sanctions compliance issues, perhaps the current disclosure regime will be sufficient, and issuers will only be required to consider making disclosures to the extent there is an alleged or potential violation of the law.

Additional direction from OFAC in the form of regulations, FAQs, and additional listed CCMCs should be forthcoming over the next year.

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