



Morgan Lewis

**EXECUTIVE ORDER 13959
SANCTIONS AGAINST**

CHINESE MILITARY COMPANIES

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Agenda


- Executive Order 13959 (E.O. 13959)
 - Background and Overview
 - Prohibitions and Temporary Safe Harbor
 - Implementation
- Office of Foreign Assets Control (OFAC) Guidance
- Discussion of Interpretive Matters, Open Issues, and Recent Developments

E.O. 13959 - Background



- National Defense Authorization Act (NDAA) of FY 1999, Section 1237, required the US Department of Defense (DOD) to:
 - Determine companies operating directly or indirectly in the United States that are “Communist Chinese military companies” (CCMCs)
 - Publish a list of CCMCs in the *Federal Register*
 - Make additions or deletions to the CCMC list published “on an ongoing basis”
- Authorizes, but does not require, the President to impose sanctions under the International Emergency Economic Powers Act (IEEPA) on CCMCs
- June 2020 marked first time that the DOD identified CCMCs under Section 1237
 - List supplemented in August 2020

E.O. 13959 - Overview



- E.O. issued by President Trump on November 12, 2020
- Declares a national emergency pursuant to authority under the IEEPA
- Names the same 31 entities on DOD's Section 1237 list
- Prompted by concerns over China's Military-Civil Fusion development strategy



E.O. 13959 – Definitions

- ***Communist Chinese military company*** = persons already designated as such by the DOD and listed in the Annex to the E.O.; persons publicly designated by the DOD and/or Treasury
- ***US person*** = any US citizen, permanent resident alien (green card holder), entity organized under US law or any US jurisdiction (including foreign branches), or any person in the United States
 - Includes private funds organized under US law
- ***Transaction*** = purchase for the value of any publicly traded security



E.O. 13959 - Prohibitions

- Broadly prohibits any transaction in:
 1. publicly traded securities,
 2. any securities derivative of such securities, or
 3. securities designed to provide investment exposure to such securities of any “Communist Chinese military company” by any US person **beginning 9:30 AM EST on Jan. 11, 2021**
- Also prohibits such transactions in securities of any future-designated CCMCs **60 days after** the designation
- Prohibits any transaction that evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate EO 13959



E.O. 13959 – Temporary Safe Harbor for Divestment Transactions Only

- E.O. 13959 exempts purchases for value or sales:
 - Made on or before 11:59 PM EST on November 11, 2021, solely to divest from securities held by a US person in a CCMC
 - Made on or before 365 days from the date of a future CCMC determination, solely to divest, from securities held by a US person as of the date 60 days from the future CCMC determination

35 Entities Identified in or Pursuant to E.O. 13959 (as of Dec. 22, 2020)

- DOD's initial Section 1237 List (20 entities named in June 2020):
https://media.defense.gov/2020/Aug/28/2002486659/-1/-1/1/LINK_2_1237_TRANCHE_1_QUALIFYING_ENTITIES.PDF
- DOD's additional Section 1237 List (11 entities named in Aug. 2020):
https://media.defense.gov/2020/Aug/28/2002486689/-1/-1/1/LINK_1_1237_TRANCHE-23_QUALIFYING_ENTITIES.PDF
- OFAC's Non-SDN CCMC List (35 entities as of Dec. 2020):
https://www.treasury.gov/ofac/downloads/ccmc/ns-ccmc_list.pdf

E.O. 13959 - Implementation



- Delegates authority to implement E.O. 13959 to Treasury (OFAC)
 - Administers and enforces US sanctions against foreign countries, entities, and individuals
 - Issues FAQs to highlight key issues and topics relating to sanctions implementation
 - FAQs intended only as general information – must still comply with the full legal requirements of sanctions
 - Not all FAQs apply to all sanctions programs
 - Note E.O. 13891



5 OFAC FAQs Issued on Dec. 28, 2020 - #857

- The prohibitions in E.O. 13959 apply to subsidiaries of listed CCMCs 60 days after they are publicly listed by OFAC
- OFAC intends to apply its 50% rule in naming subsidiaries, but will also look to “control” by such companies (undefined)
- DOD may also designate CCMCs pursuant to Section 1237



5 OFAC FAQs Issued on Dec. 28, 2020 - #858

- E.O. 13959 prohibitions apply to securities of a company with a name that exactly or closely matches the name of an identified CCMC
- May not rely on only an exact name match to identify CCMC securities
 - Look at AKAs, equity tickers



5 OFAC FAQs Issued on Dec. 28, 2020 - #859

- OFAC intends to interpret the term “publicly traded securities” to include securities denominated in any currency that trades on a securities exchange or OTC-trade securities in any jurisdiction



5 OFAC FAQs Issued on Dec. 28, 2020 - #860

- Financial instruments covered by the prohibition include (but are not limited to):
 - derivatives (e.g., futures, options, swaps)
 - warrants
 - American depositary receipts (ADRs)
 - global depositary receipts (GDRs)
 - exchange-traded funds (ETFs)
 - index funds, and
 - mutual funds



5 OFAC FAQs Issued on Dec. 28, 2020 - #861

- OFAC views the prohibition against purchasing CCMC securities as applying to US or foreign funds regardless of such securities' share of the underlying index fund, ETF, or derivative thereof



1 OFAC FAQ Issued on Jan. 4, 2021- **#862**

- E.O. 13959 does not require US persons to divest their holdings of CCMCs identified in E.O. 13959 by Jan. 11, 2021



2 OFAC FAQ Issued on Jan. 6, 2021- #863

- U.S. persons can engage in these services so long as not providing services to U.S. persons for prohibited transactions:
 - Clearing
 - Execution
 - Settlement
 - Custody
 - Transfer agency
 - Back-end services
 - Other support services



2 OFAC FAQ Issued on Jan. 6, 2021- **#864**

- U.S. persons are prohibited from transactions in securities of a CCMC subsidiary with a name that exactly or closely matches the name of a CCMC identified in the E.O.
- OFAC will update its list with AKAs to help companies identify close matches
- Similar to FAQ #858

Discussion of Interpretive Matters, Open Issues, and Recent Developments

Will there be change with the new administration?

- Unclear what the Biden Administration will do with E.O. 13959 after Jan. 20
- Efforts to restrict Chinese companies' access to the US capital markets have received broad bipartisan support
- May prove difficult to withdraw E.O. 13959, but ways to limit the scope short of withdrawal may include:
 - Narrow definition of "investment exposure"
 - Not naming subsidiaries/additional entities
 - OFAC general licenses

Discussion of Interpretive Matters, Open Issues, and Recent Developments

- Impact on indexes and exchanges
- Responses from registered funds and private funds
- Timing for first subsidiaries to be publicly listed by OFAC
- Impact on affiliates of US advisers

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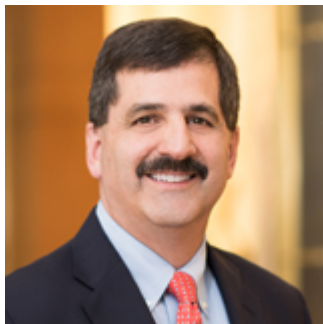
Timothy W. Levin, leader of the firm's investment management practice, counsels investment advisers and other financial services firms on the design, development, and management of pooled investment vehicles and investment advisory programs. He also advises fund managers in connection with organization, registration, and ongoing regulatory compliance. Additionally, he represents managers and sponsors of unregistered pooled investment vehicles.

Timothy's clients include many types of registered investment companies, such as mutual funds and registered funds of hedge funds, and funds focused on alternative investment strategies, including business development companies (BDCs). His unregistered pooled investment vehicle clients include private funds, bank collective investment trusts (CITs), and companies seeking exemption from investment company status.

Since 2008, *Chambers USA: America's Leading Lawyers for Business* has recognized Timothy for his work.

He speaks frequently at conferences and moderates panels. He also co-chairs the annual Hedge Fund Conference. Timothy is the editor of *Morgan Lewis Hedge Fund Deskbook: Legal and Practical Guide for a New Era* and the *Mutual Fund Regulation and Compliance Handbook*.

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Ken Nunnenkamp represents clients in international trade and national security matters before United States federal courts and government agencies, including the US departments of State, Commerce, Homeland Security, Defense, and Treasury. His practice involves internal investigations and disclosures, including voluntary disclosures and responding to government demands, as well as federal court defense against government actions. He also advises on compliance counseling and training, transactional due diligence—including both domestic and cross-border transactions—and statutory submissions to US government agencies.

With more than 30 years of litigation and investigation experience, including time as a JAG Officer in the US Marine Corps, Ken routinely conducts internal investigations for clients, including investigations into actual or potential compliance issues arising under the International Traffic in Arms Regulations (ITAR), Export Administration Regulations (EAR), Office of Foreign Assets Controls Regulations, US Customs Regulations, and Foreign Trade Regulations. Additionally, Ken works with clients to understand each business's scope and needs in establishing and improving trade and sanctions compliance programs, including the creation and auditing of company export management systems of all sizes.

Ken provides comprehensive investigation management and execution, from the preparation of an investigation plan, to the preparation, filing, and resolution of voluntary and directed disclosures of US government investigations and subpoenas related to export and import matters. His investigations work regularly involve fact gathering, witness interviews, board of directors counseling, preparation of reports for submission to US government agencies, and settlement of enforcement actions.

Ken also assists clients facing trade and national security enforcement actions from agencies including the US departments of Justice, Homeland Security, Federal Aviation Administration, and Customs, representing them in civil enforcement matters and working with criminal counsel when necessary. He has litigated such matters before the International Trade Commission, US district courts, and other US administrative agencies.

On the transactions side, Ken works with counsel in handling trade due diligence and preparing transactions for review by the Committee on Foreign Investments in the United States (CFIUS), and performing due diligence, assessment, and examination of often latent issues. He also works with both buyers and sellers on public and private transactions in the million- and billion-dollar range. Ken's experience with CFIUS includes almost every industry and transactions from more than 15 countries, including China, Germany, Japan, the United Kingdom, Canada, and Indonesia.

Ken also has aided companies with responses to various Executive and Congressional information requests and filings, including those under section 332(g) of the Tariff Act, BE-13 filings with the US Department of Commerce, or ITAR registrations and 122.4 notices with the US Department of State.

Ken has written numerous articles and chapters, and lectures regularly on CFIUS, export investigations, and export control and compliance issues. He serves as a resource for multiple publications on export, economics, and national security issues. Ken maintains an active pro bono practice, representing veterans before the Board of Veterans Appeals, the US Court of Appeals for Veterans Claims, the US Court of Appeals for the Federal Circuit, and various military discharge review boards. He previously served in the US Marine Corps as a JAG officer.

Ken is the leader of the Morgan Lewis CFIUS working group.

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Katelyn M. Hilferty helps clients navigate US export controls and customs laws, sanctioned country regulations, anti-money laundering regulations, and national security issues. She has experience with classification/jurisdiction analyses, license applications, compliance counseling, investigations, and voluntary disclosures under the International Traffic in Arms Regulations (ITAR), Export Administration Regulations (EAR), and Office of Foreign Assets Control (OFAC) regulations. Additionally, she has counseled clients on transactions before the Committee on Foreign Investment in the US (CFIUS).

Katelyn also has experience with import-related matters under the jurisdiction of US Customs and Border Protection (CBP), including ruling requests, prior disclosures, protests of Customs seizures, and focused assessments.

In addition, Katelyn advises clients on US government contracting issues, such as federal procurement of commercial items and services. She helps ensure compliance with the Federal Acquisition Regulation (FAR) and agency supplements to the FAR such as the Defense Federal Acquisition Regulation Supplement (DFARS). She has experience with both challenges to and defenses of contract awards at the US Government Accountability Office (GAO) and the US Court of Federal Claims (COFC). Katelyn also counsels clients in negotiations of federal government subcontracts. She is proficient in French.

Katelyn is a member of the Morgan Lewis CFIUS working group.

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Christine M. Nassauer focuses her practice on representing mutual funds, closed-end funds, private funds and their investment advisers in a wide variety of legal, regulatory, transactional, and compliance matters. Her experience extends to work in several areas, including fund formations and reorganizations, corporate governance matters and regulatory issues. She also counsels investment adviser clients on the applicability and interpretation of securities laws, including with respect to registration and disclosure, marketing regulations and pay-to-play issues.

While in law school, Christine was a member of the Temple Law Review. Christine also won the prize for the highest academic average in her LL.M. program, focused on international business and economic law.