

November 24, 2020

Andrea Gacki
Director, Office of Foreign Assets Control
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220
Submitted electronically to:
andrea.gacki@treasury.gov and
OFAC_Feedback@treasury.gov

Re: Questions Regarding Executive Order 13959 and its Application to Regulated Funds

Dear Ms. Gacki:

On behalf of the Investment Company Institute (ICI),¹ I write to request that the Office of Foreign Assets Control (OFAC) issue guidance to address certain questions and concerns raised by our members in connection with the Executive Order on Addressing the Threat from Securities Investments that Finance Communist Chinese Military Companies issued on November 12, 2020 (EO 13959).

EO 13959 potentially could have a tremendous impact on the holdings and activities of our members that invest in securities of entities that are or may be designated as a Communist Chinese military company (CCMC). Although EO 13959 imposes prohibitions on activities that are similar to those imposed under existing sanctions programs, it is novel in many respects and therefore raises numerous questions regarding its precise scope, and in particular its impact on regulated funds.²

¹ The Investment Company Institute (ICI) is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI's members manage total assets of US\$26.1 trillion in the United States, serving more than 100 million US shareholders, and US\$7.7 trillion in assets in other jurisdictions. ICI carries out its international work through ICI Global, with offices in London, Hong Kong, and Washington, DC.

² The term "regulated funds" includes US funds, which are comprehensively regulated under the Investment Company Act of 1940 (Investment Company Act), and non-US funds, that are organized or formed outside the US and substantively regulated to make them eligible for sale to retail investors (e.g., funds domiciled in the European Union and qualified under the UCITS Directive (UCITS)).

We understand that OFAC has already received requests for guidance and clarification from other industry participants, both on the sell and buy side. We raise below questions that are particularly relevant or unique to regulated funds. The questions described below are those that have been identified by our members as most pressing; additional questions may arise as we continue to analyze the impact of EO 13959 with members and/or as any guidance or FAQs are released.

We urge OFAC to issue guidance with respect to these questions as soon as practicable to help US persons comply with the new prohibitions. We appreciate that the prohibitions do not go into effect until 60 days from the date of the issuance of EO 13959. Many market participants, including regulated funds, however, will need to take swift action, such as rebalancing their holdings, to ensure compliance. The sooner that OFAC can provide clarity and guidance, the sooner US persons can proceed with taking the steps necessary to comply with EO 13959 in a manner that achieves the US Government's objectives without unnecessary negative impacts on US investors.

Receiving clarity on EO 13959 is a high priority for our member firms, and we would welcome the opportunity to discuss our submission with you or your staff at the earliest opportunity.

1. Prohibited Securities

- a. Publicly traded securities: We request that OFAC specify whether the term "publicly traded securities" refers to only securities traded on a US national securities exchange, or whether it also includes securities traded in the OTC market, securities traded on non-US exchanges or other non-US regulated markets. Please also clarify whether the term captures securities traded under Rule 144A or Regulation S.
- b. Covered securities: We request that OFAC provide the International Securities Identification Number for each security that is included in the prohibition.
- c. Affiliates and subsidiaries: We request that OFAC confirm that securities issued by an affiliate or subsidiary of a CCMC (including securities issued by an affiliate or subsidiary of any of the 31 entities already determined to be a CCMC) are not within scope of the prohibition unless and until the Secretary of Defense or OFAC lists such an affiliate or subsidiary as a CCMC. Please also confirm that if an affiliate or subsidiary of any of the 31 entities already determined to be a CCMC is itself determined to be a CCMC, the prohibition on transacting in securities issued by such affiliate or subsidiary will not take effect on January 11, 2021, but rather 60 days after such determination.
- d. Fifty-percent rule: We request that OFAC confirm that the fifty-percent rule, which would pull into the scope of the prohibition entities that are 50% or more owned by a CCMC does not apply under EO 13959.

- e. Special purpose vehicles: We request that OFAC specify whether securities issued by special purpose vehicles on behalf of CCMCs are included within the scope of the prohibition.
- f. Derivatives: We request that OFAC specify whether derivatives of CCMC securities that are not publicly traded are within the scope of the prohibition (i.e., derivatives traded on the over the counter markets).
- g. Participation in corporate actions: We request that OFAC confirm that a US person, including a regulated fund, that continues to hold securities of a CCMC after January 11, 2021 (or 60 days after designation of the CCMC), may continue to participate in corporate actions, including corporate actions that may result in the acquisition of additional in scope securities, with respect to securities of such CCMC that are not divested.
- h. Holding CCMC securities: We request that OFAC confirm that US investors can continue to hold publicly traded securities of a CCMC indefinitely, including after January 11, 2021 and after November 11, 2021, and are not required to divest such securities.

2. US and Non-US Investment Funds

- a. We request that OFAC clarify the scope of what is considered to be a security that is “designed to provide investment exposure to” a CCMC security. Specifically, please clarify whether a US person is permitted to purchase interests in a US regulated fund that holds publicly traded securities of a CCMC after January 11, 2021, regardless of the percentage of AUM that such CCMC securities comprise, and, further, whether a US regulated fund is permitted to sell its securities to US persons in that circumstance. Please also specify whether the response depends on the percentage of the regulated fund that is comprised of publicly traded securities of CCMCs (i.e., whether the analysis depends on whether the value of the fund is predominantly linked (50% or more by value) to CCMC securities or if any de minimis amount of holdings would be considered to “provide investment exposure to” the CCMC securities).
- b. Similarly, we request that OFAC clarify that US persons are permitted to purchase interests in non-US regulated funds that hold securities of CCMCs after January 11, 2021, regardless of the percentage of AUM that such CCMC securities comprise. Please specify whether the response depends on the percentage of the regulated fund that is comprised of publicly traded securities of CCMCs.
- c. We request that OFAC specify whether synthetic exposure to CCMC securities is within the scope of the prohibition. Specifically, we request clarity on whether the prohibition applies to regulated funds that have synthetic exposure that approximates the return on CCMC securities but which do not actually hold CCMC securities. If such regulated funds are in scope, please specify whether any such holdings pull the

- regulated fund within scope, or whether there is a permissible percentage of holdings under which a regulated fund would remain out of scope of the prohibition.
- d. Similarly, we request that OFAC clarify whether other investment products related to an index that includes CCMC securities (e.g., index swaps, index futures, synthetic index futures) would be captured by the prohibition as “securities...designed to provide investment exposure to” a CCMC security.
 - e. We request that OFAC confirm that the prohibitions do not apply directly to non-US affiliates or subsidiaries of US persons (such as a non-US investment manager), as long as such non-US affiliates or subsidiaries are separate legal entities organized under non-US law and are not a foreign branch of a US person.
 - f. We request that OFAC confirm that the prohibitions do not apply directly to non-US regulated funds that are managed by a non-US investment manager by virtue of that manager being affiliated with or under the control of a US person. We also request that OFAC clarify to what extent US persons that are directors or officers of non-US funds or are employees of a non-US investment manager remain individually subject to the prohibitions – for example, whether such US person employees are prohibited from advising, approving, or otherwise facilitating purchases of CCMC securities by the non-US investment manager and non-US fund.
 - g. We request that OFAC confirm that US persons are permitted to facilitate, clear, and settle transactions by US or non-US regulated funds to divest CCMC securities to a non-US person, including with respect to actions such as processing of such trades by brokers, dealers, custodians and other intermediaries or processing US dollar transactions clearing through the US financial system in connection with such trades.
 - h. We request that OFAC clarify the expected level of due diligence that should be undertaken in assessing whether a divestment of CCMC securities is to a non-US person. In particular, please clarify if the due diligence standards set forth in FAQ 650 regarding trades in Venezuelan securities applies to divestments permitted under EO 13959 (i.e., that US persons are expected to conduct due diligence on their direct customers and can rely on information ordinarily available to them for such diligence.)
 - i. We request that OFAC confirm that intermediaries that are US persons are permitted to facilitate purchases and sales of CCMC securities on behalf of non-US persons after January 21, 2021.

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We sincerely appreciate your attention to this matter. We will be in touch with your office to request a meeting at your earliest convenience. If you have any questions, please do not hesitate to

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contact the undersigned at 202-326-5876 or jennifer.choi@ici.org or Eva Mykolenko, Associate Chief Counsel – Securities Regulation, at 202-657-7926 or emykolenko@ici.org.

Respectfully submitted,

/s/ Jennifer S. Choi

Jennifer S. Choi
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