

**MEMO# 33021**

January 5, 2021

## **China EO 13959: Additional Guidance Provided Orally by OFAC Staff to ICI Staff**

[33021]

January 5, 2021 TO: AML Compliance Working Group  
Chief Compliance Officer Committee  
Chief Risk Officer Committee  
Compliance Advisory Committee  
ETF (Exchange-Traded Funds) Committee  
ETF Advisory Committee  
Global Operations Advisory Committee  
ICI Global Investing Subcommittee  
ICI Global Regulated Funds Committee  
ICI Global Regulated Funds Committee - Asia  
Public Communications Committee  
SEC Rules Committee  
Securities Operations Advisory Committee  
Small Funds Committee RE: China EO 13959: Additional Guidance Provided Orally by OFAC Staff to ICI Staff

On January 5, the US Treasury's Office of Foreign Assets Control (OFAC) staff orally provided ICI staff with the following additional guidance and information with respect to the Executive Order on Addressing the Threat from Securities Investments that Finance Communist Chinese Military Companies (EO 13959). We understand that OFAC staff have provided the same information to other trade associations.

We intend to submit a letter to OFAC requesting that they issue written guidance with this information as soon as possible, underscoring the need for legal certainty and clarity for industry participants. However, it is unclear whether OFAC staff will issue this guidance in writing and, if so, the potential timing of any such written guidance.

The guidance that was provided is the following:

1. **Investment in US Funds by US Persons:** OFAC's view is that US persons can continue to invest in US funds that hold CCMC securities during the "wind down period" so long as the US fund is "acting in accordance with the Order," e.g., sales only for divestment (see Item 2 below for "wind down period"). Specifically, existing

investors can remain invested in such US fund and increase their investments, and new US persons are permitted to invest in the US fund. OFAC stated that they are looking for such US funds to communicate to their investors that they are acting in accordance with the terms of EO 13959 (see Due Diligence below).

2. **Divestment of CCMC Securities by US Funds:** OFAC views transactions by US funds seeking to wind down their holdings in CCMC securities taking place after January 11, 2021, and until November 11, 2021, as permissible under EO 13959. When asked whether a US person is required to divest all CCMC securities by November 11, 2021 (as the order does not explicitly require divestment), OFAC stated that they will need to consider further this question.
3. **Market Intermediaries:** Market intermediaries and participants can engage in ancillary activities (such as clearing, settlement, market-making, and transfer agency) related to prohibited securities so long as such activities are in connection with permissible transactions, whether undertaken by US persons or non-US persons.
4. **Due Diligence:** The level of due diligence that is expected in determining whether a transaction is permissible under EO 13959 is that specified in FAQ 650.[\[1\]](#)
5. **Covered Financial Instruments:** OFAC stated that if a financial instrument is not included within the definition of “security” in EO 13959 (as defined under the Securities Exchange Act), then it is not within the scope of the prohibition (e.g., certain futures).
6. **Non-US Funds:** When asked if US intermediaries (e.g., US broker-dealers and US custodians) can facilitate transactions in CCMC securities for non-US persons, OFAC stated that as long as the underlying transaction is in compliance with EO 13959, US intermediaries can engage in these activities.
7. **Non-US Fund with a US Adviser:** When asked whether a non-US fund with a US adviser is within scope of the prohibitions, OFAC stated that they will need to consider this question further.
8. **Scope of US Person Definition:** Regarding the scope of the U.S. person definition, OFAC stated that EO 13959 includes entities organized under the laws of the United States or any jurisdiction within the United States, including foreign branches. Consistent with other IEEPA programs, this definition does not generally extend to foreign-incorporated subsidiaries or affiliates.

In addition, on a January 4th member call on this matter it was mentioned that the NYSE was intending to delist the securities of three ADRs related to EO 13959. NYSE has since issued a release stating that it no longer plans to delist those three ADRs[\[2\]](#).

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#### endnotes

[\[1\]](#) See EO 13959, FAQ 650 *available at* <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/650>

[2] See

<https://ir.theice.com/press/news-details/2021/NYSE-Updates-Guidance-on-Delisting-Determination-for-Securities-of-Three-Issuers-in-Relation-to-Executive-Order-13959--/default.aspx>

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