

Alert

White House Bans Trading in 31 Chinese Companies

November 13, 2020

On Nov. 12, 2020, President Donald Trump signed an Executive Order¹ that, effective Jan. 11, 2021, will impose a ban on trading by U.S. persons in the securities (and derivatives thereof) of 31 entities² deemed to be supporting the People’s Liberation Army of China (each, a “Covered Company,” a complete list of these companies is appended to this *Alert*). The Executive Order does not impose an immediate trading ban, and a temporary safe harbor is provided for divestment from Covered Companies.

Timing and Effectiveness

The Executive Order’s ban does not go into effect until early January. Furthermore, the Executive Order permits otherwise prohibited “purchases for value or sales,” through Nov. 11, 2021, if made “solely to divest” (wholly or partially) from Covered Companies. The timing of the Executive Order can be summarized as:

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| Prior to Jan. 11, 2021 (9:30 a.m. EST) | No prohibition on purchases or sales (but managers should consider whether a transaction during this period would entail a future transaction on or after Jan. 11, 2021) |
| Jan. 11, 2021 to Nov. 11, 2021 | Only transactions “solely to divest” are permitted |
| From and after Nov. 12, 2021 | Full transaction ban in effect |

The Executive Order also authorizes the designation of additional Chinese companies in the future, with a ban on trading in those companies’ securities to take effect 60 days after such designation. The “safe harbor” for divestment purchases or sales relating to firms that are subsequently deemed to be Covered Companies will be 365 days from the date of the applicable determination.

Covered Transactions

The Executive Order applies to transactions in “publicly traded securities of Covered Companies, or any securities that are derivative of, or are designed to provide investment exposure to such securities.” The introductory language in the Executive Order signals that the White House intends this ban to be read

¹ See Executive Order on Addressing the Threat from Securities Investments that Finance Communist Chinese Military Companies (Nov. 12, 2020), [available here](#).

² See Qualifying Entities Prepared in Response to Section 1237 of the National Defense Authorization Act for Fiscal Year 1999 (PUBLIC LAW 105–261), Tranche 1, [available here](#); and Tranche 2, [available here](#).

broadly, as it references efforts by Covered Companies to raise capital through individual publicly listed securities (on domestic and non-U.S. exchanges), U.S. index providers and funds, and “other acts to ensure access to United States capital.” This means that private fund managers should review their portfolios and screen future transactions to identify holdings or proposed transactions in common shares, other equities, ADRs and ADSes and ETFs and other index products that would be affected by the Executive Order.

While futures contracts and swaps are not specifically mentioned in the Executive Order, “derivative” securities are expressly included in the Executive Order’s coverage. In addition, the definition of “securities” in the Executive Order is not limited; it merely states that the term “security” *includes* the items in the Securities Exchange Act’s definition (by contrast, the other definitions in the Executive Order state that the defined term “*means*” something specific). Accordingly, private fund managers are advised to assess the impact of the Executive Order on any derivative that references one or more Covered Companies, irrespective of the materiality of the exposure within the basket of referenced assets.

Excluded from the ban are transactions permitted by “statutes, or in regulations, orders, directive, or licenses” that may be issued pursuant to the order, suggesting that future orders could be issued to modify the scope of the ban, although no particular detail is provided on such points. The Executive Order also notes that procedures may be established to allow investors to seek a license to engage in activity otherwise prohibited by the Executive Order.

Affected Persons

The Executive Order applies to trading in securities of Covered Companies by any “United States person.” This term is defined to mean “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.”

Given the international nature of the asset management business today, questions will inevitably arise involving various arrangements. Private fund managers organized in the United States or solely operating within the United States will be covered by the Executive Order, as would funds organized in the United States. Non-U.S. managers will want to carefully consider whether their relationships with U.S. person investors, clients, ERISA-covered offshore private funds, employees and financial institutions pull some or all of their activities into the scope of the Executive Order. Analysis of the ban’s impact in such situations likely will require an examination of the extent and nature of U.S. person involvement and other facts and circumstances.

Anti-Evasion

The Executive Order contains a broad and customary anti-evasion provision, stating that “any transaction by a United States person or within the United States that evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate the prohibitions set forth in this order is prohibited” and that “any conspiracy formed to violate any of the prohibitions set forth in this order is prohibited.” Accordingly, any determinations that a particular relationship or person is not covered by the Executive Order should be examined not just in terms of a technical application of the text of the order, but in light of the spirit of this general anti-evasion provision.

The list of Covered Companies does not, on its face, extend to those entities' affiliates. However, the Executive Order authorizes designation of subsidiaries and other entities owned or controlled by Covered Companies. Managers investing in China and Asia should carefully consider how to address situations involving affiliates of Covered Companies.

Action Items

While the Executive Order is not effective until January of next year, failing to abide by its terms would be a violation of federal law, and so every manager should immediately review the Executive Order, consider their potential exposure, and take the following next steps:

- Determine whether any current or anticipated trading positions might be covered by the Executive Order. For more complex instruments such as derivatives and indexes, this may require the assistance of outside counsel.
- For currently held Covered Company securities, start formulating a divestment plan. The Executive Order's safe harbor should provide ample time for wind down, but complicated derivatives may entail special timing considerations.
- Plan to monitor for future updates to the list of Covered Companies.

Covered Companies

(as of Nov. 13, 2020)

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| China Communications Construction Company (CCCC) | China Academy of Launch Vehicle Technology (CALT) | China Spacesat | China United Network Communications Group Co Ltd | China Electronics Corporation (CEC) |
| China National Chemical Engineering Group Co., Ltd. (CNCEC) | China National Chemical Corporation (ChemChina) | Sinochem Group Co Ltd | China State Construction Group Co., Ltd. | China Three Gorges Corporation Limited |
| China Nuclear Engineering & Construction Corporation (CNECC) | Aviation Industry Corporation of China (AVIC) | China Aerospace Science and Technology Corporation (CASC) | China Aerospace Science and Industry Corporation (CASIC) | China South Industries Group Corporation (CSGC) |
| China Shipbuilding Industry Corporation (CSIC) | China State Shipbuilding Corporation (CSSC) | China North Industries Group Corporation (Norinco Group) | China Electronics Technology Group Corporation (CETC) | Huawei |
| Inspur Group | Aero Engine Corporation of China | China Railway Construction Corporation (CRCC) | Hangzhou Hikvision Digital Technology Co., Ltd. (Hikvision) | Panda Electronics Group |
| Dawning Information Industry Co (Sugon) | China Mobile Communications Group | China General Nuclear Power Corp. | CRRC Corp. | China National Nuclear Corp. |
| China Telecommunications Corp. | | | | |

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