January 22, 2021

Andrea Gacki, Director
Office of Foreign Assets Control
US Department of the Treasury
1500 Pennsylvania Ave NW
Washington, DC 20220
Submitted electronically to:
andrea.gacki@treasury.gov

Dear Director Gacki:

On behalf of the Investment Company Institute,[1] I write to express concerns about the implementation of Executive Order 13959 (Order) and to request that the Office of Foreign Assets Control (OFAC) address the harmful effects of the implementation of the Order related to unlisted subsidiaries of entities publicly listed as Communist Chinese military companies (CCMCs). We also ask for clarity on the impact of the regulatory freeze announced by President Biden's administration on the implementation of the Order.

Application of Order to Unlisted Subsidiaries

Sections 1(a)(ii), 1(c), and 4(a)(iii) of the Order – as well as FAQ 857 issued by OFAC on December 28, 2020 – indicated that subsidiaries of entities listed as CCMCs by the US Department of Defense or the US Department of the Treasury were not subject to the Order's restrictions unless and until such subsidiaries were publicly listed on a CCMC list.[2] Under the same provisions and guidance, restrictions would not take effect until 60 days after the subsidiaries were publicly listed.

On the basis of that information, the US regulated fund industry worked diligently to identify securities affected by the Order relying on the direction from OFAC that only listed CCMCs were affected. On January 6, 2021 – five days before the Order's restrictions were set to take effect – OFAC

[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 $27.7 trillion in the United States, serving more than 100 million US shareholders, and $8.3 trillion in assets in other jurisdictions. ICI carries out its international work through ICI Global, with offices in London, Brussels, Hong Kong, and Washington, DC.
[2] Sec. 1(a)(ii), Sec. 1(c) of Executive Order 13959.

issued FAQ 864. This FAQ created an entirely new standard and dramatically expanded the scope of the Order's restrictions beyond the language of the Order and prior guidance by: (i) newly listing three subsidiaries of previously listed CCMCs and imposing restrictions on such subsidiaries on the same timeline applicable to their parent companies (rather than triggering a new 60 day effectiveness and one year divestment deadline); and (ii) stating that transactions in the securities of any CCMC subsidiary, "whether expressly listed or not," are prohibited if the subsidiary's name "exactly or closely matches" the name of an entity identified in the Annex to the Order.

We understand that, as of the third quarter of 2020, hundreds of US mutual funds and ETFs held approximately $5.8 billion in equity securities of the three newly listed subsidiaries, for which prohibitions went into effect on January 11. After publication of FAQ 864, the regulated fund industry was of the view that they had only three business days to divest with respect to the three new subsidiaries because FAQ 865 had not yet been issued.[3] Given this very short time-frame and that other investors also would be offloading these securities, the size of these holdings would have made it difficult for regulated funds to divest without some negative price impact, potentially harming fund investors. Although the issuance of FAQ 865 alleviated the immediate concerns for those three subsidiaries by allowing funds to divest by November 11, FAQ 864 as it currently stands will continue to bring uncertainty to funds because they may have little notice and time to come into compliance with the Order.

Even today FAQ 864 continues to create significant strain on the US regulated fund industry as OFAC has not yet provided guidance on what standards should be considered when assessing whether a name is a close match for a listed entity. Market participants are attempting on a good faith basis to assemble their own lists of unlisted subsidiaries that might be affected by the Order, which has resulted in an abundance of competing and contradicting lists. This results in a significant impact on US investors – including, ultimately, the many US pensioners, retirees and 401(K) participants invested in US mutual funds and ETFs – who may be forced to divest securities, or may be unable to purchase securities, of companies that were never intended to be within scope of the Order, and certainly are not within the scope of the Order under its plain terms.

Although the future effects of the standard set forth in FAQ 864 have been temporarily mitigated by the issuance of General License 1 (GL 1), GL 1 is scheduled to expire on January 28, 2021. As a result, market participants are preparing for the return of the significant uncertainty that plagued the market during the days between the issuance of FAQ 864 and the issuance of GL 1.

ICI respectfully requests that OFAC revoke the "exact or closely matches" standard set forth in FAQ 864, which appears to have no basis in the Order and sets an impossible standard for compliance. We request instead that OFAC make clear that the Order's prohibitions apply only to entities expressly identified as CCMCs by the Department of Defense or on OFAC's Non-SDN CCMC List and that

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[3] FAQ 865 permits US persons to purchase securities of a US regulated fund that holds publicly traded securities of a CCMC and is seeking to divest the CCMC securities during the relevant wind-down period for such security.

restrictions do not apply to previously unlisted subsidiaries until 60 days from the date of such listing. These steps would be entirely more consistent with the Order and FAQ 857 than FAQ 864.

Clarity on Impact of Regulatory Freeze

We also would appreciate clarity about the effect on the Order of the regulatory freeze announced by President Biden's Chief of Staff, Ronald A. Klain, in a memorandum on January 20. The memorandum issued by Mr. Klain states that US agencies should consider postponing for 60 days the effective date of rules that have been issued in any manner but have not yet taken effect. "Rules" within scope of this delay expressly include "any agency statement of general applicability and future effect that sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue."

We believe that this regulatory freeze, at a minimum, should be read to affect implementation of the Order with respect to items that have not yet taken effect. We therefore respectfully ask OFAC to clarify how it will implement the regulatory freeze with respect to the Order, which we assume could include: (i) postponing the effect of the Order on entities that have been identified as CCMCs but for which restrictions have not yet taken effect (e.g., CNOOC, SMIC, etc.); (ii) extending GL 1 (if the arbitrary standard set forth in FAQ 864 is not revoked entirely); and (iii) not listing any additional subsidiaries of CCMCs – and not otherwise listing any other new entities as CCMCs – until the regulatory freeze has concluded.

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FAQ 864 is producing tremendous uncertainty for the US financial services community. We request that OFAC take immediate steps to revoke FAQ 864 and also make clear that the Order's prohibitions apply only to entities expressly identified as CCMCs by the Department of Defense or on OFAC's Non-SDN CCMC List, and that restrictions do not apply to previously unlisted subsidiaries until 60 days from the date of such listing.

We sincerely appreciate your attention to this matter. If you have any questions, please do not hesitate to 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

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