

U.S. Government Agrees to Remove Xiaomi from Communist Chinese Military Company List; American Exchanges Delist Others

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On May 11, 2021, the U.S. Department of Defense (DOD) agreed to remove Chinese smartphone maker Xiaomi Corp. from its list of “Communist Chinese Military Companies” (CCMC). DOD identified Xiaomi as a CCMC on January 14, 2021, pursuant to Section 1237 of the 1999 National Defense Authorization Act (NDAA). As a result of the CCMC designation, Xiaomi would have been prohibited from selling securities to U.S. investors under Executive Order (EO) 13959, “Addressing the Threat from Securities Investments that Finance Communist Chinese Military Companies,” as amended by EO 13974.

The agreement to remove Xiaomi from the CCMC list follows a March 12, 2021 preliminary injunction by the D.C. District Court, enjoining enforcement of the EOs against Xiaomi. The Court cited the Administrative Procedure Act (APA) in finding that DOD did not develop sufficient evidence to support its designation of Xiaomi as a CCMC.

The Court’s willingness to question the adequacy of DOD’s evidentiary record under the APA has given, and will continue to give, rise to additional litigation by other Chinese companies seeking similar injunctions. On May 5, 2021, the D.C. District Court enjoined enforcement of EOs 13959 and 13974 against Luokung Technology Corp., another Chinese company identified as a CCMC in the January 14, 2021 list. In doing so, the Court rejected the government’s arguments in favor of a broader definition of affiliation than the one it applied in the Xiaomi case. The Court reasoned that the government’s proposed definition “would have almost no limiting principle” and “would potentially encompass all Chinese government

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contractors.”

Based on the narrower definition that it applied in the Xiaomi case, the Court held that Luokung was likely to succeed on the merits of its appeal because (i) the CCMC designation exceeded DOD’s statutory authority under Section 1237 of the 1999 NDAA, and (ii) the evidence underlying the designation was insufficient under the APA’s “substantial evidence” standard.

Between June 2020 and January 2021, DOD identified a total of 44 Chinese companies as CCMCs. The D.C. District Court’s Xiaomi and Luokung injunctions, and the Biden Administration’s decision to remove Xiaomi prior to a final Court decision on the merits, create uncertainty around the remaining CCMC designations. As noted in a prior alert, businesses should be aware that CCMC designations have legal implications beyond EOs 13959 and 13974 for U.S. government contractors and other companies participating in the U.S. government’s supply chain. These include prohibitions or restrictions on transactions under the Federal Acquisition Regulation (FAR) and Defense Federal Acquisition Regulation (DFAR), the Consolidated Appropriations Act for 2018, and Bureau of Industry and Security controls on exports to “military end users.”

In recent months, 17 Chinese companies have been removed from American exchanges including CCMCs Semiconductor Manufacturing International Corporation (SMIC) and the China National Offshore Oil Corporation (CNOOC), according to the U.S.-China Economic and Security Review Commission. Also included are three additional CCMCs – Chinese telecommunications carriers China Unicom, China Telecom, and China Mobile – for which the New York Stock Exchange (NYSE) filed delisting requests last week; American depository receipts (ADRs) of these latter companies will stop trading 10 days after the filings.

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