

U.S. Court Blocks Trump-Era Trading Ban on Xiaomi Stock 美国法院阻止特朗普对美国人投资小米的禁令

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The U.S. District Court for the District of Columbia recently ruled that certain securities trading restrictions will be prevented from going into effect with respect to Xiaomi Corporation (“Xiaomi”) under Section 1237 of the National Defense Authorization Act for Fiscal year 1999, as amended (“Section 1237”). In its opinion, the court found that Xiaomi was likely to succeed on the merits of its claims that the United States government’s designation of Xiaomi as a Communist Chinese military company (“CCMC”) was not supported by substantial evidence and violated the Administrative Procedure Act (“APA”). Accordingly, the court enjoined restrictions on the trading of Xiaomi securities and derivatives that had been imposed due to its CCMC designation. Although the preliminary injunction order specifically applies to Xiaomi, the case may ultimately impact other Chinese companies designated as CCMCs under Section 1237, or U.S. persons investing in securities of designated CCMCs.

美国哥伦比亚特区地区法院最近判定，根据经修订的《1999 财政年度国防授权法》第 1237 条 (“1237 条”) 而针对小米公司 (“小米”) 的若干证券交易限制将被阻止生效。法院在其判决中认为，小米公司在诉讼中的主张 -- 即美国政府将小米公司指定为中国共产党涉军企业 (“中国涉军企业”) 没有实质性的证据支持并且违反了《行政程序法》 (“行政程序法”) -- 很可能最终获得法院支持。因此，法院初步禁止了因小米被指定为中国涉军企业而对小米证券及其衍生品的交易实施的限制。虽然该初步禁令适用于小米，但此案可能最终影响到其他根据第 1237 条被指定为“中国涉军企业”的中国公司，以及投资指定中国涉军企业证券的美国人。

Background on Section 1237 Designations. 关于第 1237 条的背景

On January 14, 2021, the U.S. Department of Defense (“DoD”) designated Xiaomi as a CCMC. Section 1237 defines a CCMC as: (i) an entity owned or controlled by, or affiliated with, the People’s Liberation Army, or a ministry of the government of the People’s Republic of China, or that is owned or controlled by an entity affiliated with the defense industrial base of China; and that (ii) is engaged in providing commercial services, manufacturing, producing, or exporting. Under Executive Order 13959 issued

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on November 20, 2020, as amended (“EO 13959”), U.S. persons cannot engage in certain transactions with respect to the publicly traded securities and derivatives of CCMCs 60 days after the designation by DoD. We previously issued an update on EO 13959 and Section 1237 [here](#). DoD has designated a total of 44 entities under Section 1237 in five tranches that have been issued since June 2020.

2021年1月14日，美国国防部指定小米为中国涉军企业。第1237条对中国涉军企业的定义是：(i)由中国人民解放军或中华人民共和国政府部委拥有或控制的，或与之有关的，或由与中国国防工业基地有关的实体拥有或控制的；并(ii)从事提供商业服务、制造、生产或出口的任何实体。根据2020年11月20日发布的13959号行政命令（包括其修订，以下简称“《13959号行政命令》”），在美国国防部指定后60天内，美国人不能参与有关中国涉军企业的公开交易证券和衍生品的某些交易。本所先前在此处发布了关于《第13959号行政命令》和第1237条款的最新消息。美国国防部根据第1237条共指定了44个实体，自2020年6月起分五批发布。

As a result of DoD’s designation of Xiaomi, U.S. persons would have been barred from engaging in certain transactions with respect to Xiaomi’s securities or derivatives as of March 15, 2021. EO 13959 permits U.S. persons to engage in divestment transactions for one year following a Section 1237 designation, after which time merely possessing the securities becomes prohibited for U.S. persons.

由于美国国防部将小米公司指定为中国涉军企业，从2021年3月15日起，美国人将被禁止从事与小米公司证券或衍生品相关的某些交易。《第13959号行政命令》允许美国人在第1237条指定后一年内进行撤资交易，之后美国人仅持有证券也将被禁止。

The U.S. Treasury Department’s Office of Foreign Assets Control (“OFAC”) is tasked with administering and enforcing the sanctions against CCMCs. OFAC guidance states that EO 13959 broadly applies not only to the securities of CCMCs, but also to derivatives and other investment vehicles that provide exposure to the securities of the CCMCs (e.g., exchange traded funds (“ETFs”). Certain of the CCMCs have securities traded on U.S. exchanges while others have securities traded on non-U.S. exchanges. Notably, EO 13959 applies to trading activities of U.S. persons, and covers transactions outside of the United States that involve U.S. persons, including U.S. persons that merely facilitate or have tangential involvement in trading of CCMC securities. Accordingly, the impact of EO 13959 includes companies involved in investing in a variety of financial instruments and financial activities worldwide. OFAC has issued a general license authorizing certain activities of securities exchanges operated by U.S. persons.

美国财政部外国资产控制办公室（“外国资产控制办公室”）负责管理和执行对中国涉军企业的制裁。外国资产控制办公室的指南指出，第13959号行政命令不仅广泛适用于中国涉军企业的证券，还适用于为中国涉军企业的证券提供风险敞口的衍生品和其他投资工具（例如，交易所交易基金（“ETF”））。某些中国涉军企业的证券在美国交易所交易，而其他则有证券在非美国的交易所交易。值得注意的是，《第13959号行政命令》适用于美国人的交易活动，并涵盖在美国境外涉及美国人的交易，包括仅仅为中国涉军企业证券交易提供便利或有间接参与的美国人。因此，《第13959号行政命令》的影响包括在全球

范围内参与投资各种金融工具和金融活动的公司。外国资产控制办公室已经发出一般许可，授权美国人经营的证券交易所进行某些活动。

Court Opinion. 法院意见

Xiaomi challenged the DoD designation of Xiaomi as a CCMC and the restrictions under EO 13959 in a complaint and a subsequent request for a preliminary injunction to the U.S. District Court for the District of Columbia. In an opinion issued on March 12, 2021, the court granted Xiaomi's request preliminarily to enjoin restrictions from becoming effective on U.S. person trading of Xiaomi's securities or derivatives. The court's opinion found, preliminarily, that:

小米公司在向美国哥伦比亚特区地区法院提出申诉以及随后的初步禁令请求中，对美国国防部指定小米公司为中国涉军企业以及《第 13959 号行政命令》规定的限制提出了挑战。在 2021 年 3 月 12 日发布的一份意见中，法院同意了小米公司的请求，初步禁止限制措施对美国人买卖小米公司的证券或衍生品生效。法院的判决初步认定：

1. DoD's explanation for designating Xiaomi a CCMC is inadequate. The court found that DoD had failed adequately to connect its conclusions to facts relating to Xiaomi.

美国国防部关于将小米公司指定为中国涉军企业的解释不充分。法院认为，美国国防部未能将其结论与小米公司相关事实充分联系起来。

2. Xiaomi does not meet the statutory criteria to be designated a CCMC. Xiaomi is a publicly traded company with an independent board of directors and controlling shareholders and, accordingly, the court did not find support for designating Xiaomi as owned or controlled by or affiliated with the Government of China, the PLA or other Chinese security services (e.g., the defense industrial base of China).

小米公司不符合被指定为中国涉军企业的法定标准。小米公司是一家上市公司，有独立的董事会和控股股东，因此，法院没有找到支持将小米公司指定为中国政府、解放军或其他中国安全部门（如中国国防工业基地）所拥有或控制或与之有关联的依据。

3. DoD's designation of Xiaomi lacked substantial evidentiary support under the APA. DoD defended its decision by pointing to Xiaomi's involvement in fifth generation ("5G") internet networks and artificial intelligence, and the receipt by Xiaomi's founder of an award from the Government of China. The court found that this evidence was insufficient to find that Xiaomi is a CCMC and stated it was "troubled by the lack of any limiting principal" in DoD's interpretation of Section 1237 as it was applied to Xiaomi.

根据美国《行政程序法》，美国国防部对小米公司的指定缺乏实质性的证据支持。美国国防部为其决定辩护时指出，小米公司涉足第五代（“5G”）互联网网络和人工智能领域，以及小米公司创始人获得中国政府颁发的奖项。法院认为，这些证据尚不足以认定小米公司是中国涉军企业，并称，其对美国国防部关于第 1237 条适用于小米公司的解释“缺乏任何限制性原则而感到不安”。

The court then found that Xiaomi established imminent irreparable harm because of the EO 13959 restrictions and the CCMC designation, and that the balance of harms favored Xiaomi's request for a preliminary injunction. It is unclear at this time how the Xiaomi lawsuit will proceed in light of this ruling.

法院随后认定，由于《第 13959 号行政命令》的限制和被指定为中国涉军企业，确定小米公司面临迫在眉睫的不可挽回的损害，并且损害的平衡有利于小米公司的初步禁令请求。基于该等裁决，目前尚不清楚小米诉讼下一步将如何发展。

Impact on Other CCMCs. 对其他“中国涉军企业”的影响

The court's preliminary injunction order specifically applies only to Xiaomi. However, DoD to date has designated 43 other Chinese companies as CCMCs. The Xiaomi case could impact these other CCMCs, or U.S. persons who trade in their securities or derivatives.

法院的该初步禁令只特定适用于小米公司。不过，美国国防部迄今已将其他 43 家中国公司指定为中国涉军企业。小米案可能会影响到其他这些中国涉军企业，或买卖这些企业的证券或衍生品的美国人。

Other than Xiaomi, DoD has not publicly released information indicating why it has designated other Chinese companies as CCMCs, or what factual support exists for such designations. Nonetheless, other CCMCs could challenge their designations as well in federal court. Their likelihood of success will depend on DoD's factual support for the designation and the Chinese entity's proximity to the Chinese government, the PLA, and other parts of the Chinese defense industrial base.

除小米外，美国国防部并没有公开发布信息，说明为何将其他中国公司指定为中国涉军企业，或这种指定有什么事实基础。尽管如此，其他中国涉军企业也可以在联邦法院对这些指定提出质疑。他们成功的可能性将取决于美国国防部将该等实体指定为涉军企业的事实依据，以及这些中国公司与中国政府、解放军和中国国防工业基地其他部分的关联和接近程度。

As an example, Luokung Technology Corp. ("Luokung") has also filed a complaint with the U.S. District Court for the District of Columbia, and is represented by Dorsey & Whitney in that case. Luokung too has obtained a temporary "break" as OFAC also released a frequently asked question ("FAQ") on March 14, 2021 clarifying that restrictions as to Luokung were delayed until May 8, 2021 because DoD had misspelled the company's name. Luokung had initially been designated by DoD on January 14, 2021 in the same tranche of CCMCs that included Xiaomi. DoD corrected the error in Luokung's name on March 9, 2021, after Luokung filed its lawsuit against DoD.

例如，由美国德汇律师事务所代理的中国企业箩筐技术公司（“箩筐”）此前也向美国哥伦比亚特区地区法院提出了申诉。箩筐也因取得了技术性的临时胜利而获得了更多的努力余地：外国资产控制办公室还在 2021 年 3 月 14 日发布了一条常见问题答复（“FAQ”），澄清对箩筐的限制被推迟到 2021 年 5 月 8 日，原因是美国国防部将该公司的名称拼错。美国国防部最初于 2021 年 1 月 14 日将箩筐列入包括小米在内的同一批中国涉军企业中。在

箩筐对美国国防部提起诉讼后，美国国防部于 2021 年 3 月 9 日纠正了箩筐名称中的错误。

In addition, it is possible that the Biden Administration could review CCMC designations and the scope of restrictions under EO 13959, although the Biden Administration has not indicated that it intends to do so. Also, to date, neither DoD nor OFAC have established an administrative review process of Section 1237 designations.

此外，拜登政府有可能对根据《第 13959 号》行政命令的中国涉军企业的指定和限制范围进行审查，尽管拜登政府尚未表示会打算这样做。此外，到目前为止，美国国防部和外国资产控制办公室都没有建立对第 1237 条指定的行政审查程序。

Conclusion. 结语

Dorsey & Whitney attorneys are experienced in helping clients understand and examine EO 13959, and assessing their possibility to challenge restrictions imposed under EO 13959. Please do not hesitate to reach out to attorneys linked with this e-Update for further information.

美国德汇律师事务所的律师在帮助客户理解和研究《第 13959 号行政命令》以及评估中国公司挑战《第 13959 号行政命令》的可能性方面实战经验丰富。如需更多信息，请垂询本文作者。