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Western countries and their partners the world over have become increasingly attuned to the risks posed by allowing China continued unfettered access to their economies. Leaders from the United Kingdom to Japan have taken important and laudable steps such as limiting trade with, and technology transfers to, China in security-sensitive sectors. That said, the U.S. is presently alone in acting to curtail the undisciplined and unrestricted access to its capital markets that Chinese companies have luxuriated in for more than 20 years.

In November 2020, the Trump Administration signed Executive Order (E.O.) 13959, aimed at "*Addressing the Threat from Securities Investments That Finance Communist Chinese Military Companies*", the first such Order to ever weaponize America's dominant capital markets for defense-related purposes. The Order banned U.S. citizens from holding the securities of some 44 Chinese military companies and their subsidiaries and ultimately resulted in the forced delisting of three major Chinese telecommunications companies from the New York Stock Exchange. The transition to the Biden Administration and an extensive lobbying campaign by Wall Street introduced uncertainty into the fate of the E.O., and of capital markets sanctions more broadly.

This uncertainty was resolved, to a substantial extent, when the Biden Administration opted to institutionalize and, indeed, strengthen in some ways, the capital markets sanctions they inherited from the previous administration. In doing so, an historic threshold was crossed on this topic. What is arguably the most powerful and fearsome policy tool in America's non-military arsenal with respect to China has become a permanent fixture on the landscape of U.S. security policy.

With the issuance of a new Executive Order (14032) amending E.O. 13959, a number of important questions have been resolved, first and foremost whether or not capital markets sanctions of Chinese corporate "bad actors" are to survive as a potent new policy tool to advance human rights and U.S. national security. The Biden Administration's E.O. suggests that the U.S. will remain a world leader in this issue area for some time. Overall, it provides a strong template for allies to follow if and when they too decide to take action on denying market access selectively to egregious Chinese corporate human rights and national security abusers, while also protecting shareholders from undue risk that is often undisclosed due to Beijing's state secrecy laws and other forms of influence over the operations of their companies.

The Fact Sheet accompanying E.O. 14032 released by the White House observes that, "This E.O. prevents U.S. investment from supporting the Chinese defense sector…It signals that the Administration will not hesitate to prevent U.S. capital from flowing into the PRC's [People's Republic of China's] defense and related materiel sector…". One major expansion of these sanctions involves entities determined "to operate or have operated in the defense and related materiel sector or the surveillance technology sector of the economy of the PRC…". This surveillance sector inclusion expands significantly the companies subject to these capital markets sanctions.

This was not the outcome hoped for by either Beijing or Wall Street and is an historic win for those talented national security and human rights-minded advocates, both inside and outside of government, who invested in the granular research required to unearth the scale and unfortunate politics of this rather vast scandal, born, in large part, from epic fiduciary malfeasance.

Not surprisingly, there are on-going concerns about the new E.O., the most troubling of which is the new primacy granted the Department of Treasury – over that of the Pentagon in the previous E.O. – which is known for its relationship with Wall Street. A second concern is the treatment of the publicly traded subsidiaries of sanctioned companies, which are often the fundraising arms of these major corporate "bad actors".

Under the original E.O. (13959), sanctions enacted against a listed company would be automatically extended to any subsidiary in which that sanctioned company held a 50% or more ownership stake. Under the amended E.O. (14032), each legal entity, be it a parent company or a subsidiary, must be individually placed on the list for sanctions to be triggered. Other concerns involve the lack of an outright divestment deadline and the seemingly permissive treatment of the dollar-denominated bonds of offending companies. Finally, some five corporate entities originally sanctioned under E.O. 13959 have been excluded from the updated sanctions list, and it remains unclear on what grounds, if any, these sanctions were dropped.

Until these and other questions are resolved, it is a good bet that those responsible for originating this issue area, in and out of government, will remain vigilant in seeking to preserve the integrity and bipartisanship of the very promising work being continued, broadened and hopefully strengthened by this Administration.

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