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## *President Biden Uses Executive Order as Signal to Investor Community of CFIUS's Importance, Without Substantive Process Changes*

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On September 15, 2022, President Biden issued an [Executive Order](#) regarding the Committee on Foreign Investment in the United States ("CFIUS" or the "Committee"). This marks the first presidential statement of any kind, since CFIUS legislation was first passed in 1975, regarding the risk factors that the Committee should consider in its national security review process. Prior to this EO, only legislation, regulation, and agency guidance had outlined national security factors that CFIUS considers.

CFIUS is an interagency body chaired by the Secretary of the Treasury that is empowered to review investment in the United States that could result in a foreign person acquiring control of, or, in some cases, certain governance rights in connection with a minority investment in, a U.S. Business (as defined).

Importantly, Executive Order 14083 (the "EO" or the "Order") does not change CFIUS's existing processes or legal framework, and it **adds very little** to the factors that experienced CFIUS counsel know the Committee has reviewed for years (even if not specifically enumerated).

The EO does, however, use the President's largest unilateral tool (an Executive Order) to emphasize to the private sector the Administration's national security priorities and continued reliance on CFIUS in responding to the evolving national security threat landscape. Additionally, parties seeking CFIUS clearance in the specified sectors may increasingly see the language of the Order echoed in questions from the Committee as CFIUS seeks to communicate with its stakeholders regarding the threats posed by a transaction.

The EO enumerates several, interrelated, national security risk factors that CFIUS should consider in reviewing foreign investment transactions under its jurisdiction (each, a "Covered Transaction"), including:

- Critical **supply chain resiliency** and security, including:
  - the degree of diversification and the existence of **alternative suppliers**, both domestically and in allied/partner countries;

- the nature of any U.S. government, energy sector, or defense sector **supply relationships**; and
- critical **mineral resources**.
- **U.S. technological leadership**, including critical manufacturing capabilities, services, critical mineral resources, and technology production in the following sectors:
  - microelectronics,
  - artificial intelligence,
  - biotechnology and biomanufacturing,
  - quantum computing,
  - advanced clean energy,
  - climate adaptation technologies, and
  - food security in the agricultural industrial base.
- **Aggregate industry-investment trends**—the market share concentration of not just the foreign investor as a result of the Covered Transaction, but in the context of related prior transactions, as well as other foreign investors from the same country.
- **Cybersecurity vulnerabilities**, including the ability to conduct cyber intrusions or other malicious cyber-enabled activities, particularly with regard to:
  - election threats,
  - data storage, and
  - energy infrastructure, including smart grids.
- **U.S. persons' sensitive personal data**, including health and biological data.
- Alongside each of the above factors, threats presented by the foreign investor, including through its commercial, investment, non-economic, or other "**third-party ties**."

Both the [White House "fact sheet" announcement](#) of the President's action and [Secretary Yellen's subsequent statement](#) emphasize that the EO does not change CFIUS's existing processes or legal framework. CFIUS has long been considering most of these factors when reviewing Covered Transactions.

However, two points stand out as new.

1. First, with regard to aggregate industry-investment trends, CFIUS has long considered the foreign investor's concentration in the U.S. Business's market sector, but CFIUS must now also consider **the aggregate concentration of all investors from the foreign investor's country** in that market sector.

2. Second, the EO's focus on "relevant third-party ties" requires CFIUS to consider a foreign investor's contractual or investment ***ties or other allegiances*** (e.g., to the foreign investor's government).

The EO also serves to notify the business community of the Committee's focus areas, likely in an ongoing effort to encourage parties to submit voluntarily transactions involving these risk factors to CFIUS's review process.

The Order, moreover, reinforces the Biden Administration's national security priorities, including its continued concerns over the multivector threat posed by foreign investment in sensitive sectors, particularly from those countries militarily or economically opposed to the United States and its allies, and underscores the important role CFIUS will continue to play in the U.S. Government's response to the evolving national security threat landscape.

Transactions that implicate these risk factors will continue to face heightened scrutiny from CFIUS. Compared to CFIUS's broad statutory mandate, President Biden's directive may sharpen the Committee's focus on the enumerated risk factors when it must consider resource prioritization and may lead to additional questions from CFIUS regarding transactions under its review.

The elevation of the Administration's concerns about sensitive data, further, may indicate ongoing consideration of a mandatory filing requirement for certain transactions, though [prior congressional efforts to establish such a mechanism have stalled](#). The issuance of this Order also comes amid ongoing speculation over the establishment of an [outbound investment review process](#) to address perceived gaps in the U.S. government's national security toolkit. At this time, however, the mandatory CFIUS filing triggers remain unaltered by the EO and no "reverse CFIUS" process has been established.

Parties contemplating transactions involving foreign investment would be well advised to continue to examine these risk factors as they contemplate U.S. investments, and whether to submit such transactions to CFIUS. And parties may find that the Committee's investigations into so-called "non-notified" transactions reflect a greater focus in these areas of concern. The Committee, further, may increasingly echo the language of the Order in their communications with parties during their national security review process and when seeking to block Covered Transactions.



*If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings Washington, D.C. lawyers:*

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