

President Biden Orders Enhanced CFIUS Enforcement

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For the first time since the Committee on Foreign Investment in the United States (“CFIUS”) was established in 1975, the President has on September 15 issued an [Executive Order](#) providing direction to CFIUS regarding national security risks to be considered in reviewing foreign investment transactions. Although the Executive Order does not change CFIUS’s processes or legal jurisdiction, it does cite the risks to U.S. national security from “competitor or adversarial nations” and provides direction to CFIUS by adding five categories of national security factors for CFIUS to consider during its review process.

- A given transaction’s effect on the resilience of critical U.S. supply chains that may have national security implications, including those outside of the defense industrial base.
- A given transaction’s effect on U.S. technological leadership in areas affecting U.S. national security, including but not limited to microelectronics, artificial intelligence, biotechnology and biomanufacturing, quantum computing, advanced clean energy, and climate adaptation technologies.
- Industry investment trends that may have consequences for a given transaction’s impact on U.S. national security.
- Cybersecurity risks that threaten to impair national security.
- Risks to U.S. persons’ sensitive data.

While the above are already among the factors considered by CFIUS, the fact that the President issued an Executive Order setting forth these issues underscores how critical it has become to protect U.S. supply chains, advanced intellectual property, industrial production bases, cyber infrastructure and personal data from theft or interference by adversaries such as China, Iran, North Korea and Russia. The Biden Administration is putting the business community on notice that it should consider all the above factors when deciding whether to provide advance notice to CFIUS of a foreign investment into the United States.

CFIUS has in recent months increased the size and resources of its staff dedicated towards ferreting out inbound foreign investments of which it has not been notified. As a result, to avoid post-closing CFIUS review or even direct financial penalties companies need to be careful to include full CFIUS due diligence as part of their transaction planning processes and to build the time for CFIUS review into their schedules.

In light of the Executive Order, this due diligence should cover not only what have heretofore been considered national security issues (*i.e.*, access to confidential government information or military contracts) but also the above-listed wider range of issues. For example, for companies in the energy space, this will require a close examination of the U.S. technology to which a foreign investor may gain access, particularly as regards how that technology impacts U.S. competitiveness in climate change adaptation.