

Executive Order Intensifies Scrutiny Of M&A Transactions Involving Foreign Investment In The U.S.

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Highlights

- President Biden orders CFIUS to consider additional national security factors when evaluating foreign investments in the U.S.
- Areas of scrutiny include microelectronics, artificial intelligence, biotechnology and biomanufacturing, quantum computing, advanced clean energy, climate adaptation technologies, mineral resources, and agriculture
- This move is expected to boost the transactions reviewed by CFIUS, particularly affecting voluntary filings and non-notified transactions

On Sept. 15, 2022, President Biden issued [Executive Order 14083](#) directing the Committee on Foreign Investment in the United States (CFIUS) to consider additional specified national security factors and build on existing ones when reviewing covered transactions. The Executive Order, the first of its kind, does not change CFIUS processes or legal jurisdiction and should be read in conjunction with the existing national security factors already considered by CFIUS.

The Executive Order is intended to make CFIUS more responsive to emerging and evolving national security risks, and specifically directs CFIUS to consider the following five factors, as well as others:

- Effect on the resilience of critical U.S. supply chains

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- U.S. technological leadership in certain areas, including but not limited to microelectronics, artificial intelligence, biotechnology and biomanufacturing, quantum computing, advanced clean energy, and climate adaptation technologies
 - Aggregate industry investment trends
 - Cybersecurity risks
 - Risks to U.S. persons' sensitive data

What is CFIUS?

CFIUS is the interagency committee responsible for monitoring and reviewing foreign investment in the U.S. for potential national security risks. Under Section 721 of the Defense Production Act of 1950 (DPA), and as amended by the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), the president has broad power to investigate, amend, and prevent foreign inbound investments, apply mitigation measures, or even to require divestment of closed transactions. The DPA and FIRRMA authorize the CFIUS to review foreign investments in U.S. businesses and set forth the scope of transactions that are subject to CFIUS's jurisdiction. FIRRMA and [the implementing regulations in 2020 significantly expanded CFIUS's powers and jurisdiction](#).

What is Significant About This Executive Order?

This represents the first time since CFIUS was established in 1975 that a U.S. president has issued an executive order providing formal direction on the risks CFIUS should consider when reviewing covered transactions. It comes as the U.S. government increases its focus on strategic competition – particularly regarding the national security implications of critical technologies, critical infrastructure, and sensitive personal data (i.e., “TID U.S. business”). CFIUS has considered some or all of these factors in past cases, but the Executive Order empowers CFIUS to prioritize these factors going forward.

Relatedly, the president's direction follows shortly after the release of CFIUS's [Annual Report for Calendar Year 2021](#) in early August. This reporting year was significant in part because it represents the first full year of data since the regulations implementing FIRRMA went into effect in February 2020. According to the report, 2021 marked an increase in both mandatory and voluntary filings, resulting in the review of a record 436 transactions by CFIUS. In that same year, CFIUS increased its scrutiny of non-notified transactions, considering 135 non-notified transactions in 2021, up from 117 in 2020.

The Executive Order plays an important role in the U.S.'s national security objectives by protecting U.S. technological competitiveness and curbing U.S. reliance on foreign supply chains involving critical technologies. Moreover, it continues the momentum established by [recent legislation](#) enacted by Congress to advance the U.S.'s scientific and technological edge, as well as other [Biden administration initiatives](#) to boost biotech and bio-manufacturing.

More on the Five Factors

The Executive Order emphasized the importance of continual assessment of the effect of foreign

investment on the domestic capacity to meet national security requirements. These five factors should be considered in that assessment.

- 1. Effect on Resilience of Critical U.S. Supply Chains:** The Executive Order directs CFIUS to consider supply chain resiliency, inside and outside the defense sector. This includes whether a transaction could potentially cause disruptions of goods and services critical to the United States, including manufacturing capability, critical mineral resources, elements of the agriculture industrial base and other technologies. Specific elements CFIUS should consider as a result are: 1) whether a supply chain is sufficiently diversified with alternative suppliers including in allied and partner countries, 2) whether the U.S. party to the transaction supplies the U.S. government, and 3) the concentration of ownership or control in the supply chain by the foreign investor.
- 2. U.S. Technological Leadership:** The second factor focuses CFIUS' attention on a transaction's potential effect on U.S. leadership in certain critical sectors that are fundamental to national security, including microelectronics, artificial intelligence, biotechnology and biomanufacturing, quantum computing, advanced clean energy (such as battery storage and hydrogen), and climate adaptation technologies. The specific technologies identified in the Executive Order align with the most recent list of [Critical and Emerging Technologies](#) published by the U.S. National Science and Technology Council. Part of CFIUS's review of this factor will need to include whether the transaction could reasonably result in future advancements and applications in technology that could undermine U.S. national security.
- 3. Consideration of Aggregate Industry Trends:** Directing CFIUS to consider the consequences of industry investment trends on a particular transaction's national security impact grants it express authority to block a transaction even where the covered transaction itself might not constitute a national security risk. Under this factor, CFIUS would also consider broader industry trends, such as whether a specific foreign actor is acquiring or investing in multiple companies in a sector that, in the aggregate, could affect U.S. national security. This factor has significant disruptive potential for deal certainty given that it formally broadens CFIUS review beyond the facts of the transaction itself.
- 4. Cybersecurity Risks:** CFIUS also now must consider whether a covered transaction may provide a foreign person or their third-party ties with access and ability to conduct cyber intrusions or other malicious cyber activity. This factor appears to direct increased attention to technologies that would not necessarily be considered critical technologies, but are core to business operations in a manner that could have national security implications should they be compromised by a malicious actor.
- 5. Access to U.S. Persons' Sensitive Data:** CFIUS is directed to consider whether a covered transaction involves a U.S. business with access to U.S. persons' sensitive data, and whether the foreign investor has, or the foreign investor's ties have, the ability to exploit that data through commercial or other means to the detriment of U.S. national security.

Given these five factors, combined with the Biden administration's goals of prioritizing U.S. competitiveness in certain critical technology sectors, it is expected that the number of transactions reviewed by CFIUS will continue to grow, particularly with respect to voluntary filings and filings resulting from non-notified transactions.

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