
President Biden Directs CFIUS to Consider Factors Affecting National Security

President Biden ordered federal agencies reviewing foreign investments to consider enhanced factors affecting national security, including supply chain resilience, technological leadership, cybersecurity, sensitive personal data, and industry trends. In an Executive Order signed on September 15, 2022 (the “Order”), the President directed the Committee on Foreign Investment in the United States (“CFIUS”) to consider five factors affecting national security risks during its review process.¹ CFIUS is an interagency committee authorized to review certain transactions involving foreign investment in the United States to determine the impact of such investment on U.S. national security concerns. Our prior memoranda on CFIUS can be found [here](#).

The Order is the first Executive Order that relates to CFIUS to be issued since CFIUS was established in 1975 and provides formal Presidential direction regarding the risks CFIUS should consider in its review of covered transactions. President Biden issued the Order to address the evolution of “the national security environment, including the behavior of countries and individuals that seek to impair U.S. national security.”²

The Order does not change CFIUS procedures or legal jurisdiction, but rather elaborates on existing factors that CFIUS is mandated by statute to consider and enumerates additional national security factors for CFIUS to consider during its review. Specifically, the Order directs CFIUS to evaluate the impact of each covered transaction on five factors:

1. **The resilience of critical U.S. supply chains that may have national security implications, both within and outside the defense industrial base.** The Order states that CFIUS should consider a covered transaction’s effects on: (i) the degree of diversification through alternative suppliers across the supply chain, including suppliers located in allied or partner countries; (ii) supply relationships with the U.S. government; and (iii) the concentration of ownership or control by the foreign person in a given supply chain.³
2. **U.S. technological leadership in areas affecting U.S. national security.** The Order directs CFIUS to examine whether a covered transaction could reasonably result in future advancements and applications in

¹ Executive Order on Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States (Sept. 15, 2022), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/09/15/executive-order-on-ensuring-robust-consideration-of-evolving-national-security-risks-by-the-committee-on-foreign-investment-in-the-united-states/>.

² Fact Sheet: President Biden Signs Executive Order to Ensure Robust Reviews of Evolving National Security Risks by the Committee on Foreign Investment in the United States (Sept. 15, 2022), available at: <https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/15/fact-sheet-president-biden-signs-executive-order-to-ensure-robust-reviews-of-evolving-national-security-risks-by-the-committee-on-foreign-investment-in-the-united-states/>.

³ Order, Section 2(a)(ii)(B).

technology that could undermine national security. In particular, CFIUS is to consider whether a covered transaction involves manufacturing capabilities, services, critical mineral resources, or technologies that are fundamental to United States in any of the following sectors: microelectronics, artificial intelligence, biotechnology and biomanufacturing, quantum computing, advanced clean energy, climate adaptation technologies, and elements of the agricultural industrial base that have implications for food security.⁴

3. **Aggregate trends in relevant industries.** The Order recognizes that a series of acquisitions in the same, similar, or related sectors that are fundamental to national security may result in a particular covered transaction giving rise to a national security risk when considered in the context of transactions that preceded it.⁵ Therefore, the Order requires CFIUS to consider incremental investments that could impair U.S. national security. To carry out that review, CFIUS may request an analysis of a specific industry from the Department of Commerce's International Trade Administration.⁶
4. **Cybersecurity risks that threaten to impair national security.** The Order requires CFIUS to consider whether a covered transaction may provide a foreign person or their third-party ties with direct or indirect access to capabilities or information databases and systems where threat actors could engage in malicious cyber-enabled activities, including: (i) the protection or integrity of data in storage or databases or systems housing sensitive data; (ii) activity designed to interfere with U.S. elections, critical infrastructure, defense industrial base, or other cybersecurity national security priorities set forth in Executive Order 14028 of May 12, 2021 (Improving the Nation's Cybersecurity), which can be found [here](#); and (iii) the sabotage of critical energy infrastructure.⁷
5. **Risks to U.S. persons' sensitive data.** The Order requires CFIUS 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 parties to whom the foreign investor has ties have, sought or have the ability to exploit such information to the detriment of national security.⁸

The factors and guidance set forth in the Order should be considered by investors and their advisors for transactions that may result in a foreign person gaining access to or influence over a U.S. business or assets that may affect national security. Foreign investors should consult counsel at the start of any acquisition of or investment in a U.S. business or asset to evaluate any concerns relating to CFIUS review.

* * *

If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Elai Katz (partner) at 212.701.3039 or ekatz@cahill.com; Lauren Rackow (counsel) at 212.701.3725 or lrackow@cahill.com; or Mathieu Coquelet (Associate) at 212.701.3437 or mcoquelet@cahill.com; or email publications@cahill.com.

⁴ Order, Section 2(b)(ii)-(iii).

⁵ Order, Section 3(a)(i)-(ii).

⁶ Order, Section 3(a)(iii).

⁷ Order, Section 3(b)(i)-(ii).

⁸ Order, Section 3(c).

This memorandum is for general information purposes only and is not intended to advertise our services, solicit clients or represent our legal advice.