



President Biden's Recent Statement Expressing Support for the United States' Open Investment Policy and Its Potential Implications for CFIUS Reviews

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Although it did not receive much attention in the press, President Biden recently issued a statement reiterating the United States' commitment to the open investment policy, the longstanding policy of the United States to encourage foreign investment in the U.S. economy. Tyler McGaughey, a partner in Winston & Strawn LLP's Washington office, and a former senior CFIUS official at the U.S. Department of the Treasury, briefly summarizes President Biden's statement and analyzes its potential CFIUS implications.

Last month, on June 8, 2021, the White House issued a “Statement by President Joe Biden on the United States’ Commitment to Open Investment.”^[1] In his statement, President Biden expressed his commitment “to ensuring that the United States remains the most attractive place in the world for businesses to grow and invest,” noting that foreign investment helps the U.S. economy by “creating jobs here at home,” “strengthening supply chains across the country,” and “deepening our relationships with partners and allies.” President Biden also declared that “our country—and our world—are safer, more resilient, and more prosperous because of the investment of foreign-owned companies in the United States.” Even though President Biden expressed his support for the open investment policy, he acknowledged that certain foreign investments will be subject to a national security review by the Committee on Foreign Investment in the United States (CFIUS or the Committee). However, President Biden pledged to “maintain a level playing field” and “treat all investors fairly and equitably under the law.”

President Biden’s statement is similar to statements made by former presidents and senior government officials going all the way back to Alexander Hamilton. In his eighteenth-century “Report on the Subject of Manufactures,” Hamilton argued that “every farthing of foreign capital” is a “precious acquisition.”^[2] In 1954, President Eisenhower expressed a similar sentiment in his “Special Message to Congress on Foreign Economic Policy,” noting that “[g]reat mutual advantages to buyer and seller, to producer and consumer, to investor and to the community where investment is made, accrue from high levels of trade and investment.”^[3] More recently, in 2008, President Bush issued a revised executive order for CFIUS that included a provision stating that “[i]nternational investment in the United States promotes economic growth, productivity, competitiveness, and job creation,” and declaring that “[i]t is the policy of the United States to support unequivocally such investment, consistent with the protection of national security.”^[4]

CFIUS is supposed to work in support of the open investment policy by adhering to three basic principles. First, the Committee is supposed to evaluate each transaction on a case-by-case basis—there are no presumptions against

investments from particular countries. Second, the Committee is required to make evidence-based decisions and intervene to mitigate or block a transaction only where there is “credible evidence”^[5] that a risk to U.S. national security could “reasonably result”^[6] from a transaction. Finally, by law, CFIUS is obligated to use its authorities as a last resort, mitigating or blocking a transaction only where other legal authorities are not sufficient to address a national security risk.^[7] These principles, together, are designed to help ensure that CFIUS uses its authorities sparingly and selectively, quickly clearing the vast majority of foreign investments and focusing time and attention on the few instances where evidence exists to support a national security risk.

Within the Committee, however, there is debate about how—and even whether—to apply these principles. For example, whereas some agencies favor mitigating or blocking transactions only in rare circumstances where evidence exists to support every element of a potential national security risk, other agencies are comfortable mitigating or blocking transactions based on fewer facts and more speculation. Indeed, because CFIUS’s deliberations are confidential and its decisions are not subject to judicial review, there is always an opportunity for agencies to push the envelope, threatening not to clear transactions by the statutory deadline and thereby disrupting the efficient functioning of the Committee based on tenuous national security arguments.

Under these circumstances, President Biden’s statement in support of the open investment policy—and in particular his pledge to “maintain a level playing field” and “treat all investors fairly and equitably under the law”—may signal that the White House expects CFIUS to adhere to its core principles. In other words, President Biden’s statement may signal that the White House is putting its finger on the scale in favor of evidence-based decisions, and that it will not condone aggressive action by the Committee based on speculation. If that happens, and the Committee sticks to its principles, most transaction parties should be able to negotiate the CFIUS process successfully and in an efficient manner, particularly for transactions where there is no particularized evidence of a national security risk.

Of course, there is a big difference between, on the one hand, making a statement claiming support for open investment and, on the other hand, taking the steps necessary to ensure that the United States remains open to foreign investment. If President Biden’s statement is to mean anything, the White House will need to play an active role in supervising CFIUS’s deliberations, ensuring that whenever a member agency threatens not to clear a transaction by the statutory deadline, the agency’s position is memorialized in writing and supported by credible evidence. Moreover, because CFIUS’s deliberations are private, it will not be easy to determine what effect, if any, President Biden’s statement will have on CFIUS’s conduct until sometime in 2022, when CFIUS publishes its annual report for 2021, and everyone can compare CFIUS’s statistics for 2021 to those of earlier years. At this point, President Biden’s decision to issue a statement supporting the open investment policy within months of taking office should be regarded as at least a promising sign for foreign investors looking to invest in the United States.

Takeaways:

1. President Biden recently issued a statement expressing support for the United States’ open investment policy, the longstanding policy of the United States to encourage foreign investment in the United States.
2. Even though President Biden expressed support for the open investment policy, he acknowledged that certain foreign investments will be subject to a national security review by CFIUS.
3. President Biden pledged to treat all investors who go through the CFIUS process “fairly and equitably under the law.”
4. President Biden’s statement—particularly his pledge to treat all investors “fairly and equitably under the law”—may signal that the White House will not permit CFIUS to mitigate or block transactions based on highly speculative reasoning.
5. If CFIUS closely adheres to its core principles, it will be easier for foreign investors to negotiate the CFIUS process successfully, particularly transactions for which there exists no particularized evidence of a national security risk.

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tenure, Tyler supervised the completion of hundreds of national security reviews and investigations, including transactions worth billions of dollars. He also reviewed and approved mitigation agreements, supervised the publication of new regulations implementing the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), and helped to build Treasury’s non-notified team, a government unit whose only job is to scour commercial databases, press releases, bankruptcy filings, and other sources, searching for transactions that were not filed with CFIUS.

^[1] The complete statement is available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/08/statement-by-president-joe-biden-on-the-united-states-commitment-to-open-investment>.

^[2] Alexander Hamilton, Report on the Subject of Manufactures (Dec. 5, 1791), available at <https://founders.archives.gov/documents/hamilton/01-10-02-0001-0007>.

^[3] Dwight D. Eisenhower, Special Message to Congress on Foreign Economic Policy (Mar. 30, 1954), available at <https://www.presidency.ucsb.edu/documents/special-message-the-congress-foreign-economic-policy>.

^[4] Executive Order 13456, Further Amendment of Executive Order 11858 Concerning Foreign Investment in the United States (Jan. 23, 2008), available at <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-laws-and-guidance>.

^[5] 31 C.F.R. §§ 800.102, 800.601(a)(2).

^[6] *Id.* § 800.102(c).

^[7] *Id.* § 800.601(a)(3).

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