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The America First Investment Policy

March 17, 2025

On February 21, 2025, the White House issued a memorandum announcing the America First Investment Policy (AFIP) and directing executive branch departments and agencies to promulgate rules and regulations to promote America's long-standing "open investment" policy while protecting US national and economic security.

Broadly speaking, the AFIP seeks to address structural tensions between the benefits of an open investment posture and the national security risks associated with foreign investment – particularly with respect to US companies with a nexus to sensitive technology, data and infrastructure, as well as other characteristics that present potential vulnerabilities to US national security. The AFIP focuses on promoting and streamlining investments by US allies and partners – including sovereign wealth funds – that support the national interest by fostering domestic economic growth, job creation and innovation. At the same time, the AFIP seeks to protect America's national security interests from threats posed by China and certain other foreign adversaries, including Russia.

The AFIP outlines high-level policy changes that will ultimately be implemented using "all necessary legal instruments," including those wielded by the Committee on Foreign Investment in the United States (CFIUS) and through the new Outbound Investment Security Program (OISP) – often referred to as "reverse CFIUS."

While certain of the directives and underlying sentiments in the AFIP reflect current thinking and investment policy, some elements of the AFIP – if implemented – would represent policy expansions and innovations that could be impactful to US businesses and their investors.

Elements of the AFIP pertaining to foreign investment in US businesses (CFIUS)

Notable parts of the AFIP pertaining to foreign investment in US businesses (i.e., CFIUS's traditional remit) include the following:

Heightened scrutiny of certain 'strategic' sectors

The AFIP signals a redoubling of efforts to restrict foreign investments in certain "strategic" sectors of the US economy – including "technology, critical infrastructure, healthcare, agriculture, energy, [and] raw materials," and pledges to protect farmland and real estate near "sensitive facilities." While CFIUS has traditionally focused scrutiny on each of these sectors (and others), the AFIP specifically identifies investments by "PRC-affiliated persons" as targets of this renewed scrutiny and suggests that the administration will expand the regulatory toolkit beyond CFIUS to "all legal instruments" at the US government's disposal.

Expanded 'critical technologies' designations

When Congress passed the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), it created for the first time a class of "mandatory" CFIUS filing requirements to the historically entirely "voluntary" CFIUS filing regime. Per FIRRMA, "mandatory" CFIUS filings could be required where a US business receiving a foreign investment worked in certain ways with "critical technologies" – a term defined with reference to US export control regulations. At the time, there was an expectation that the US Department of Commerce would identify new categories of "emerging and foundational" technologies that would constitute "critical technologies" for CFIUS purposes, thus implicating potential mandatory CFIUS filing requirements. While defining "emerging and foundational" technologies had been a policy goal of CFIUS for the past several years, the prior administration made little progress toward that goal, managing only to expand the relevant export controls to a few select items (e.g., certain semiconductors, laboratory equipment, peptide synthesizers, nucleic acid assembler/synthesizer software, and marine toxins). The AFIP expressly restates the government's intention to "expand the remit of 'emerging and foundational' technologies addressable by CFIUS." If this directive is implemented – and

depending on the specific characteristics of technologies that are ultimately designated – the change may significantly increase the scope of circumstances requiring mandatory CFIUS filings. Companies and investors that have appropriate diligence processes in place today should be able to identify the new classes of "emerging and foundational" technologies without significant additional effort. Whether the changes will modify investment behavior will depend on the specific technologies designated.

Farmland and real estate near sensitive facilities

CFIUS historically has struggled to regulate foreign acquisitions of and investment in real estate in proximity to sensitive facilities (e.g., military bases, telecommunications infrastructure, energy transmissions lines and pipelines). Because many real estate transactions do not involve a "US business" – the traditional hook for CFIUS jurisdiction – CFIUS sometimes lacked legal authority to review foreign real estate transactions that it wished to assess. While the regulations implementing FIRRMA expanded CFIUS's authority to review real estate transactions, the implementing regime (Part 802 of the CFIUS regulations) relied on a complex matrix of enumerated facilities and proximity-based rules, leaving CFIUS blind to transactions involving property near certain sensitive facilities that were not listed in the regulations. (The case of China's Fufeng USA's aborted effort to build an agricultural mill near Grand Forks Air Force Base is a good example. The mill was to be constructed near a sensitive Air Force facility that was not listed in the regulations.) The AFIP is silent as to how policy will address these "persistent proximity" concerns – a particularly difficult issue to regulate, as the locations of sensitive facilities are often not disclosed, for good reason.

Assessing 'distance and independence' from adversaries

The AFIP contemplates a sliding-scale loosening of restrictions on foreign investment in US companies in proportion to the foreign investor's "verifiable distance and independence" from "the predatory investment and technology-acquisition practices" of "foreign adversaries or threat actors." Because the current CFIUS regime requires CFIUS to assess the extent to which a foreign investor represents a "threat" to US national security, the concept of distance and independence is implicitly already part of the process. To the extent the AFIP contemplates a separate assessment or an expansion of the current process, it is not yet clear what standards or metrics will be used to verify an investor's distance and independence from China. While the details will not become evident until the rulemaking process is underway, certain sovereign wealth funds and institutional investors may be encouraged by this development – particularly where they have limited investments and operations in China.

A 'fast-track' process for certain allies and partners

Perhaps the most consequential policy change in the AFIP is the directive that agencies create an expedited "fast-track" process to facilitate foreign investment from certain allies and partners in US businesses with advanced technologies. The AFIP does not state what that process will look like or who would qualify as an ally or partner, but it does direct agencies to base such determinations on unstated "objective standards," and specifies that investors will be required to avoid partnering with US adversaries to qualify. Whether the fast-track will be implemented as a "Global Entry"-type program for specific investors that are preapproved to invest, or whether the process will define characteristics of low-risk investors analogous to the current "excepted investor" regime, a fast-track will likely be received as a welcome innovation for US businesses raising foreign capital, and for serial foreign investors who heretofore have decided to submit to the CFIUS process regardless of their CFIUS "track record." We anticipate that a fast-track regime likely will be applied to Gulf States investors, certain major sovereign wealth funds and other prominent serial foreign investors.

Pulling back on 'mitigation' agreements

Another transformational proposed shift is the AFIP's direction to limit CFIUS's use of burdensome and open-ended CFIUS "mitigation" agreements, formally called national security agreements (NSAs), by focusing instead on "concrete actions that companies can complete within a specific time." As we wrote in this September 2024 client alert, the increased use of mitigation agreements – and the burdensome manner in which they are negotiated and enforced – has forced a shift in the cost-benefit assessment that US businesses and investors undertake when deciding whether to make to an investment, and how to structure the same.

The Trump administration's position on mitigation agreements appears to represent a rebuke to the prior administration's emphasis on them, which – anecdotally speaking – CFIUS increasingly imposed on parties in the past several years. According to the AFIP, de-emphasizing mitigation agreements will allow the government to direct more administrative resources toward "facilitating investments from key partner countries," consonant with the "distance and independence" principle and "fast-track" proposal. Companies with existing NSAs should

watch these developments closely with a view to petitioning CFIUS to terminate or scale back their NSA obligations.

New authority to review 'greenfield' investments

Less generally popular will be the AFIP's direction to enact legislation to expand CFIUS jurisdiction to cover historically off-bounds "greenfield" investments, which involve the establishment of a "new" business in the United States – as opposed to an investment in an existing US business. While the line between a greenfield business and an existing business (which can include a collection of related business assets) was never particularly bright, expressly expanding CFIUS jurisdiction to reach true greenfield projects would mark a significant change. To the extent greenfield investments are opened to CFIUS review, the AFIP suggests that the government's focus will be on transactions involving artificial intelligence (AI) technologies. Unlike other policies in the AFIP, which require only regulatory rulemakings, expanding CFIUS jurisdiction to reach greenfield transactions will likely require congressional action.

Encouragement of 'passive' investments

While the current CFIUS regulations implicitly encourage "passive" foreign investments (e.g., with a reasonably well-defined jurisdictional carve out), the AFIP expressly states that the United States will "welcome and encourage" new passive investments in US businesses from "all" foreign persons – regardless of the general industry sector and specific technology involved in a transaction. The AFIP's conception of passivity seems to comport with the current construct (i.e., "non-controlling stakes and shares with no voting, board, or other governance rights and that do not confer any managerial influence, substantive decisionmaking, or non-public access to technologies or technical information, products, or services."). To the extent the various regulations implementing the AFIP make customary venture-style investments difficult or prohibitively costly for "adversaries" to pursue, the renewed embrace of passive investments may offer a path to funding for US businesses facing difficulty raising domestic capital.

Elements of the AFIP pertaining to restricting the flow of US capital and technology to foreign adversaries (OISP)

In parallel with reforms targeting the regulation of inbound foreign investments, the AFIP directs the executive branch to further restrict the flow of US capital and technology to foreign adversaries, with a specific emphasis on China (the remit of the new OISP regime):

Expanding the OISP's technology sector coverage

As noted above, AFIP's implementing regulations will likely tighten existing restrictions on the outbound flow of capital into specified technology sectors (e.g., semiconductors and other microelectronics, quantum computing, and certain AI technologies) where a relevant nexus to China is implicated. At the same time, we expect forthcoming regulations to impose restrictions on funding of other sectors perceived as critical to China's strategic military objectives (e.g., biotechnology, hypersonics and aerospace, advanced manufacturing, and directed energy, to name a few). Notably, international trade involving certain of the targeted sectors already is highly regulated under US law (e.g., under existing export control and sanctions laws). To the extent current laws already limit trade in a given sector, the impact of new investment-related restrictions may be blunted – at least for certain risk-averse investors. For other less-regulated sectors (e.g., life sciences and biotechnology), however, the impact of an expanded OISP regime may be significant.

Expanding the OISP's transaction-type coverage

In parallel with the directive to expand the OISP regime to cover additional technologies, the AFIP indicates that outbound investment restrictions will apply to a broader range of transactions – potentially including investments in publicly traded securities – that are excluded from the current OISP regime. Such a change will require public companies to implement compliance policies that heretofore were not required by many.

Eliminating OISP exclusions

Further, the AFIP may result in the elimination of significant exclusions under the current OISP jurisdictional framework, including consideration of new restrictions on funding from certain “other limited partner [LP] investors.” This direction may signal changes to the current framework, which excludes from regulation certain LP capital commitments (e.g., those that do not exceed $2 million or are made pursuant to a binding contractual assurance that capital will not be used for prohibited or notifiable investments). This issue will be top of mind for fund managers and LP investors.

Employing 'all necessary legal instruments'

Finally, the AFIP notes that the United States will use “all necessary legal instruments to further deter United States persons from investing in [China’s] military-industrial sector.” While the AFIP does not hint at what instruments are contemplated, there are a range of existing US export controls and sanctions measures available to serve this objective. This toolkit includes military end-user and end-use restrictions in the Export Administration Regulations, licensing requirements for certain US-regulated products and technologies (including some produced outside the United States), and sanctions (e.g., restrictions on exports to or dealings with persons identified on US government restricted parties lists – including the Bureau of Industry and Security’s Entity List and the Office of Foreign Assets Control’s Chinese Military-Industrial Complex Company List and Specially Designated Nationals List). If the implementing regulations reflect the broad approach suggested by the AFIP, we would expect regulators to leverage these more traditional export control and sanctions mechanisms to broaden restrictions in furtherance of policy objectives.

Conclusions

On its face, the AFIP presents a mix of foreign investment policy orthodoxy (e.g., heightened scrutiny on strategic sectors implicating national security vulnerabilities) and innovation (e.g., the creation of a “fast-track” review process) in service of the long-standing policy of balancing an open investment posture with national security interests. Depending on its implementation, we expect mixed reception to the AFIP regime, with some companies and investors embracing certain changes (e.g., the pivot away from national security mitigation agreements) and dismayed by others (e.g., the expansion of CFIUS authority to review “greenfield” investments).

In general, however, we anticipate that most companies and investors will be able to manage compliance with appropriate adjustments to their diligence and risk-allocation practices – including screening for “critical technologies” and assessments of investor “distance and independence” from adversaries. Where diligence and contract terms are insufficient to address compliance risk, transacting parties may embrace the AIFP’s encouragement of “passive” foreign investments by all investors. However, the extent to which the implementing regulations will force foreign investment into passivity – and the extent to which passive investments will be commercially viable – will depend on how the AFIP’s policies are reduced to law.

See the Chinese translation

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Key Contacts

Christopher Kimball **Washington, DC**	**ckimball@cooley.com** **+1 202 842 7892**
Annie Froehlich Washington, DC	afroehlich@cooley.com +1 202 776 2019
Dillon Martinson Washington, DC	dmartinson@cooley.com +1 202 728 7092

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