

THE JOURNAL OF FEDERAL AGENCY ACTION

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Editorial Office

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Articles and Submissions

Direct editorial inquiries and send material for publication to:

Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc.,
26910 Grand Central Parkway, #18R, Floral Park, NY 11005, smeyerowitz@
meyerowitzcommunications.com, 631.291.5541.

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Leanne Battle, Publisher, Full Court Press at leanne.battle@vlex.com or at 866.773.2782

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Customer Service

Available 8 a.m.–8 p.m. Eastern Time

866.773.2782 (phone)

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White House Policy Aims to Reshape Foreign Investment in the United States

Eric R. Markus and Sevren R. Gourley*

In this article, the authors review a national security memorandum on America First Investment Policy outlining the Trump administration's foreign direct investment policy.

President Donald Trump issued a National Security Memorandum on America First Investment Policy (the Foreign Investment Memo)¹ on February 21, 2025, outlining the administration's foreign direct investment policy, including initiatives for a regulatory "fast track" process, additional scrutiny for Chinese investors, and key changes to reviews by the Committee on Foreign Investment in the United States (CFIUS), including CFIUS's use of national security agreements.

The Bottom Line

The Foreign Investment Memo represents an explicit shift in how the United States regulates foreign direct investment. Going forward, partners and allies are likely to see some regulatory burdens ease while investors from China and other countries identified as adverse will see significantly expanded restrictions. Federal agencies have been directed to establish new rules that will specifically target Chinese investment in the United States and new or expanded restrictions on U.S. outbound investment in China in sensitive or emerging technologies. The memo also suggests that the government may reconsider Chinese companies' access to U.S. capital markets.

The Foreign Investment Memo calls for expanding CFIUS jurisdiction over real estate and greenfield projects. At the same time, the Foreign Investment Memo directs the U.S. Environmental Protection Agency (EPA) and others to reduce barriers to foreign investment from countries that are not identified as

foreign adversaries and specifically directs CFIUS to limit the use of national security agreements, which has grown in recent years. Companies and other investors from outside of the United States should carefully consider these changes, which will impact foreign direct investment in the United States going forward.

The Full Story

Upon taking office on January 20, 2025, President Trump issued a Memorandum on America First Trade Policy² calling for, among other things, “a robust and reinvigorated trade policy that promotes investment and productivity, enhances our Nation’s industrial and technological advantages, [and] defends our economic and national security.” The issuance of the February 21, 2025, Foreign Investment Memo builds on the January 20 statement by aiming to both promote investment from U.S. allies while at the same time preserving and expanding regulatory controls on investment in the United States from, and investment by U.S. persons in, “foreign adversary” countries—defined in the Foreign Investment Memo as the People’s Republic of China, including the Hong Kong Special Administrative Region and the Macau Special Administrative Region, the Republic of Cuba, the Islamic Republic of Iran, the Democratic People’s Republic of Korea, the Russian Federation, and the regime of Venezuelan politician Nicolás Maduro.

Inbound Investment Promotion for Non-Adverse Countries

The Foreign Investment Memo aims to promote investment from countries that are U.S. allies or other friendly countries in the ways described below, with a number of open questions as to how the policy will manifest for foreign investors.

1. *The Foreign Investment Memo directs federal agencies to implement a “fast track” investment process consisting of expedited national security reviews in some cases and expedited environmental reviews for large investments.*
 - *Who is eligible for the “fast track” for national security reviews? This “fast track” process will apply for “specified allies and partner sources” in U.S. businesses*

involved with U.S. advanced technology and other important areas. The Foreign Investment Memo does not detail which “specified allies and partner sources” will be eligible for this “fast track” process. The existing CFIUS rules exempt investors from Australia, Canada, New Zealand, and the United Kingdom from certain mandatory filing requirements (but maintain CFIUS jurisdiction to review controlling investments from these investors on a non-mandatory basis). Whether these countries will be the starting point for a list of “specified allies and partner sources” or whether government policy will be something else entirely will ultimately be answered by federal agencies’ implementation of these principles.

- *What will the “fast track” mean for national security reviews?* The current CFIUS rules already provide a less onerous filing option for foreign investors known as a “declaration.” This process has been available for filers since 2020 under the CFIUS rules promulgated under the Foreign Investment Risk Review Modernization Act of 2018. In practice, declarations are used for less complex reviews with limited national security implications. At present, the decision of whether to make a filing with CFIUS as a short-form declaration or long-form notice depends on the foreign investor’s own assessment of whether obtaining CFIUS clearance is likely through the declaration process. The Foreign Investment Memo directs the U.S. Secretary of the Treasury (Treasury), in consultation with the U.S. Secretary of State, the U.S. Secretary of Defense, the U.S. Secretary of Commerce, the U.S. Trade Representative, and the heads of other executive departments and agencies as deemed appropriate by Treasury and in coordination with other members of CFIUS, to take actions to implement the “fast track,” including the promulgation of new rules and regulations. Accordingly, significant implementation of the “fast track” will likely be detailed in forthcoming rulemakings by the U.S. Department of the Treasury. In the meantime, the Foreign Investment Memo is likely to inform CFIUS reviews within the existing regulatory

framework. Additionally, the Foreign Investment Memo directs that the “fast track” will be conditioned on requirements that the specified foreign investors avoid partnering with foreign adversaries.

- *What about the “fast track” for environmental reviews?*
The Foreign Investment Memo directs the Administrator of the EPA to carry out expedited environmental reviews for any investment over \$1 billion in the United States. Although included in the Foreign Investment Memo, environmental reviews are not traditionally a part of foreign direct investment regulation in the United States and the inclusion of this element in the Foreign Investment Memo appears to be a part of the administration’s broader policy to reduce environmental regulatory and permitting requirements.

2. *The Foreign Investment Memo calls for an end to certain CFIUS practices with respect to mitigation agreements.*

- CFIUS has the authority to negotiate, enter into, or impose any agreement, condition, or order with any party to mitigate national security risk arising from a covered transaction or covered real estate transaction. In recent years, CFIUS has increasingly relied on these “mitigation agreements” to address perceived national security risks with open-ended obligations for investors. As of 2023 year-end, CFIUS was engaged in the ongoing monitoring of 246 mitigation agreements and had begun to assess civil monetary penalties on investors for alleged violations of mitigation agreement conditions. CFIUS practitioners have anecdotally observed that the increasing use of mitigation agreements may in some cases dissuade foreign investors from making non-mandatory filings with CFIUS.
- The Foreign Investment Memo acknowledges that the increasing use of mitigation agreements creates uncertainty and administrative burdens for investors and directs that mitigation agreements going forward should consist of concrete actions that companies can complete within a specific time, rather than perpetual compliance obligations.

Inbound Investment Restrictions for China

The Foreign Investment Memo reaffirms and expands on existing U.S. foreign direct investment policy and regulation with respect to investors from “foreign adversaries.” Given that the “foreign adversary” countries identified in the Foreign Investment Memo (other than China) are generally subject to significant economic sanctions that in practice render investment in the United States illegal or impractical, the most significant changes under the Foreign Investment Memo concern China as described below.

1. *Expanding CFIUS Jurisdiction Over Real Estate and Greenfield Investments.* The Foreign Investment Memo announces that the new administration will take steps to protect U.S. farmland and real estate near sensitive facilities such as military, ports, and shipping terminals, as well as expand CFIUS authority over “greenfield” investments in order to restrict foreign adversary access to U.S. sensitive technologies, including artificial intelligence and “emerging and foundational” technologies. This announcement aligns with recent actions to expand the scope of real estate under CFIUS jurisdiction, including a rulemaking late last year³ that expanded the list of sensitive facilities triggering CFIUS jurisdiction, and efforts by the U.S. Congress and several U.S. states to limit Chinese investments in U.S. agricultural real estate. Notably, the Foreign Investment Memo calls for Treasury to expand CFIUS authority regarding “greenfield” investments to restrict access to U.S. sensitive technologies indicates that the current exception for “greenfield” investments may be limited by a future rulemaking to provide CFIUS with additional authority over investments in potential new businesses that involve U.S. sensitive or emerging and foundational technologies.
2. *Expanding Restrictions on Investments in U.S. Critical Infrastructure.* The Foreign Investment Memo provides as a general policy that the United States should not allow China to “take over” U.S. critical infrastructure and states that “for investment in U.S. businesses involved in critical technologies, critical infrastructure, personal data,

and other sensitive areas (referred to under the current CFIUS rules as “TID US businesses”), restrictions on foreign investors’ access to United States assets will ease in proportion to their verifiable distance and independence from the predatory investment and technology-acquisition practices of [China] and other foreign adversaries or threat actors.” The Foreign Investment Memo specifies that the administration will use CFIUS to restrict China-affiliated persons from investing in U.S. technology, critical infrastructure, healthcare, agriculture, energy, raw materials, or other strategic sectors.

In practice, the explicit targeting of China with respect to foreign direct investment does not represent a deviation from current CFIUS practice. CFIUS has historically aggressively scrutinized Chinese investment in U.S. critical infrastructure and technology. Under current CFIUS rules, mandatory filings are required for certain investments in “TID US businesses” involved in “emerging and foundational” technologies as identified by the U.S. Department of Commerce. In implementing the Foreign Investment Memo, it is likely that Treasury will promulgate rules to expand mandatory filing requirements and potentially promulgates the first CFIUS rules that call out foreign investors from specific countries, crystallizing existing practice into regulations for Chinese investors.

3. *Expanding Barriers for Chinese Investors.* As noted above, CFIUS has increasingly relied on mitigation agreements in recent years to allow foreign investment to move forward while limiting national security concerns. In practice, investors from China came to expect mitigation agreements in many circumstances where CFIUS was willing to consider mitigation and accepted such conditions as a palatable alternative to having the transaction blocked. Although anecdotal reports indicate that CFIUS has been less willing to rely on mitigation agreements with Chinese investors in recent years, the Foreign Investment Memo’s policy of ending mitigation agreements with ongoing monitoring compliance obligations may remove this option altogether if risks cannot be mitigated by concrete actions within set times.

Outbound Investment Restrictions

The Foreign Investment Memo also addresses U.S. outbound investment in China and Chinese-owned entities. Announcing that the administration will use all necessary legal instruments to further deter U.S. persons from investing in China's military-industrial sector, the Foreign Investment Memo lays out four tools to discourage U.S. investment in China:

1. *Sanctions.* Currently, U.S. sanctions on China restrict equity investment in publicly traded companies identified by Treasury as comprising part of China's military-industrial complex. The Foreign Investment Memo states that the administration will consider actions to deter U.S. investment in China through the imposition of sanctions under the International Emergency Economic Powers Act (IEEPA) through the blocking of assets of identified individuals or entities or through expanding the existing sanctions on China. The Foreign Investment Memo does not itself impose sanctions or announce that sanctions will be imposed. Nonetheless, the administration is signaling that it will consider expanded economic sanctions as a viable means to deter U.S. investment in China's military-industrial sector.
2. *Outbound Investment Rules.* On January 2, 2025, new regulations promulgated by Treasury in accordance with Executive Order 14105⁴ went into effect that regulate U.S. outbound investment in China's semiconductors and microelectronics, quantum information technologies and artificial intelligence sectors (the Outbound Investment Rules). The Foreign Investment Memo states that the new administration is reviewing Executive Order 14105 (as directed in the January Memorandum on America First Trade Policy) and indicates that the purpose of this review will be to expand the Outbound Investment Rules to restrict investment in additional sectors such as biotechnology, hypersonics, aerospace, advanced manufacturing, directed energy, and other areas implicated by China's national "Military-Civil Fusion" strategy. The administration considers that the sectors covered by the Outbound

Investment Rules should be regularly reviewed and updated and that additional investment types should be addressed by the rules. The Foreign Investment Memo specifically calls out private equity, venture capital, greenfield investments, corporate expansions, and investments in publicly traded securities, from sources including pension funds, university endowments, and other limited-partner investors. Accordingly, it is reasonable to anticipate that the Outbound Investment Rules will expand under this policy.

3. *U.S. Capital Markets.* Notably, the current Outbound Investment Rules include exceptions for certain publicly traded securities. The Foreign Investment Memo appears to target this exception where it states that Chinese companies “raise capital by: selling to American investors securities that trade on American and foreign public exchanges; lobbying United States index providers and funds to include these securities in market offerings; and engaging in other acts to ensure access to United States capital and accompanying intangible benefits.” The Foreign Investment Memo further directs Treasury, in consultation with other federal agencies and law enforcement, to provide a written recommendation on the risk posed to U.S. investors based on the auditability, corporate oversight, and evidence of criminal or civil fraudulent behavior for all foreign adversary companies currently listed on U.S. exchanges.
4. *Trade.* The Foreign Investment Memo announces that the administration will review whether to suspend or terminate the 1984 United States-The People’s Republic of China Income Tax Convention, which the memorandum states is partly responsible, along with China’s admission to the World Trade Organization, for offshoring resulting in the deindustrialization of the United States and the technological modernization of China’s military. This appears to align the Foreign Investment Memo within the new administration’s broader trade policy toward China and signals further efforts by the administration to incentivize the de-linking of U.S. firms from China.

Notably, although the Foreign Investment Memo mentions protecting U.S. personal data, it did not mention the new restrictions related to cross-border data transfers (the

Bulk Data Transfer Rules)⁵ that were scheduled to go into effect on April 8, 2025, which restrict or in some cases prohibit sharing certain U.S. personal data with Chinese companies.

Considerations

The implementation of the steps outlined in the Foreign Investment Memo will have the greatest impact on Chinese investors and other foreign investors with ties to China seeking to invest in the United States. However, these steps will generally lead to expanded diligence and related compliance obligations on both foreign and U.S. investors broadly.

Notes

* The authors, attorneys with Hunton Andrews Kurth LLP, may be contacted at ericmarkus@hunton.com and sgourley@hunton.com, respectively.

1. <https://www.whitehouse.gov/presidential-actions/2025/02/america-first-investment-policy/>.

2. <https://www.whitehouse.gov/presidential-actions/2025/01/america-first-trade-policy/>.

3. <https://www.federalregister.gov/documents/2024/11/26/2024-27310/penalty-provisions-provision-of-information-negotiation-of-mitigation-agreements-and-other>.

4. <https://www.federalregister.gov/documents/2023/08/11/2023-17449/addressing-united-states-investments-in-certain-national-security-technologies-and-products-in>.

5. <https://www.justice.gov/archives/opa/pr/justice-department-issues-final-rule-addressing-threat-posed-foreign-adversaries-access>.