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New CFIUS Order Will Prompt Broader Investment Scrutiny

By **Jennifer Doherty**

Law360 (September 16, 2022, 10:17 PM EDT) -- More companies in the biotechnology, energy and quantum computing sectors should plan to give the federal government notice before bringing on foreign investors, or risk being caught in a review instigated by the Committee on Foreign Investment in the United States.

An executive order issued by President Joe Biden on Thursday marked the first presidential directive since CFIUS was established in 1975, laying out specific sectors for the committee to focus on as it endeavors to suss out and block acquisitions by foreign entities that could jeopardize national security.

The order landed during a period of rapid growth in activity for the committee, which reported a 10-year high in the number of transactions it reviewed in its 2021 annual report released last month. In the same report, CFIUS, which has historically relied on firms to notify it of potentially sensitive foreign investments, detailed a growing push to initiate national security reviews on its own following the passage of the Foreign Investment Risk Review Modernization Act of 2018.

The combination of the order's content and context marks a turning point for the industries it singled out, and should give pause to companies that previously felt they could skip CFIUS notifications, according to Laura Fraedrich, senior counsel in Lowenstein Sandler LLP's global trade and national security practice group.

"It's going to lead to many more CFIUS filings because, given that CFIUS has lots of resources to go after non-notified transactions and has been increasing that activity in the last couple of years after FIRRMA, I think that the risk of making an error in the file-don't file calculus is going to be potentially much greater," she told Law360.

The directive also ties into a coordinated effort by the Biden administration to safeguard U.S. economic and technical dominance in the face of new challenges, including supply chain blockages and competition in fields such as biotechnology and microelectronics.

Many U.S. players in those and other highly sensitive fields singled out in the order, such as artificial intelligence, were already diligent about notifying CFIUS of potential investments by foreign entities. At the same time, the order refers to emergent sectors that may not have considered themselves targets for CFIUS review before.

Morgan Lewis & Bockius LLP partner Kenneth Nunnenkamp pointed to climate adaptation technologies, one of the sectors enumerated in Thursday's order, as an area where companies may reasonably have assumed that the government was keen to share information with foreign partners, given the government's political push for international cooperation to combat climate change.

"People who may not have been paying attention now have to pay attention, because areas where they're investing, they're now being told, are of interest to CFIUS," he said.

The former director of the U.S. Treasury Department's Office of Investment Security — the office that chairs CFIUS — appeared to warn companies of the risks of disregarding the committee's evolving focus in a statement Thursday.

"Businesses should not be surprised if Treasury comes knocking to learn more about investments that may pose a risk to the country," said J. Philip Ludvigson, now a partner at King & Spalding LLP.

"The order will do less to change the review process itself, whether that involves cases that are filed or the non-notified efforts," he elaborated in an interview with Law360 on Friday. "What it's going to have a more profound effect on is giving signals to the public."

The executive order served the publicity purpose well, offering directions that covered each of the federal agencies with a seat on the committee and alerting a broad domestic and international audience to their prospective filing responsibilities through the White House's platform. However, it also raised questions for the companies — and attorneys — it put on notice.

The order makes 10 references to third parties, entities linked to a foreign investor, "that might cause the transaction to pose a threat to national security," which will factor into CFIUS reviews moving forward. It also affirms the committee's authority to look beyond the details of a single transaction to investment trends in a given industry that may collectively affect the risk of the deal.

Each of those considerations opens up a world of new challenges for counsel, who must now figure out how much information the committee is looking for from their clients.

In some cases, Fraerich said, the government is likely to have more information on those factors than either of the parties to a transaction could reasonably obtain.

Morrison Foerster partner Charles Capito told Law360 his team was looking into how to integrate the general atmosphere in Thursday's order into their risk assessments, but only time would tell what the best approach is.

"It's going to continue to be a largely experienced based field where you learn by working with the committee in the context of transactions and getting a feel about how they're implementing particular features of the executive order," he said.

Nunnenkamp likewise said that the concrete implications of the order would show themselves through the committee's work over the next three or four months, adding that formal rulemaking to implement the order "would show a very proactive stance."

--Editing by Emily Kokoll.