



Research Memorandum

CFIUS AUTHORITY AND HISTORY

June 2024

Kelly Lower, Research Analyst

QUESTIONS:

1. What is the authority of the Committee on Foreign Investment in the United States (CFIUS)? How does the committee function and what are the rules and regulations of the committee?
2. Regarding the Executive Order issued on May 13, 2024, requiring the divestment of MineOne Partners interest in a bitcoin mining facility located within one mile of the Francis E. Warren Air Force Base (F.E. Warren AFB) in Cheyenne, has the U.S. taken similar action elsewhere?
3. What information is available regarding how CFIUS reviewed and acted on the MineOne Partners transaction? What is the background of the transaction?

SHORT ANSWER:

CFIUS plays a role in safeguarding national security by scrutinizing foreign investment in U.S. businesses and real estate. Established in 1975 with a focus on studying foreign investment, CFIUS has steadily gained authority through legislative acts and executive orders such as the Exon-Florio Amendment and the Foreign Investment Risk Review Modernization Act (FIRRMA). Today, CFIUS can review a broad range of transactions, assess potential risks in emerging areas like supply chains, critical infrastructure, and technology, and even recommend that the president block business transactions, e.g., mergers or acquisitions. Since its formation the president has issued 9 executive orders relating to CFIUS investigations, including the recent order requiring the divestment of MineOne Partners interest in a bitcoin mining facility located within one mile of the F.E. Warren AFB.

DISCUSSION:

Question 1: CFIUS Formation and Authority

The Committee on Foreign Investment in the United States (CFIUS) is an interagency committee chaired by the Secretary of the Treasury. The committee consists of nine members: Secretaries of the Treasury (chair), State, Defense, Homeland Security, Commerce, and Energy; the Attorney

General; a U.S. trade Representative; and the Director of the Office of Science and Technology Policy. The Secretary of Labor and Director of National Intelligence serve as ex officio members of the committee. Five White House offices observe or participate in CFIUS, as needed (e.g., the Council of Economic Advisers and National Security Council). The president can appoint other officials to serve on a case-by-case basis.¹

CFIUS operates pursuant to section 721 of the Defense Production Act of 1950, as amended, and as implemented by Executive Order 11858, as amended, as well as the regulations at chapter VIII of title 31 of the Code of Federal Regulations. The committee serves the president in overseeing national security risks associated with foreign direct investment in the United States (U.S.) economy. CFIUS reviews mergers, acquisitions, and takeovers which may result in foreign control of a U.S. business.² CFIUS also reviews select noncontrolling investments in businesses involved in critical technologies, critical infrastructure, or sensitive personal information and certain real estate transactions.³

A CFIUS review process begins when parties notify CFIUS of a pending transaction. Some transactions carry mandatory reporting requirements, while others are voluntary. Additionally, members of the public are encouraged to send CFIUS a tip about transactions involving foreign investment which might impact national security.⁴ Firms may have an incentive to report to CFIUS even when doing so is not mandatory to receive potential “safe harbor” from CFIUS, which limits future action by the committee after a transaction is cleared.

There are two notification types for transactions parties may submit to CFIUS: a declaration (abbreviated filing with a 30-day assessment period) or a traditional written notice (45-day review period). A declaration is mandatory in certain circumstances, including when a transaction involves a foreign government acquiring “substantial interest” in critical technology, critical infrastructure, or sensitive personal data, or when a transaction involves a critical U.S. business that produces, designs, manufactures, etc. a critical technology subject to export licensing/controls.⁵

After notifying CFIUS of a transaction, the next step is a review by the Department of the Treasury and a co-lead agency to determine the effects of the transaction on U.S. national security, as informed by an Office of the Director of National Intelligence threat analysis. During the review

¹ Rules and Regulations, Federal Register Vol. 73, No. 226, Nov. 21, 2008.

² Congressional Research Service, The Committee on Foreign Investment in the United States (CFIUS), Feb. 26, 2020.

³ Ibid.

⁴ U.S. Department of the Treasury, The Committee on Foreign Investment in the United States (CFIUS), June 2024, <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius>.

⁵ Congressional Research Service, The Committee on Foreign Investment in the United States, May 17, 2024.

CFIUS considers the threat, vulnerabilities, and consequences to national security of the transaction. Factors CFIUS is to consider in the assessment include:

- Domestic production needed for projected national defense requirements;
- Control of domestic industries and commercial activity by foreign citizens;
- Effects on potential sales of military goods, equipment, or technology to a country that supports terrorism or proliferates missile technology or chemical and biological weapons;
- U.S. technological leadership in areas affecting national security; and
- Effects on U.S. critical infrastructure, including major energy assets, and critical technologies.⁶

CFIUS has a 45-day period in which to conduct the national security review. Following the review, the transaction proceeds to a 45-day investigation should CFIUS find that the transaction threatens to impair national security and the risk has not been mitigated; is foreign-government controlled; or would result in foreign control of any U.S. critical infrastructure. CFIUS may negotiate and impose mitigation conditions or agreements on parties to a covered transaction in order to address concerns identified in the investigation. If CFIUS determines a transaction poses unresolved concerns for U.S. national security, the committee may recommend to the president that the deal be prohibited unless the concerned parties abandon the transaction. The president has 15 days to take action upon receiving a recommendation from CFIUS.

Below is a timeline of CFIUS's formation and additional authorities granted to the committee:

1975: Executive Order 11858, signed by President Gerald Ford, established CFIUS. The function of the committee was to study the impact of foreign investment on the U.S. economy and national security.⁷

1980s: Exon-Florio Amendment of 1988 gave CFIUS the power to review transactions and recommend the president block them if national security was at risk. The amendment tied CFIUS's actions to national security concerns and provided the committee a clear legal basis by which to intervene in foreign investment transactions.⁸

2007: The Foreign Investment and National Security Act (FINSAs) further solidified CFIUS's authority. The act established the committee by law, defined its membership, and codified the review process. Previously CFIUS existed through executive orders, with FINSAs formally establishing the committee as a legal entity. Additionally, FINSAs introduced some measures for

⁶ Ibid.

⁷ President Ford, Executive Order 11858, May 7, 1975.

⁸ 50 U.S.C. app. § 2170 (1988).

increased transparency and accountability. It mandated reporting requirements to Congress on CFIUS activities and allowed for limited public information sharing in some cases.⁹

2018: The Foreign Investment Risk Review Modernization Act (FIRRMA) significantly expanded CFIUS's authority to scrutinize foreign investment in the United States. The following are some additional authorities granted to CFIUS by FIRRMA. The Act:

- Allows CFIUS to review not just acquisitions resulting in foreign control of U.S. businesses but also certain non-controlling investments. This includes investments in critical technologies, critical infrastructure, and businesses collecting sensitive personal data on U.S. citizens.
- Grants CFIUS the authority to examine real estate transactions involving foreign buyers, particularly those near sensitive locations such as military installations or government facilities.
- Strengthens CFIUS's ability to investigate transactions with indirect foreign government involvement, even if the investment comes through a seemingly private company.
- Authorizes CFIUS to request additional information from not only the parties involved in a transaction but also from third parties.¹⁰

2022: Executive Order 14083 on Ensuring Robust Consideration of Evolving National Security Risks by CFIUS. The order emphasizes a more comprehensive approach to reviewing foreign investment deals for potential national security risks, including the following considerations of a transaction under review.

- **Supply Chain Resilience:** CFIUS must now broaden its focus beyond the defense industrial base to encompass the entire U.S. supply chain. This entails scrutinizing potential disruptions to critical manufacturing capabilities, services, and access to essential resources such as minerals.
- **Technological Leadership:** The order directs CFIUS to pay closer attention to technologies critical to U.S. technological leadership. This includes not only the immediate impact of a transaction on existing capabilities but also the potential for future advancements by the foreign investor that could undermine U.S. national security.
- **Third-Party Ties:** CFIUS is now tasked with considering the "relevant third-party ties" of the foreign entity involved in the transaction. This means examining potential connections to other foreign actors that might pose a national security threat.

⁹ Rules and Regulations, Federal Register Vol. 73, No. 226, Nov. 21, 2008.

¹⁰ Foreign Investment Risk Review Modernization Act of 2018, 115 H.R. 5841, 2018 H.R. 5841, 115 H.R. 5841.

- Future Applications: The order emphasizes the importance of assessing the long-term implications of a transaction. CFIUS must consider whether the deal could lead to future technological advancements by the foreign actor that could be detrimental to U.S. security.
- Industry Trends: CFIUS is directed to consider broader industry investment trends when evaluating a specific transaction. This allows CFIUS to assess the cumulative impact of multiple foreign investments in a particular sector.¹¹

Question 2: Previous Actions by CFIUS

Presidential prohibitions of foreign acquisitions are infrequent.¹² Prior to the latest order requiring the divestment of MineOne Partners interest in a bitcoin mining facility located within one mile of the F.E. Warren AFB in Cheyenne, only eight transactions had been subject to a CFIUS-related presidential order:

1990: China National Aero-Technology Import and Export Corporation's acquisition of MAMCO

2006: Alcatel's acquisition of Lucent

2012: Ralls Corporation's acquisition of four U.S. wind farm projects

2016: Grand Chip Investment's acquisition of Aixtron

2017: Canyon Bridge's acquisition of Lattice Semiconductor

2018: Broadcom's acquisition of Qualcomm Semiconductor

2020: Shiji Information Technology's acquisition of StayNTouch

2020: ByteDance's acquisition of Musical.ly

Including the MineOne order, 7 out of 9 presidential orders have involved a Chinese acquiror. All presidential orders prohibited the transaction at issue, except for Alcatel's acquisition of Lucent, where the president, at CFIUS's recommendation, permitted the transaction subject to mitigation agreements.

Question 3: CFIUS review of MineOne Partners' acquisition near F.E. Warren AFB

MineOne Partners Background

In June 2022, MineOne Cloud Computing Investment I L.P. (MineOne Partners) acquired real estate within one mile of F.E. Warren AFB (North Range site). The North Range site was purchased from Cheyenne LEADS, a private non-profit corporation serving as the economic development entity for the City of Cheyenne and Laramie County. Another site, the Campstool site, was also acquired by MineOne. Both sites were acquired for the purpose of bitcoin mining,

¹¹ President Biden, Executive Order 14083 on Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States, Sept. 15, 2022.

¹² The rarity of a presidential order barring a transaction could possibly be explained by the practice of parties abandoning controversial transactions once CFIUS indicates that it will refer them to the president for review. Congressional Research Service, The Committee on Foreign Investment in the United States, May 17, 2024.

and MineOne entered a contract with Black Hills Energy to provide energy to the sites for their mining operations. Through various affiliates, including Bison Blockchain, MineOne proceeded to make improvements to establish cryptocurrency operations on the North Range and Campstool sites.

An article in the Wyoming Tribune Eagle which has since been deleted, reported that Bison Blockchain LLC negotiated a contract for MineOne with the local energy supplier Black Hills Energy.¹³ MineOne would initially receive up to 45 megawatts and later up to 75 megawatts. The bitcoin mines would be operated by Bison Blockchain, which promised to create 20 well-paying jobs in Cheyenne.

However, collaboration between the two companies did not prosper. In March 2023, Bison Blockchain filed a lawsuit against MineOne Partners alleging breach of contract. In an open letter to stakeholders at the end of May 2023, Bison Blockchain explained:

As we prepared to energize and begin Bitcoin mining at the North Range site, we became increasingly concerned by MineOne’s actions. They turned from being a partner we thought we knew and trusted, to working against us with an agenda to take over the North Range and Campstool projects. Ultimately, they removed us as the operator of both sites, without cause, and have denied us the well-deserved financial remuneration and success of the projects.¹⁴

Bison Blockchain elaborates in their filing that by the end of 2022 the company had been replaced as the operator of the two bitcoin mining sites by Chinese nationals and temporary workers.¹⁵

In October 2023, Bison Blockchain expanded their suit to include a second company, Bitmain, which is the largest bitcoin mining hardware manufacturer in the world. The complaint by Bison Blockchain describes the actions of Bitmain as a takeover of the bitcoin mines by a Chinese conglomerate, and the effective removal of Bison Blockchain as the operator of the mining sites.¹⁶

Additionally, in the amended complaint by Bison Blockchain the group alleges that Bison Blockchain received a copy of a 16-page report by Microsoft, which operates a datacenter neighboring the North Range site. The report allegedly cites national security interests in the bitcoin mining operations, due to the site’s Chinese national owners and operators. This report was

¹³ Jonathan Make, Wyoming Tribune Eagle, “Wyoming crypto efforts get boost with big power agreement in Cheyenne”, June 22, 2022, <https://archive.is/c4R48>.

¹⁴ Bison Blockchain, “Bison Blockchain files suit against Chinese conglomerate of Bitcoin miners” May 30, 2023, <https://bisonblockchain.com/news/open-letter>.

¹⁵ Amended Complaint, BCB Cheyenne LLC v. MineOne Wyoming Data Center LLC and affiliates.

¹⁶ Ibid.

reportedly sent to the U.S. Government, which recommended further research into the operator's interest in the North Range site.¹⁷

MineOne Partners and CFIUS

MineOne did not seek CFIUS approval in connection with the acquisition of real estate in 2022. The Committee has been reported to have learned of the transaction thereafter through a public tip from Microsoft. The *New York Times* reports that the Microsoft tip stated the bitcoin mining site could be used to “pursue full-spectrum intelligence collection operations,” upon the nearby AFB.¹⁸ Upon receipt of the information, the Committee investigated the transaction and ultimately identified national security risks that could not be mitigated through a national security agreement, at which point the matter was referred to President Biden.

President Biden issued an executive order on May 13, 2024, prohibiting MineOne's property acquisition, requiring the divestment of certain real estate operated as a cryptocurrency mining facility located within one mile of F.E. Warren AFB, and requiring the removal of certain improvements and equipment at the relevant property by MineOne. Both the divestment and the equipment removal are mandated to occur within an established timetable.¹⁹

Prior to the executive order, on May 9, 2024, CleanSpark, an American bitcoin mining company, announced it had entered into definite agreements to acquire the North Range and Campstool sites from MineOne Partners for a total of \$18.75 million on the condition that Black Hills Energy provide at least 45 megawatts to the North Range site and 30 megawatts to the Campstool site.²⁰ The company stated they were not aware of a pending executive order addressing MineOne's acquisition of the North Range site prior to reaching an agreement with the company.²¹

If you have any further questions, please do not hesitate to contact LSO Research at 777-7881.

¹⁷ Ibid.

¹⁸ Gabriel J.X. Dance and Michael Forsythe, *New York Times*, “Across U.S., Chinese Bitcoin Mines Draw National Security Scrutiny”, Oct. 18, 2023, <https://www.nytimes.com/2023/10/13/us/bitcoin-mines-china-united-states.html>.

¹⁹ President Biden, Order Regarding the Acquisition of Certain Real Property of Cheyenne Leads by MineOne Cloud Computing Investment I L.P., May 13, 2024, <https://www.whitehouse.gov/briefing-room/presidential-actions/2024/05/13/order-regarding-the-acquisition-of-certain-real-property-of-cheyenne-leads-by-mineone-cloud-computing-investment-i-l-p/>.

²⁰ CleanSpark, “CleanSpark to Acquire 75 MW of Bitcoin Mining Sites in Wyoming for \$18.75 Million”, May 9, 2024, <https://investors.cleanspark.com/news/news-details/2024/CleanSpark-to-Acquire-75-MW-of-Bitcoin-Mining-Sites-in-Wyoming-for-18.75-Million/default.aspx>.

²¹ Zach Bradford, CEO, CleanSpark, Select Committee on Blockchain, Financial Technology and Digital Innovation Technology, May 21, 2024.