

# US-Mexico Agreement Signals Mexican Foreign Investment Screening Body To Come

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On December 7, 2023, U.S. Secretary of the Treasury Janet L. Yellen and Mexico's Secretary of Finance and Public Credit Rogelio Ramírez de la O signed a [Memorandum of Intent \(MOI\) to establish a bilateral working group](#) to cooperate and discuss best practices for the development of a foreign investment screening regime in Mexico similar to the Committee on Foreign Investment in the United States (CFIUS).

This outreach is the latest in U.S. government efforts — led by the Treasury Department — over the past several years to work with foreign partners and allies on the establishment of more comprehensive processes for screening foreign direct investments (FDI) for national security risks.

The diplomatic strategy reflects policy goals established in President Joe Biden's September 15, 2022, executive order, "[Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States](#)," and by the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA). It has helped spur the development of FDI screening mechanisms in Europe, Asia and the Americas, with dozens of countries creating or enhancing their existing FDI screening processes over the past five years alone.

Currently, Mexico's Foreign Investment Law broadly permits FDI in Mexico without prior national security review or authorization, except with respect to certain industry sectors subject to FDI prohibitions and investment caps. The development of new legislation in Mexico is likely to take years, and Mexico has not yet signaled how it expects a future FDI screening regime to operate.

According to the Treasury Department, the MOI reaffirms "the benefits of maintaining an open investment climate," suggesting that foreign investment under any new Mexican FDI regime will remain open to all but those few investments with the potential to impair Mexican or regional security.

In creating such a program, Mexico will need to make a number of key decisions about its investment regime.

## 1. What industry sectors and national security considerations will be the focus of the regime?

According to the Treasury Department's press release, the MOI recognizes "national security risks that can arise from certain foreign investment, particularly in certain technologies, critical infrastructure, and sensitive data." While CFIUS and several other FDI review regimes focus in large part on investments in businesses that trigger these three considerations, other FDI programs include additional sectors of interest, such as transportation, food and agriculture, and the press or media.

## 2. Will filings be mandatory or voluntary?

Although CFIUS has jurisdiction to review (among other things) any controlling investment in a U.S. business by a non-U.S. investor, for most transactions the decision to file with CFIUS is voluntary. Some other FDI regimes take a more expansive approach to circumstances in which a filing is mandatory, particularly with respect to investors owned or controlled by foreign governments.

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## 3. What level of investment will trigger a filing?

CFIUS establishes a subjective standard of “control” for most transactions while also covering any equity investment when certain rights are also provided in a narrow set of U.S. businesses related to technology, infrastructure and data. Many other FDI regimes establish equity percentage thresholds; in some cases, investors are required to make multiple successive filings if they make incremental acquisitions crossing certain thresholds (*e.g.*, more than 10%, 20% or 25%).

## 4. Which countries will be impacted by the new regime?

FDI screening regimes vary in how they approach “foreign investment.” CFIUS jurisdiction generally extends to all “foreign persons” regardless of their country of nationality, with narrow exceptions for investors from a small number of countries. Several European Union FDI regimes make distinctions between EU member countries and non-EU members. Other regimes favor investors from countries that are members of the Organization for Economic Cooperation and Development (OECD). Still others provide differential treatment to investors from neighboring countries.

## 5. Will pending FDI reviews have a suspensory effect on closing transactions?

In a number of jurisdictions, FDI filings are suspensory, meaning that the transaction under review cannot close until the review has been completed and authorization has been granted. In contrast, in the United States, even where a CFIUS filing is mandatory, CFIUS filings are never suspensory except in the very rare cases where the U.S. government takes specific action to suspend a transaction.

## In Sum

U.S.-Mexico engagement on FDI screening is a natural outgrowth of broader efforts between the two countries to harmonize trade policies and strengthen North American supply chains. From the

United States-Mexico-Canada Agreement on trade, which entered into force on July 1, 2020, to the tax credits offered in the Inflation Reduction Act of 2022, U.S. law and policy strongly support trade with Mexico.

As the U.S. expands its supply chain into Mexico, however, it will increasingly seek mechanisms to protect those supply chains from foreign adversaries. The Biden administration has promoted Mexico as a destination for American supply chains and investments while expressing some concern about foreign adversaries using Mexico as a “back door” to access U.S. supply chains where trade restrictions may prevent direct access. FDI screening represents one mechanism to further harmonize U.S. and Mexico trade law and policy.

However, in recent years, Mexico and U.S. foreign policy and security priorities have not always aligned, leaving uncertainty regarding how a Mexican FDI screening regime will be implemented. For example, the U.S. has raised concerns regarding Mexico’s relationship with China, specifically with respect to recent plans by Chinese electric-vehicle makers to invest in and build factories in Mexico.

Additionally, Mexico and the U.S. have taken differing positions on ongoing global conflicts such as the war in Ukraine and violence in the Middle East. If such foreign policy divergence continues, it is likely to present challenges to any expected harmonization of guiding principles behind a Mexican FDI regime, especially with respect to restricted jurisdictions and sensitive industries of focus.

Thus, the ultimate direction of any Mexican FDI screening body and its alignment with U.S. interests is less certain than in other jurisdictions where CFIUS-like regimes have been recently enacted.

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