

CFIUS Reports Substantial Increase in Use of Mitigation Measures in 2022

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August 7, 2023

On July 31, 2023, the Committee on Foreign Investment in the United States (CFIUS or the “Committee”) released its Annual Report for 2022. Overall, the statistics indicate that CFIUS is taking more time to finish its review and more frequently taking action to address national security risk. Key highlights include the following:

- CFIUS reviewed a total of 440 filings. Although this is technically an increase of four filings from 2021, the number of unique transactions decreased slightly.
- CFIUS continues to clear the majority of transactions it reviews. However, the number of transactions that were concluded on the basis of mitigation agreements increased notably in 2022. In fact, CFIUS adopted mitigation measures or conditions in 52 instances in 2022, up from 31 in 2021, a 68% year-over-year increase.
- CFIUS cleared fewer notices in the first 45-day review period. More notices went into the second 45-day “investigation” period, with over half (57%) requiring an investigation in 2022, versus less than half in 2021.
- Transactions filed as short-form declarations were more likely to result in a follow-on long-form notice in 2022 than in 2021, with 32% of declarations proceeding to a notice as compared to just 18% of declarations in 2021.
- While the number of non-notified transactions that were put forward for formal consideration by the Committee was down (84 in 2022 as compared to 135 in 2021), the Committee requested more filings as a result of its non-notified process in 2022 (19 in 2022 versus eight in 2021).
- CFIUS is now concentrating its non-notified efforts on more recent transactions rather than older transactions.
- Transactions involving “critical technologies” comprised a substantial portion of filings in 2022. Approximately 41% (181) of the transactions filed with CFIUS involved target companies that are involved in research, development or production of “critical technologies,” which are, generally speaking, export-controlled items.

Background

CFIUS is the inter-agency committee that monitors and reviews foreign investment in the United States for possible national security concerns. In its recently-issued **Annual Report** for Calendar Year 2022 (the “Report”), CFIUS provided key insights into trends in CFIUS filings that are otherwise strictly confidential.

As always, the annual report—the only official, public source of information regarding CFIUS filings—provides a useful snapshot of filing trends, such as clearance rates, average length of filings from submission to conclusion, number of mitigation agreements concluded, number of filings by investors from each country and number of filings involving specific sectors. Although the Report does not provide more substantive details regarding the transactions that required lengthier reviews, resulted in mitigation or that were ultimately abandoned by the parties, it does include a number of metrics and key insights worth highlighting:

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- ***CFIUS reviewed a record number of filings in 2022, but only saw a slight increase in filings from 2021.*** CFIUS reviewed 440 total filings in 2022, the most for a single year, although only four more filings than reported for 2021. The number of notices filed increased from 272 in 2021 to 286 in 2022, while the number of declarations decreased from 164 in 2021 to 154 in 2022. However, due to CFIUS requesting more follow-on notices for transactions filed first as declarations, the number of distinct transactions it reviewed in 2022 appears to have decreased.¹
 - ***While most transactions continue to clear without mitigation conditions, the number of cases requiring mitigation increased 68% year over year, from 31 in 2021 to 52 in 2022.*** In 2022, nearly a quarter of transactions filed as a notice were cleared subject to a mitigation agreement (41), up from around 10% in 2021. The other nine instances in which CFIUS utilized conditions involved transactions that were withdrawn or abandoned or interim measures imposed while CFIUS finished its review.
 - ***CFIUS formally considered fewer non-notified transactions in 2022 than in 2021, though the percentage that resulted in a request for a filing increased.*** In 2022, 84 non-notified transactions were put forward to CFIUS for formal consideration, as opposed to 135 in 2021 and 117 in 2020. Notably, CFIUS requested a formal filing for 19 transactions in 2022, a substantial increase from 2021 when only it requested a filing in only eight non-notified transactions. In the Report, CFIUS notes that the volume of non-notified transactions that are put forward for formal consideration may continue to decrease as CFIUS completes its consideration of pre-Foreign Investment Risk Review Modernization Act (FIRRMA) transactions. Even so, CFIUS reported that it and its member agencies regularly review thousands of non-notified transactions for potential formal consideration each year. According to the Report, CFIUS is “now primarily focused on monitoring more recent foreign investments for potential non-notified and non-declared transactions.”
 - ***As in 2021, a significant number of CFIUS cases were not concluded within the statutory period.*** While the majority of transactions were still cleared within the statutory timeframes, a number of transactions had to be withdrawn and refiled in 2022—roughly 24% of the notices filed in 2022, which is similar to 2021 in which 23% of notices were withdrawn and refiled.
 - ***There were more abandoned transactions but no official blocks.*** As in 2021, there were no presidential blocks or divestiture orders in 2022. However, parties withdrew their notice and abandoned their transaction 12 times last year after being unable to reach agreement with CFIUS on mitigation measures to resolve identified national security concerns, which is three more than in 2021.
 - ***Transactions involving scientific research and design companies had the highest sector-specific number of filings, more than double the amount of filing for this sector in 2021.*** Looking at transactions by specific sectors, transactions involving scientific research and design companies had the highest number of filings at 41, slightly more than the double the number of filings for this sector in 2021 (20). Other common sectors included: electric power generation, transmission, and distribution (39); software publishers (28); semiconductor and other electronic component manufacturing (21); computer systems design and related services (18); navigational, measuring, electromedical, and control instrument manufacturing (16); aerospace product and parts manufacturing (16); architectural, engineering and related services (14); satellite telecommunications (13); wired and wireless telecommunications carriers (12); and data processing, hosting and related services (12).
 - ***Filings from Singaporean investors nearly doubled, with filings from Chinese investors holding relatively steady. Singaporean investors filed the highest number of filings in 2022, with 46 filings, a significant increase from 24 in 2021.*** Chinese investors, a close second, filed a total of 41 times in 2022 as compared to 45 filings in 2021. Other countries with a large number filings include Canada (39); Japan (33); the UK (26); South Korea (25); and Germany (23). Based on the number of “distinct transactions” (i.e., counting refiled

transactions only once), CFIUS reported that over the course of three years (2020-2022) Singapore accounted for the highest number of notices, following by the U.K. in second, and Canada and Japan tied for third.

- ***As in 2021, transactions involving “critical technologies” comprised a substantial portion of filings.*** Approximately 41% (181) of the transactions filed with CFIUS involved target companies that are involved in research, development or production of “critical technologies,” which are, generally speaking, export-controlled items. Notably, the most common sector for critical technology transactions was machinery manufacturing, representing 84 out of the 181 critical technology transactions. The machinery manufacturing sector represented only 12 of the critical technology transactions in 2021. Investors from Japan and France were involved in the most critical technology filings, with 16 and 14 filings, respectively.
- ***Real estate filings remained rare.*** Only five declarations and one notice were filed under the real estate regulations, similar to the numbers from 2021 (one declaration and five notices). These figures may result in continuing interest by Congress and the states in regulating or prohibiting real estate transactions, as discussed in a prior client alert.
- ***The Treasury’s Office of Investment Security is continuing to hire additional team members, including, for the first time, individuals hired for their specific technical expertise.*** The Treasury is hiring new case officers and has established and grown teams dedicated to functions such as non-notified transactions, monitoring and enforcement, and collaboration with international partners. The Treasury is also hiring, for the first time, individuals specifically for their technical expertise in certain areas, including in the cybersecurity, sciences and enforcement spaces and has begun participating in university recruitment programs.

Overall, these statistics show that CFIUS continues to clear most transactions, but parties must increasingly plan for longer review times and the potential for CFIUS to require mitigation as a condition for its clearance.

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¹ Parties have the option of filing either a long-form notice or a short-form declaration with CFIUS. A declaration is an abbreviated filing that CFIUS has 30 days to assess, at which point it may request that the parties file a long-form notice.