

CFIUS Releases 2022 Annual Report as Congress Considers Expanding CFIUS Jurisdiction

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The Committee on Foreign Investment in the United States (CFIUS or the Committee) recently released the public version of its Annual Report to Congress for calendar year 2022. The report shows that the volume of CFIUS filings remains at a historic high and that more transactions are being cleared with mitigation, while the Committee has continued to identify and evaluate deals that are not voluntarily filed. Against this backdrop, Congress has recently advanced various legislative proposals that would curtail Chinese investment and expand CFIUS powers.

The overall number of covered transactions (notices and declarations) reviewed or assessed by CFIUS in 2022 (440 transactions) was slightly more than in 2021 (436 transactions). While this figure reflects a record number of filings, it does not represent the total number of distinct transactions that were reviewed because some transactions were the subject of more than one notice. In addition, the Committee remained focused on non-notified transactions, as it identified 84 transactions through its non-notified process in 2022 and issued a request for filing in 11 of those cases (in addition to another 8 that were identified in prior years). The following provides further highlights from the 2022 report plus an update on the latest Congressional efforts to expand CFIUS jurisdiction.

Highlights of the 2022 Annual Report

Declarations

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- The volume of declarations decreased slightly from 164 in 2021 to 154 in 2022.
- Only five of these declarations were for covered real estate transactions.
- For the 154 declarations filed in 2022, the Committee concluded all action under Section 721 following the 30-day assessment in 90 cases, requested that the parties file a written notice in 50 cases, and informed the parties that it was unable to conclude action in 14 cases.
- Investors from Canada, Japan, and Germany accounted for the most declarations in 2022 as well as the largest proportion of declarations for the three-year period 2020-2022.

Notices

- The volume of formal notices increased from 272 in 2021 to 286 in 2022.
- Of the 286 notices filed in 2022, 162 cases – approximately 57% – proceeded to the investigation stage, an increase from approximately 48% in 2021.
- No presidential actions were taken in 2022, though in 12 cases the parties withdrew their notices and abandoned the transaction “after CFIUS either informed the parties that it was unable to identify mitigation measures that would resolve its national security concerns, or it proposed mitigation measures that the parties chose not to accept.”
- Only one of the 286 notices was a real estate notice filed under 31 C.F.R. Part 802.
- Singaporean, Chinese, and British investors accounted for the highest number of notices in 2022. For the three-year period 2020-2022, Chinese, Japanese, and Singaporean investors accounted for the highest number of notice filings.

Mitigation Measures

- In 2022, CFIUS adopted mitigation measures and conditions in 52 instances, which is approximately 18% of all 2022 notices. Because some transactions were subject to more than one notice, however, the percentage of unique transactions that ultimately resulted in mitigation measures or conditions was approximately 23%.
- CFIUS adopted mitigation agreements to resolve national security concerns with respect to 41 of the 286 notices reviewed in 2022.
- For 3 notices that were voluntarily withdrawn and abandoned, CFIUS adopted mitigation agreements to address “residual national security concerns.”
- For 5 other notices that were withdrawn and abandoned, the Treasury Department issued letters imposing conditions while stopping short of imposing a mitigation agreement.
- The Committee imposed measures to mitigate interim risk with respect to 3 notices filed in 2022.

Continued focus on non-notified transactions. The Committee continued to use various methods to identify non-notified transactions, though it identified significantly fewer non-notified transactions in 2022 as compared to 2021.

- As noted above, in 2022, CFIUS identified and evaluated 84 transactions through its non-notified process (down from 135 in 2021) and issued a total of 19 requests for a filing through this process in 2022.
- The report notes that the “reportable number of potential non-notified transactions identified through the established process does not reflect instances where the parties decide to voluntarily file a declaration or notice upon receipt of non-notified-related outreach but prior to a formal request.”
- The report also clarifies that “[t]he volume of overall non-notified transactions that were put forward to the Committee for consideration may continue to decrease as CFIUS works through its consideration of transactions that pre-date the Committee’s current, increased level of resources.” Moreover, “CFIUS is now primarily focused on monitoring more recent foreign investments for potential non-notified and nondeclared transactions, but will continue to assess pre-FIRRMA transactions as new information becomes available to the Committee.”

Congressional efforts to expand CFIUS Jurisdiction

While the most recent statutory update to CFIUS authorities occurred in 2018 with the enactment of the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), there is momentum on Capitol Hill to further expand CFIUS’s jurisdiction.

For example, the Promoting Agriculture Safeguards and Security (PASS) Act recently passed the Senate with bipartisan support and will be included in the Senate version of the National Defense Authorization Act (NDAA) for Fiscal Year 2024. The PASS Act focuses on agriculture security and would prohibit persons acting on behalf of a “foreign adversary” (*i.e.*, China, Russia, Iran, and North Korea) from purchasing or controlling U.S. agricultural land and businesses. In addition, the bill would add the Secretary of Agriculture as a member of CFIUS to focus on agriculture needs when making determinations affecting U.S. national security.

As another recent example, on June 21, 2023, Senators Kevin Cramer (R-ND) and John Kennedy (R-LA) introduced the Exposing China’s Belt and Road Investment in America Act (S.3038) that would put Chinese greenfield initiatives within the Committee’s purview. The bill would require a CFIUS review for any investment made by a foreign person involving the acquisition of real estate in the United States and the establishment of a U.S. business on such real estate that results in China’s direct or indirect control of that business.

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Should you have any questions regarding CFIUS’s 2022 Annual Report to Congress or pending CFIUS-related legislation, please do not hesitate to contact one of the members of our CFIUS and national security practices listed on this alert.