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6 Key Takeaways from the CFIUS 2022 Annual Report

The Committee on Foreign Investment in the United States ("CFIUS" or the "Committee") recently released the unclassified version of its statutorily mandated annual report to Congress, covering calendar year 2022. Viewed in the context of prior CFIUS reports to Congress, the report, released July 31, 2023, highlights key trends in the U.S. government's review of inbound foreign investment, including a record number of filings, increased investigations, and the emergence of Singapore as a top investor domicile. Overall, the report makes clear that CFIUS continues to play an active and robust role in reviewing proposed investments in U.S. businesses, and dealmakers should account for this from the outset of deal planning.

Here are six key takeaways from the CFIUS annual report:

1. CFIUS Reviewed a Record Number of Filings, Even as M&A Activity Slowed

CFIUS reviewed 440 filings (154 short-form declarations and 286 full joint voluntary notices) in 2022, a slight increase over the prior record of 436 filings that CFIUS reviewed in 2021. This is particularly notable given the slowdown in M&A deals in the second half of 2022.

The record number of filings is reflective of robust engagement with the CFIUS process by foreign investors, as investors become more familiar with the process and as CFIUS makes clear that it will vigorously safeguard U.S. national security in reviewing investments. Notably, the record-high filings came in the midst of intensified public engagement regarding CFIUS review in 2022, including a presidential executive order, issuance of the first-ever CFIUS enforcement guidelines, and the inaugural Treasury Department CFIUS conference.

2. Declarations Resulting in Full Joint Voluntary Notices More Frequently

Before an investor avails itself of the CFIUS short-form declaration process, which provides for a more streamlined filing with a shorter adjudication time, one key issue to assess is the likelihood that CFIUS will request that the parties submit a full notice at the end of the declaration review period. If CFIUS does request a full notice, that can result in a substantially longer CFIUS review than if the parties had submitted a full notice from the start.

In 2022, CFIUS did this 32 percent of the time (50 out of 154 declarations), a significant increase over 2021 (18 percent). This underscores the importance of qualitatively assessing the potential national security risk presented by a transaction when choosing whether to file via declaration or full notice, as a CFIUS request for a full notice at the end of the declaration period will, as noted, significantly impact deal timing.

3. CFIUS Is Conducting More Investigations

According to the report, with respect to full joint notices, CFIUS conducted an investigation—*i.e.,* initiated a second 45-day review period—in 57 percent of cases (162 out of 286) in 2022. This marks an increase from 2021, when CFIUS initiated an investigation 48 percent of the time.

This reflects continued robust review by CFIUS, its mandate reinforced by the executive order noted above and increased staffing. As with declarations, when filing a notice, it is crucial for investors to assess the potential national security risk presented by a transaction, and anticipate the impact of a lengthy CFIUS process on deal timing.

4. Singapore Emerges as a Top Source of CFIUS Filings

Regarding the countries of domicile of investors making CFIUS filings, the big story in 2022 was the emergence of Singaporean investors on the scene, as there were 46 filings involving Singapore, a plurality of the filings that CFIUS reviewed. This was an increase from 24 Singapore-related filings in 2021.

Investors from China were not far behind, accounting for 41 filings, just about steady with 2021 (44 filings). Even as investment from China has slowed, China and China-related links are a top target for CFIUS review, and the large number of China-related filings reflects investors' understanding of this.

Other top filers include Canada (39), Japan (33), and the United Kingdom (26). This reflects that even where an investor is domiciled in a country that is a close U.S. ally, a CFIUS filing may still be required (*e.g.,* where the target manufactures defense articles) or warranted (if for no other reason than to be transparent and bolster good standing with U.S. authorities).

5. Scientific R&D, Tech, Software, and Utilities Dominate

In terms of sectors, perhaps not surprisingly, filings relating to scientific R&D, other tech-related applications, software, and electric power utilities were most prominent.

Specifically, among the 154 declarations, the top sectors were as follows:

- Scientific research and development (15)
- Electric power generation, transmission, and distribution (15)
- Telecommunications (9)
- Software (8)
- Semiconductors (6)
- Data processing (6)
- Aerospace (6)
- Architectural and engineering (6)
- Real estate (5)
- Navigational and measuring instruments (4)

Meanwhile, among the 286 full notices, the top sectors were as follows:

- Scientific research and development (26)
- Electric power generation, transmission, and distribution (24)
- Telecommunications (22)
- Software (20)
- Computer systems design (15)
- Semiconductors (14)
- Navigational and measuring instruments (12)
- Aerospace (10)

6. Non-Notified Transactions

CFIUS continued to pursue the identification of covered transactions for which no joint notice or declaration was filed. With a growing staff devoted to this effort, CFIUS identified 84 transactions that were submitted to the Committee for consideration. Of those, CFIUS requested a filing in 11 transactions in 2022, and CFIUS received eight more filings in 2022 for transactions that had been identified in 2021. The annual report indicates that these numbers do not reflect other cases in which CFIUS reached out to transaction parties for information, and the parties made a CFIUS filing before CFIUS made a formal request for a filing.

Thus, in assessing whether to make a voluntary filing with CFIUS, transaction parties should also consider the risk that CFIUS will become aware of the transaction and request that a filing be made, resulting in an unexpected delay in the transaction or post-closing mitigation measures.

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