



ALERTS

CFIUS Annual Report: Reviews Of Foreign Investments In The U.S. Remain At Record High Levels

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Highlights

The Committee on Foreign Investment in the United States (CFIUS) reviewed a record-high 440 covered transactions in 2022; investors from Singapore and China accounted for most reviewed by country

CFIUS conducted more investigations and imposed more mitigation measures in 2022 compared to 2021

CFIUS continues to monitor thousands of foreign investment transactions in the U.S. each year and, in 2022, directed an increased number of parties to file for review

The Committee on Foreign Investment in the United States (CFIUS) [released its annual report](#) covering the calendar year 2022 at the end of July. This report represents the second year of full data since the Foreign Investment Risk Review Modernization Act (FIRRMA) regulations went into effect in February 2020.

The 2022 report states that CFIUS reviewed a record-setting 440 covered transactions, up from last year's 436 covered transactions, which at the

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time was also a record high. In addition to CFIUS' busiest year, the report reveals certain trends in the countries and industries reviewed most frequently, as well as the success rate of short-form filings and CFIUS' targeting of non-notified transactions.

CFIUS is the interagency committee responsible for monitoring and reviewing foreign investment in the U.S. for potential national security risks.

Singapore Rises to the Top, While China Remains in Focus

In 2022, the countries most frequently reviewed by CFIUS remained largely the same as in prior years; Canada, Japan, South Korea, Germany, France and the United Kingdom remained among the top foreign investment countries reviewed by CFIUS. However, the report reveals a notable shift, with investments from Singapore taking the top spot at 46 filings reviewed – a significant increase from its 24 filings in 2021. Investments from China followed closely behind with the second-most filings reviewed in 2022 (41), down only slightly from its number of filings reviewed in 2021 (45), indicating that investments from China remain a focal point for CFIUS.

Key Takeaway: It is unclear what drove Singapore's sudden rise to the top, and whether the rise is related to the increased influx of wealth from China into Singapore. Even so, although Singapore and China were the top two investment countries, the two represented less than 20 percent of all CFIUS filings in 2022. Thus, all foreign investment transactions involving a U.S. business, even if the investment comes from a country friendly to the U.S., need to account for potential CFIUS risks as a best practice.

Sustained Interest in “Finance, Information and Services” and “Critical Technology”

The 2022 report shows that U.S. businesses described under the category of “Finance, Information and Services” comprised a little more than 50 percent of notices reviewed by CFIUS. While this percentage is similar to 2021, the percentage remains high relative to the 10-year average of 42 percent for this particular category, indicating that the increased focus by CFIUS in this category is likely a post-FIRRMA trend.

Within this category, there was significant movement in the subsectors of “telecommunications” and “scientific research and development activities.” For telecommunications, there were 31 total filings reviewed in 2022, compared to 17 in the prior year. And for scientific research and development activities, there were 41 filings in 2022, up from 20 in the prior year.

The report also shows that CFIUS reviewed 181 covered transactions involving U.S. “critical technology” companies (e.g., defense-related companies and advanced or emerging technology companies). Although similar to the prior year's number, 181 stands in contrast to the 76 critical technology transactions reviewed in 2018, which is the year when CFIUS first introduced its pilot program requiring mandatory declarations for certain critical technology transactions.

Key Takeaway: The types of U.S. businesses most frequently reviewed in 2022 generally fit the profile of CFIUS' so-called "TID U.S. business," i.e., a U.S. business involving critical technology, critical infrastructure, or sensitive personal data. Thus, the TID U.S. business analysis, which requires an export classification determination, will continue to play an important role in CFIUS assessments.

Challenges With Short-Form Declarations: More Investigations and Mitigation Measures

In 2020 and pursuant to FIRRMA, CFIUS introduced a short-form filing process involving a 30-day review, referred to as a declaration. Many frequent filers or parties with lower risk transactions have been relying on this option to get expedited clearance from CFIUS. In 2021, nearly 75 percent of the 164 declarations filed with CFIUS resulted in clearance. The 2022 report reveals, however, that declarations remain far from a sure thing for clearance. Of the 154 declarations reviewed in 2022, less than 60 percent were cleared by CFIUS, down nearly 15 percent from the prior year.

Additionally, about 32 percent of the declarations resulted in CFIUS instructing parties to file the longer notice, and about 9 percent resulted in no action by CFIUS. The report unfortunately does not provide further insight into the cause of the recent decrease in declaration clearance rate. Thus, it remains unclear, for instance, whether the decreased clearance percentage was a result of parties with lower CFIUS risk transactions choosing not to file at all with CFIUS or a result of more parties with higher CFIUS risk transactions hoping to gain clearance within the declaration's 30-day review period.

As for notices, CFIUS reviewed 286 of these filings in 2022, up from 272 notices in 2021. A closer look at the 2022 data also reveals that 1) more notices resulted in an investigation (162 up from prior year's 130), which means CFIUS reviews on average are taking longer; and 2) CFIUS imposed more mitigation measures or conditions (52 up from last year's 31) to resolve its national security concerns.

Key Takeaway: Although declarations remain a useful tool for the right transaction, parties cannot assume they can obtain CFIUS clearance within the 30-day declaration window and should plan accordingly. Parties should also consider identifying solutions for mitigating any national security risks in the early stages of a transaction, given CFIUS' increased imposition of mitigation measures to address national security concerns.

Higher Percentage of Non-Notified Transactions Resulted in CFIUS Filing

CFIUS continues to monitor M&A activity to identify those transactions that were not filed with CFIUS ("non-notified transactions") and posed a potential national security concern. The 2022 report reveals that CFIUS looked at thousands of non-notified transactions, and of those thousands, CFIUS targeted 84 non-notified transactions for further consideration. Of the 84 targeted transactions, CFIUS directed parties in 11 of the transactions to file with CFIUS, an increase from 2021. These numbers indicate that CFIUS has not slowed down or eased its monitoring and

scrutiny of non-notified transactions. The report also noted CFIUS' intentional shift away from review of pre-FIRRMA transactions to more recent non-notified transactions.

Key Takeaway: There is no statute of limitations restricting CFIUS' jurisdiction to review transactions after its completion. Transaction parties that choose not to file with CFIUS and obtain safe harbor (i.e., clearance) prior to closing risk being one of the non-notified transactions identified by CFIUS. Failure to file when a transaction is subject to mandatory declaration requirements can result in substantial monetary penalties. And, when parties must file with CFIUS as a non-notified transaction, the review process can pose unexpected challenges, such as CFIUS imposing strict mitigation measures or requiring divestment or unwinding of a transaction.

In summary, given another record-setting year, CFIUS remains a significant regulatory hurdle for foreign investments in the United States. When conducting their diligence and risk calculus and considering whether to file with CFIUS, transaction parties should bear in mind these trends and key takeaways.

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