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The 2022 Annual CFIUS Report: The Good, the Bad, and the Ugly

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The Committee on Foreign Investment in the United States (“CFIUS” or “the Committee”) has released its [annual report](#) to Congress, covering CFIUS’ activity during calendar year 2022 (the “Annual Report”). This Annual Report covers statistical changes related to CFIUS’ review of 2022 transactions (*i.e.*, declarations and joint voluntary notices (“JVNs”)), as compared to prior years.

Key Highlights:

Although CFIUS reviewed 440 notifications (*i.e.*, JVNs and declarations) in 2022, which looks like an increase of approximately 1% from 2021, parties only notified 337 Distinct Transactions¹ to CFIUS in 2022, which is a 4% decrease from the 351 Distinct Transactions CFIUS reviewed in 2021.

- Of these, 154 were declarations (an approximately 6% decrease from 2021), 50 of which resulted in a request for a JVN.
- Of these, 183 were Distinct JVNs², an approximately 3% decrease from 2021.

Parties withdrew 88 of 233 Unique JVNs³, an astonishing 38%, and abandoned the transaction in 20 of those 88 instances.

Approximately 28% of Unique JVNs resulted in some form of mitigation or the parties’ abandoning the underlying transaction because CFIUS and the parties could not agree on mitigation satisfactory to CFIUS.

The President did not issue any orders prohibiting or divesting any transactions in 2022.

While CFIUS continued to review non-notified transactions, it requested a formal JVN in approximately 13% of the total non-notified/non-declared transactions it considered.

CFIUS reviewed more transactions from Singapore than from any other country; approximately 14% of all Distinct Transactions involved an acquirer from Singapore and approximately 12% of all Distinct Transactions involved an acquirer from China.

¹ This figure represents the total number of transactions reviewed by CFIUS, calculated by summing the number of declarations and Distinct JVNs (as defined below). Where applicable, figures were calculated the same way for prior years.

² This figure represents the total number of JVNs filed (286), minus the 50 instances in which CFIUS requested parties to file a JVN after submitting a declaration, minus the 53 instances in which parties withdrew and refiled in 2022. In 14 instances, CFIUS did not make a determination at the end of the 30-day review process, and it is not clear whether the parties filed a JVN in those instances; we have assumed they did not file a subsequent JVN for purposes of calculating these figures. Where applicable, figures were calculated the same way for prior years.

³ This figure represents the total number of JVNs filed (286), minus the 53 instances in which parties withdrew and refiled in 2022. This figure includes the 50 instances in which CFIUS requested parties to file a JVN after submitting a declaration. Where applicable, figures were calculated the same way for prior years.

The Good:

CFIUS' Caseload Appears to Have Stabilized, Even in a Down Market

While CFIUS reviewed 286 JVN in 2022, as compared to 272 in 2021 (i.e., an approximately 5% increase), this figure includes JVN that were withdrawn and refiled as well as JVN parties filed after a request from CFIUS at the end of the declaration's assessment period. When accounting for each of those JVN situations, CFIUS reviewed 5 fewer JVN in 2022 than 2021, an approximately 3% reduction.

CFIUS Is Starting the Statutory Clock Promptly upon Submission of a Filing

The average number of business days that elapsed between the date of submission of a draft JVN and the date on which the Committee provided written comments on the draft JVN was 7.4 days, which is less than the 10-day deadline applicable under Section 721 of the Defense Production Act of 1950 ("Section 721"), but an increase from the 6.2 day average in 2021, and more in line with the 7.7 day average in 2020. The average number of business days that elapsed between the date of submission of a formal written JVN and the date on which the Committee accepted the formal written JVN was 4.5 days, which is also less than the 10-day deadline applicable under Section 721, and down from 6.0 days in 2021 and 9.1 days in 2020. Additionally, the Annual Report highlights that the average time it took CFIUS in 2021 to accept a declaration and start the 30-day review period was 5.6 days, which is largely consistent with the 5.5 calendar day average from 2021, and up slightly from a 4.7 business day average in 2020. These trends demonstrate CFIUS' continued ability to promptly initiate review after the parties file and are likely the result of increased staffing.

CFIUS Terminated a Large Number of Outdated Mitigation Agreements

CFIUS terminated 16 mitigation agreements in 2022, double the amount terminated in 2021, representing a termination of approximately 7% of active mitigation agreements in 2022, compared to approximately 4% in 2021. It is a difficult task to get such a diverse interagency committee to agree to terminate an existing agreement that was once deemed necessary to protect U.S. national security, so this is a particularly welcomed and positive sign.

CFIUS Review of Pre-FIRRMA Non-Notified Transactions Has Leveled Off

CFIUS, as well as certain of its member agencies, have developed internal systems to identify transactions that may be subject to CFIUS' jurisdiction and may raise national security concerns, but were not filed for its review (i.e., non-notified transactions). Once CFIUS identifies a non-notified transaction of potential concern, it contacts the parties and poses a set of questions to determine if further action is required. CFIUS has the authority to request that the parties file a JVN and CFIUS exercised this authority in 11 instances out of a total of 84 non-notified transactions (13%) that it considered in 2022, as compared to 8 of the 135 transactions (6%) it considered in 2021. The Annual Report suggests that CFIUS' non-notified process has matured such that, in certain instances, CFIUS is able to obviate the need to pose inquiries to the transaction parties and parties themselves increasingly are making defensible decisions after conducting reasonable due diligence to inform their decisions of whether a transaction necessarily warrants a voluntary filing. Notably, the Annual Report also suggests that CFIUS has largely cleared its pre-FIRRMA⁴ backlog of non-notified transactions to review, with less than 1% of the Committee's 2022 work in this regard constituting pre-FIRRMA cases, as compared to approximately 26% in 2021 and approximately 80% in 2020.

⁴ FIRRMA means the Foreign Investment Risk Review Modernization Act of 2018.

CFIUS Issued No Penalties in 2022

CFIUS released [enforcement and penalty guidelines](#) in October 2022, which provide the public insight into how CFIUS assesses violations of law and potential breaches of CFIUS mitigation agreements. Further, in the Annual Report, CFIUS indicated that it has increased the number of case officers dedicated to reviewing and investigating covered transactions and managing mitigation agreement compliance. Additionally, the Annual Report indicates that Treasury is hiring individuals with subject matter expertise to assist with its review, investigation, and enforcement capabilities as transactions grow increasingly complex. Despite this increased enforcement effort, CFIUS issued no penalties in 2022.

The President Did Not Issue Any Orders Prohibiting or Divesting Any Transactions in 2022

This could be an indication that the frequency of Presidential action in CFIUS matters could be returning to historical norms after peaking in the Trump administration. President Biden has never issued such an order. President Trump issued 4 such orders, the last of which was in 2020 that ordered Chinese-owned ByteDance to divest TikTok's U.S. operations and any data obtained or derived from TikTok or musical.ly users in the United States.

Covered Real Estate Transactions Still Represent a Small Percentage of Transactions Reviewed

Only 6 of the 440 notifications reviewed by CFIUS in 2022 involved a covered real estate transaction. Of these, 5 were declarations and 1 was a JVN. This is consistent with our expectations that covered real estate transactions would constitute a relatively small percentage of covered transactions subject to CFIUS review.

The Bad:

CFIUS Approved Fewer JVNs from the Initial Review Period and Sent More Transactions into the Second-stage Investigation Period

CFIUS only approved approximately 30% of the 233 Unique JVNs at the end of the initial review period, as compared to 40% in 2021. The Committee initiated 162 investigations, which accounted for approximately 70% of the Unique JVNs, as compared to 60% of the Unique JVNs in 2021. This increased use of the investigation period demonstrates that CFIUS is taking more time to conclude action with respect to certain transactions, despite having significantly increased its staffing and resources. CFIUS did not, however, utilize its authority to extend the investigation period under Section 721, which allows for one 15-day extension of the investigation period in extraordinary circumstances, as compared to doing so 3 times in 2021.

Use of the Short-Form Declarations Declined Because CFIUS Is More Frequently Requesting Full JVNs

CFIUS reviewed approximately 6% fewer declarations in 2022 than it did in 2021. This marks the first overall decline in the use of declarations since they were introduced in 2018. Of the 154 declarations, 44% were utilized to satisfy a mandatory filing requirement and the remaining 56% were voluntarily submitted. CFIUS requested that parties file a full JVN after reviewing a declaration in approximately 33% of the declarations, as compared to 18% in 2021, a notable increase and consistent with the trend of longer total review periods demonstrated by the large increase of JVNs withdrawn and refiled (discussed further below). CFIUS approved approximately 58% of the declarations within the 30-day review period, as compared to 73% in 2021. CFIUS was unable to complete action in 9% of the declarations, as compared to 7% in 2021.

The Ugly:

Parties Are Increasingly Withdrawing and Refiling or Abandoning Transactions

The Annual Report highlights an alarming and continued increase in the percentage of transactions that parties withdrew and refiled. Withdrawing and refiling a transaction should be rare because it effectively circumvents the statutorily required timeframes for CFIUS to conclude action. The Annual Report demonstrates that CFIUS is using this procedure to effectively extend the total relevant review period in nearly 1 out of every 3 Distinct Transactions and in nearly 1 out of every 4 Unique JVNs it reviews. This is a strong indication of a severe process failure in how CFIUS was conducting its reviews. Specifically, parties withdrew 88 of 233 Unique JVNs (1 during the review phase and the remaining 87 during the investigation phase), approximately 38%, as compared to 34% in 2021, 17% in 2020, and 14% in 2019. The parties filed a new JVN in 68 of these instances (*i.e.*, approximately 77% of withdrawn JVNs were re-filed). In 20 instances, parties withdrew a JVN and subsequently abandoned the transaction. The parties withdrew the JVN and abandoned the transaction in 12 of these instances after either CFIUS 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. In the 8 remaining instances, the parties withdrew their JVN and abandoned the transaction for commercial reasons. While the jump from 17% to 34% of withdraws in 2021 was much more drastic, it likely was attributable to challenges associated with implementing a new administration. It is disappointing to see this trend continue in 2022. Nonetheless, we are cautiously optimistic that this trend will reverse in 2023 with additional staffing improvements and increased experience within the political leadership.

CFIUS Is Requiring Mitigation in an Increasing Number of Transactions

The Committee required some form of mitigation in 52 instances, compared to 31 in 2021, of the 233 Unique JVNs that CFIUS approved—this is approximately 22% of the Unique JVNs reviewed/investigated, a notable increase over prior years. Further, approximately 18% of Unique JVNs required a national security agreement, also a notable increase compared to approximately 12% of Unique JVNs in 2021 requiring a national security agreement. Treasury Assistant Secretary Paul Rosen indicated that these increases were driven by the increasingly complex transactions reviewed by CFIUS, whose scope included increasingly complex technology. CFIUS also adopted mitigation measures to address residual national security concerns with respect to 3 JVNs that parties voluntarily withdrew and abandoned. CFIUS imposed conditions, separately, in letters issued by Treasury granting the withdrawal and abandonment for 5 JVNs, none of which involved mitigation agreements. CFIUS also adopted mitigation agreements for 3 JVNs that were voluntarily withdrawn and abandoned. CFIUS imposed measures to mitigate interim risk with respect to 3 JVNs filed in 2022. In 2021, CFIUS required mitigation in 31 of 218 (approximately 14%) Unique JVNs, as compared to 23 of 172 (approximately 9%) in 2020 and 33 of 216 (approximately 13%) in 2019.

Relatedly, the Annual Report indicates that the CFIUS mitigation figures do not capture a prohibition or divestiture effected through a withdraw of the notice and abandonment of the transaction. If such transactions were included in the mitigation statistics, approximately 28% of the Unique JVNs resulted in mitigation in this broader sense, amplifying the increase from 2021. This demonstrates that the Committee is increasingly comfortable requiring mitigation measures before approving a transaction. It also implies that CFIUS is increasingly requiring mitigation in the more routine transactions that do not directly involve countries of potential concern, which is consistent with our experience.

Conclusion:

The Annual Report serves as a strong reminder that parties should conduct thorough CFIUS due diligence when pursuing a transaction implicating CFIUS' jurisdiction. In 2022, more than 1 out of every 3 Distinct Transactions failed to clear within the statutory time frames and CFIUS required or effected mitigation in more than 1 out of every 4 Unique JVs. Moreover, CFIUS is aggressively looking for instances of non-compliance with its regulations and mitigation measures. Accordingly, parties are well advised to conduct comprehensive and defensible CFIUS risk assessments as early as possible in the transaction process.

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If you have questions concerning the contents of this alert, or would like more information, please speak to your regular contact at Weil or to the authors:

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