GIBSON DUNN

CFIUS Annual Report for CY 2022: Top Takeaways

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On July 31, 2023, the Committee on Foreign Investment in the United States ("CFIUS" or the "Committee") released its annual report covering calendar year 2022 (the "Annual Report"). Our top takeaways from the Annual Report are set forth below.

1. **2022 Numbers Set Another Record, or Did They?**

As we discussed in our client alert last year, 2021 saw a significant increase in CFIUS filings from prior years (436 total filings in 2021, compared to 313 the year prior). With a slight uptick in 2022, the total number of filings before the Committee largely stayed on pace with 2021, with the Committee reviewing a total of 440 filings, consisting of 286 notices (65 percent) and 154 declarations (35 percent).

Year-Over-Year Comparison of CFIUS Filings

	2020	**2021**	**2022 (? from 2021)**
Declarations	126	164	154 (?6%)
Notices	187	272	286 (?5%)
Total Filings	313	436	440 (?0.9%)

However, the total number of notices filed with the Committee includes those transactions that were subject to more than one notice (e.g., where the original notice was withdrawn and refiled). It also includes 50 declarations that resulted in a request from the Committee to file a full written notice.

Therefore, looking more closely at the numbers, after accounting for duplicate declaration filings and withdrawn and refiled notices, the Committee would have reviewed approximately 337 distinct transactions, a slight decrease from the 354 distinct transactions reviewed by the Committee in 2021.

Yet, placed in the broader context of a slower M&A market in 2022 and decreasing foreign direct investment year over year, the Annual Report data may suggest a significant proportional increase in CFIUS filings. By all accounts, the M&A market hit its peak in 2021. S&P Global reported that global deal volumes in 2022 were down 37 percent from a record-setting 2021.[1] Likewise, expenditures by foreign direct investors to acquire, establish, or expand U.S. businesses totaled $362.6 billion in 2021.[2] 2022, by contrast, saw just $177.5 billion in foreign direct investment.[3]

In other words, while the numbers themselves indicate a slight drop of distinct transaction reviews from 2021 to 2022, in the context of broader economic trendlines, the 2022 data indicates a substantial increase in the number of CFIUS filings relative to M&A activity and foreign direct investment in the U.S.

2. **After a Busy Year for Declarations in 2021, a Decline in 2022**

Fewer parties opted to take the short-form declaration route in 2022. While declaration

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filings jumped up 30 percent from 2020 to 2021, they decreased by approximately 6 percent in 2022. The numbers may reflect a growing hesitation in the market to use the short form filing process, except in transactions presenting minimal national security risk or where CFIUS may already be somewhat familiar with the transaction details (e.g., through past filings), due to risks of increasing the overall CFIUS review period. This appears to be particularly true regarding transactions that require mandatory declarations to the Committee, where the national security risks are generally higher, and where the parties are increasingly eschewing the declaration option and heading straight into voluntary notices. Of the 154 declarations filed in 2022, only 44 (or 28 percent) were subject to mandatory filing requirements. That is approximately the same ratio as 2021 (47 of 164).

From a regulatory standpoint, declarations offer the parties a potentially shorter review timeline of 30 days, as opposed to the 45-day initial review period plus another possible 45-day investigation period in the voluntary notice process. However, in practice, if CFIUS decides during the 30-day review period in a declaration process that the transaction warrants a closer look, or if the Committee cannot complete review to its satisfaction within the 30 days, the Committee may either request the parties file a voluntary notice, or notify the parties that the Committee is unable to conclude action, known colloquially as the "shrug," the latter of which results in the parties not obtaining the CFIUS safe harbor. In either event, the parties then find themselves in the position, for all intents and purposes, of having to file a voluntary notice, which restarts the 45-day review plus 45-day investigation clock (potentially after further delay while acquiring the additional information required in a full filing as opposed to the short-form declaration).

The Committee cleared less than 60 percent of declarations in 2022, a sharp decrease from the 73 percent clearance rate in 2021, and below the Committee's 64 percent rate of clearance in 2020. The cases in which the Committee was unable to conclude action during the 30-day assessment period increased from 7 percent in 2021 to 9 percent in 2022. And the number of instances the Committee requested the parties to a declaration file a full written notice increased significantly from 30 (18 percent) to 50 (32.5 percent).

Committee Disposition of Declarations

Committee Action	**Number of Declarations (154 total)**
Request Parties File a Written Notice	50 (32.5%)
Unable to Conclude Action	14 (9%)
Clearance	90 (58.5%)
Rejected	0 (0%)

3. **Filings by Business Sector and Origin Reflect Committee's Continued Focus on Protecting U.S. Persons' Sensitive Data and Critical Technology**

With the Committee's continued focus on protecting U.S. persons' sensitive data in foreign acquisitions, and consistent with previous years, the Finance, Information, and Services ("FIS") sector accounted for 52 percent or 149 of the 285 non-real estate notices reviewed by the Committee in 2022. The FIS sector includes several notable subsectors wherein sensitive personal data is very likely to be at issue, such as data processing, hosting and related services, telecommunications, professional, scientific, and technical services, and hospitals and other healthcare services. We expect filings in the FIS sector to continue to account for a large portion of the Committee's caseload going forward.

The Committee also reviewed 181 covered transactions involving acquisitions of U.S. critical technology companies in 2022, on par with the numbers in 2021. As we discussed last year, the 2021 decline in declarations by Chinese acquirers may have indicated that Chinese investors were increasingly shying away from the more sensitive technology transactions amid rising U.S.-China geopolitical tensions and increasing scrutiny by the Committee of such investments. The 2022 numbers continue to support this possibility.

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Compared to 2021, when Chinese acquirers accounted for 10 critical technology filings (which are mandatory), only 8 critical technology filings in 2022 involved Chinese acquirers. Overall, while China still accounted for the most covered notices of any country, 2022 saw a decline in total notices filed by Chinese investors, from 44 notices in 2021 to 36 notices in 2022.

4. **A Significant Increase in Mitigation Measures and Conditions**

2022 saw a dramatic 67 percent increase in instances where the Committee adopted mitigation measures and conditions to mitigate the national security risks associated with a transaction—from 31 instances in 2021 to 52 instances in 2022.

Of the 52 instances in 2022, CFIUS concluded action after adopting mitigation agreements with respect to 41 notices, approximately 14.3 percent of the total number of notices, or 22.4 percent of all distinct transaction notices in 2022. This represents a 58 percent increase from 2021 during which the Committee concluded action after adopting mitigation agreements with respect to 26 notices (approximately 10 percent of the total number of notices, or 13.7 percent of all distinct transaction notices in 2021.) Further, in 2022, CFIUS adopted mitigation agreements to address residual national security concerns with respect to three notices that were voluntarily withdrawn and abandoned. It also imposed conditions without mitigation agreements on five withdrawn and abandoned notices, as well as measures to mitigate interim risk with respect to three notices filed in 2021. As reflected in the chart below, these numbers are higher across the board when compared to the 2021 data.

As discussed in takeaway #1, the total number of notice filings in 2022 increased by only 5 percent, and the number of distinct notice filings in 2022 actually decreased. Thus, the data shows that the Committee imposed mitigation measures and conditions on notices with significantly higher frequency than last year.

	2021	**2022**
Concluded Action After Adopting Mitigation Measures	26	41 (?58%)
Adopted Mitigation Measures for Withdrawn and Abandoned Notices	2	3
Conditions Imposed on Withdrawn Notices Without Mitigation Agreements	2	5
Measures Imposed on Notices from Prior Years	1	3
Total	31	52 (?67%)

The increase in withdrawn notices from 2021 to 2022 may also be reflective of a more aggressive Committee on mitigation. In 2021, 27 percent of notices were withdrawn (74 notices). By contrast, in 2022, nearly 31 percent of all notices were withdrawn (88 notices). Only one of these notices was withdrawn during the initial review phrase, with the remaining 87 notices being withdrawn after the Committee's commencement of an investigation. According to the Annual Report, the majority of notices were withdrawn after the Committee informed the parties that the transaction posed a national security risk. In 12 instances following withdrawal, the parties abandoned the transaction either because CFIUS was unable to identify mitigation measures that would resolve the national security risk posed by the transaction, or the parties did not accept the mitigation measures proposed by the Committee. In 2021, parties abandoned the transaction for the same reasons in nine instances. These withdrawal numbers, in conjunction with the large uptick in mitigation numbers, suggest that the Committee is taking a more aggressive stance on imposing conditions on its approvals.

5. **The Number of Non-Notified Transactions Identified Decreased Substantially, While the Number of Requests for a Filing Increased**

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In addition to reviewing proactive filings, the Committee may also identify and initiate unilateral review of a transaction and may request the parties to submit a filing. In 2021, the Committee identified 135 non-notified transactions, with eight transactions resulting in a request for filing. In 2022, the Committee identified substantially fewer non-notified transactions—84 transactions—with 11 transactions resulting in a request for filing. Thus, while the overall percentage of identified transactions resulting in a requested filing more than doubled year over year (from 6 percent in 2021 to 13 percent in 2022), there is a noticeable decrease in the number of non-notified transactions identified by the Committee. While this is also potentially connected to the overall decrease in deal volume, given there is no statute of limitations on non-notified reviews, this does not seem to be the full picture.

In the Annual Report, the Committee explains that the "volume of overall non-notified transactions that were put forward to the Committee for consideration may continue to decrease" because "CFIUS is now primarily focused on monitoring more recent foreign investments for potential non-notified and non-declared transactions" as opposed to pre-FIRRMA transactions. Thus, the higher number of non-notified transactions in prior years may be a consequence of the Committee's expanded jurisdiction under the Foreign Investment Review Risk Modernization Act of 2018 (FIRRMA). Said another way, the broader scope of transactions falling within the Committee's jurisdiction post-FIRRMA may have resulted in additional non-notified transactions identified that occurred pre-FIRRMA. Given recent increases in CFIUS monitoring and enforcement staff and the Committee's stated focus on non-notified transaction reviews, it is unlikely that this declined rate of non-notified reviews will hold for calendar year 2023.

6. **The Committee Shortened Its Response Times to Respond to Draft Notices and Accept Formal Notices, but Continues to Largely Take Advantage of the Full Time Periods to Complete its Actual Reviews**

Parties submitting draft notices to the Committee in 2022 received comments back from CFIUS within an average of approximately seven business days. This represents a slight increase from the 2021 average of roughly six days, but it remains well within the 10-day deadline. The Committee averaged four-and-a-half business days to accept a formal written notice after submission, which is an improvement from the average of six business days reported 2021.

The Committee continues to utilize the full review period available to evaluate both declarations and notices. For declarations, the Committee took action, on average, at the conclusion of the entire 30-day period. For notices, the Committee completed review during the initial review stage, on average, within 46 calendar days. For notices that proceeded to the subsequent investigation phase, it took on average 80.5 calendar days for CFIUS to complete its investigations; the median value however was slightly longer, at 91 days. While the median data is consistent with 2021 data, the average value reflects a significant jump from 65 days in 2021—indicating that fewer and fewer notices are cleared in advance of the available 90-day review period.

* * * *

On the whole, the 2022 data evinces an increasingly vigilant Committee. Overall, the Committee reviewed slightly fewer distinct transactions, yet 2022 saw a significant increase in mitigation measures and conditions imposed. Thus, the data reflects an increasingly vigorous Committee when it comes to mitigating perceived national security risks. In light of this, the number of non-notified transactions resulting in a request for a filing is an area that parties should continue to watch, as the numbers reflect an increasingly efficient process for identifying more recent non-notified transactions for review.

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[1] S&P Global, Global M&A by the Numbers: 2022 in Review, *available at* https://www.spglobal.com/marketintelligence/en/news-insights/blog/global-ma-by-the-numbers-2022-in-review.

[2] U.S. Bureau of Economic Analysis, New Foreign Direct Investment in the United States, *available* here.

[3] *Id.*

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