


Keep Your Investors Close, but CFIUS Closer:

Highlights from the CFIUS Annual Report and
Other Developments in Washington

August 2023



Dechert
LLP

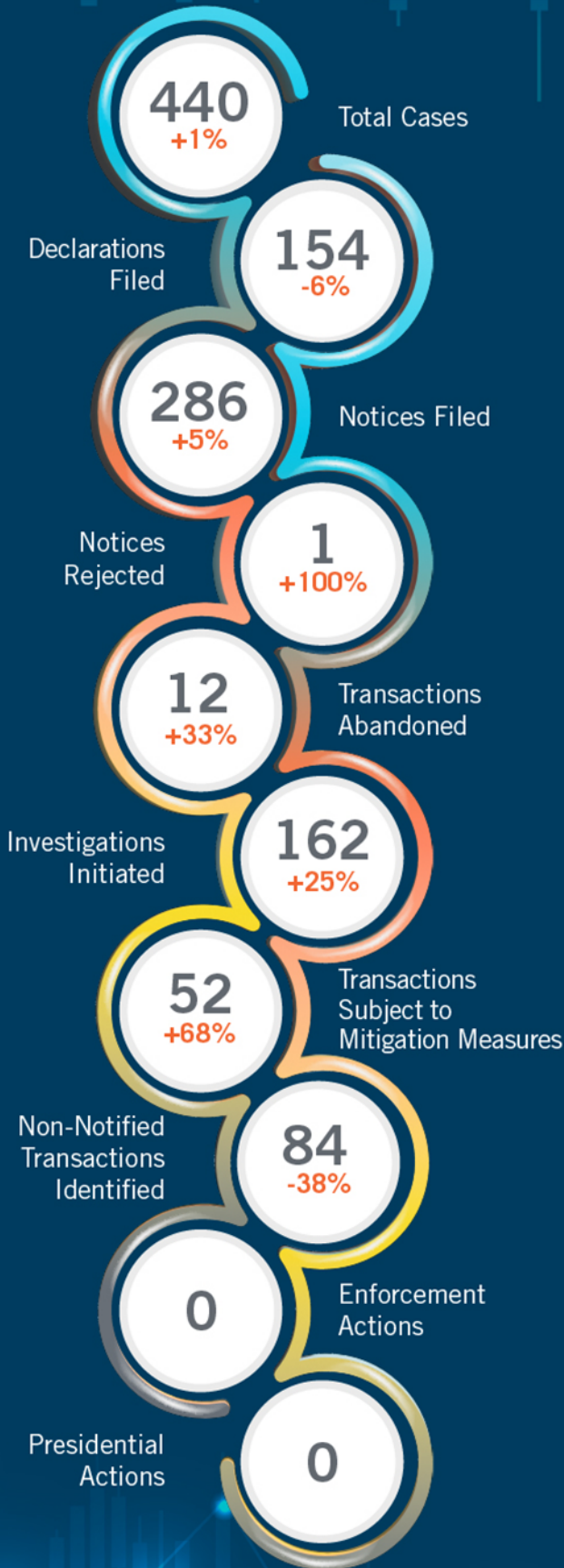


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Key Takeaways

- On July 31, 2023, the U.S. Department of the Treasury (“Treasury”) published the Committee on Foreign Investment in the United States’ (“CFIUS” or the “Committee”) Annual Report to Congress on key activities, including notices, declarations, and withdrawals through 2022 (“Annual Report”).
- The Annual Report and other guidance issued by the Committee in recent months hold important insights for dealmakers contemplating participation by non-U.S. investors in investments in U.S. businesses.
- The publication of the Annual Report also caps off what has been a “hot” year for the Committee. Fresh off a year in which CFIUS reviewed a record 440 covered transactions, there have been a dizzying number of developments that impact private equity, real estate, and venture capital transactions. There are developments adjacent to CFIUS worth monitoring as well, including proposed legislation intended to protect American farmland from foreign ownership and a potential outbound investment review mechanism, which may be announced as soon as this week.
- The trendlines remain clear – the U.S. government remains focused on managing the impact of foreign investments on U.S. national security. As compared to prior years, the Annual Report demonstrates that fewer transactions received clearance on initial review and more required national security agreements in 2022 than in prior years. In addition, more transactions are being abandoned by parties after they are unable to agree to mitigation measures with CFIUS. In light of these and other developments, dealmakers would be wise to evaluate CFIUS risks at the start of the transaction process and develop a sophisticated strategy to navigate the current headwinds. We can help.

2022 At A Glance
As Compared to 2021



CFIUS 2022 Annual: The Committee's Biggest Year Ever (Even Bigger Than Last Year)!

Timelines for CFIUS Reviews continue to increase.

Absent a withdraw/refile, the longest possible review timeline for a CFIUS review is 105 days. This includes an initial review period of 45 days, a possible additional 45-day investigation if determined necessary (in CFIUS' sole discretion) and, in extraordinary circumstances, an additional 15-day extension of the investigation period (prior to submission for presidential consideration). Notably, the Committee did not exercise its authority to extend an investigation in extraordinary circumstances in 2022, although it did so three times in 2021. The Committee did not provide guidance in the Annual Report regarding the circumstances that were sufficiently extraordinary to merit the use of this authority. As a practical matter, CFIUS often invites parties to request its approval to withdraw and resubmit filings, which restarts the clock and allows the parties and the Committee more than 15 days to conclude a review.

In 2022, 56% of notices extended into an investigation period, which is an increase of almost 10% from over the prior year (in which 47% of notices went into an investigation period). Investigations now are not only more likely, but also longer. The average investigation in 2022 lasted 80 days, which is two weeks longer than the average investigation length in 2021 (65 days).

Average Length of CFIUS Investigations (2021 vs. 2022)



The Annual Report also provides other valuable data on Committee timing. In 2022, it took CFIUS on average more time (7 business days) than it did in 2021 (6 business days) to provide parties with written comments on draft notices submitted to the Committee, but less time (4 business days) than it did in 2021 (6 business days) to accept a formal notice for review once it has been submitted.

Although these review times have held comparatively steady for now, there may be increased efficiency going forward due to a hiring push by the Committee. For example, for FY 2024, Treasury has requested an additional 39 full-time employees to work on CFIUS activities. This number is a significant increase (44%) over the 27 additional people that Treasury requested for FY 2023. In total, Treasury seeks to have 141 full-time employees in FY 2024 working on CFIUS matters.

Declarations can speed up the CFIUS review process, but often add uncertainty and time to reviews.

When filing a declaration, there are a range of possible outcomes (as opposed to the filing of a notice, which provides parties with a clear-cut response from the Committee). CFIUS may respond to a declaration by informing parties that it: (1) cleared the transaction, (2) initiated a unilateral review, (3) requested that the parties submit a full formal notice, or (4) is unable to reach a decision regarding clearance based on the declaration alone. The data from the Annual Report shows how these options continue to play out for non-U.S. investors.

In 2022, CFIUS was “unable to complete action” in a smaller percentage (9%) of the declarations filed, which is consistent with data from 2021, in which CFIUS was “unable to complete action” on 7% of declarations filed. However, there was also a smaller percentage (54%) of transactions cleared through the declaration process as compared to 2021, in which 75% of transactions were cleared using this process. The percentage of declarations filed by parties that did not have a mandatory declaration filing obligation remains consistent with prior years (72% in 2022 compared to 71% in 2021). Although there are benefits to the more efficient timeline of the declaration process, transaction parties should continue to carefully evaluate the submission of a declaration versus the submission of a notice if the Committee is unlikely to either clear the declaration or reach a conclusion with respect to such submissions.

2022 Declarations Assessments



CFIUS is increasing its use of mitigation measures (including during the course of an active case review).

In 2022, there was a 67% increase in the number of transactions subject to mitigation measures as compared to 2021. As described further below, the Annual Report also illustrates that such mitigation measures can be imposed at various points in the transaction review timeline (and not just at the conclusion of a review).

CFIUS can impose mitigation measures on a non-U.S. party’s investment in or acquisition of a U.S. business to resolve any national security risks that the Committee identifies during its review. The Annual Report included examples of mitigation measures negotiated in 2022 that required the parties involved to take specific and verifiable actions. These actions included the following:

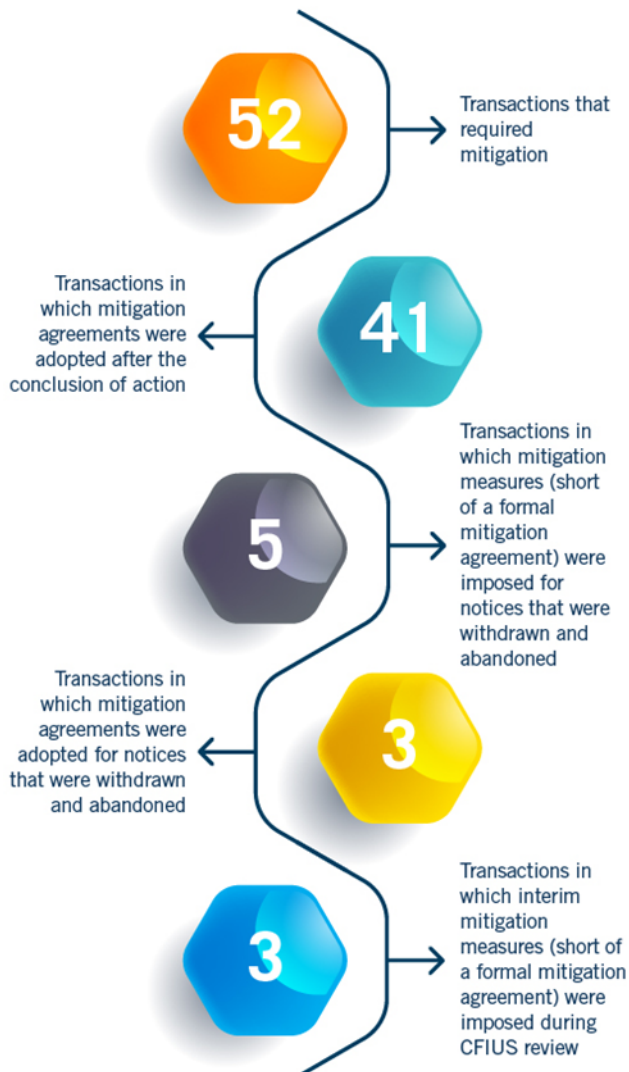
- Establishing guidelines and terms for handling existing or future contracts with the U.S. Government or its contractors, U.S. Government customer information, and other sensitive information;
- Establishing a corporate security committee, voting trust, and other mechanisms to limit non-U.S. influence and ensure compliance, including the appointment of a U.S. Government-approved security officer and/or member of the board of directors and requirements for security policies, annual reports, and independent audits; and
- Requiring prior notification to and approval by relevant U.S. Government parties in connection with any increase in ownership or rights by the non-U.S. acquirer.

The data in the Annual Report reflects a similar percentage of overall transactions requiring mitigation measures in 2022 (52, which represented 11% of all transactions reviewed by the Committee) in comparison to 2021 (31, which represented 11% of all transactions reviewed by the Committee). However, this data point can be misleading because the Committee’s use of mitigation measures also increased by 67% in 2022. Given the Committee’s increased focus on enforcement, transaction parties should take note of this increase. As we have highlighted previously (please see our May 2023 OnPoint [here](#)), mitigation has been a through line in recent remarks from CFIUS officials, and there appears to be at least a tacit acknowledgment of CFIUS’ increased use of mitigation measures (in particular, National Security Agreements) in connection with clearing proposed transactions. As CFIUS looks at risk more broadly, even

if its risk formula has remained unchanged (threat + vulnerability + consequence), transaction parties must ensure that they, too, employ thoughtful CFIUS risk mitigation strategies.

Transaction parties should also take note of the various points in the review timeline at which the Committee imposed mitigation measures; not all were imposed at the conclusion of a review. In eight instances, CFIUS adopted mitigation measures (both mitigation agreements and conditions short of a formal mitigation agreement) in cases in which parties withdrew and abandoned their notices. Mitigation measures were also imposed to address interim risk before the conclusion of a review in three instances in 2022. Transaction parties should continue to evaluate in advance of CFIUS' review what mitigation measures might be required and determine whether, and to what extent, such measures might impact the feasibility of proceeding with the transaction (and on what timetable).

CFIUS Use of Mitigation in 2022



The number of notices withdrawn from CFIUS review is increasing, which signals the increased complexity in navigating the CFIUS process.

Not only did 2022 mark an increase in the use of mitigation measures, but also it saw an increase in the number of notices withdrawn from CFIUS review (88, which represented 30% of all notices submitted to the Committee for review) as compared to 2021 (74, which represented 27% of all notices submitted to the Committee for review). Although most of the notices withdrawn were then resubmitted (68, or 77% of all notices that were withdrawn), there were still 20 notices withdrawn (i.e., 23% of all notices withdrawn) from the CFIUS review process and abandoned. In 12 such instances, either CFIUS could not identify mitigation measures that would resolve the Committee's national security concerns, or the parties were unwilling to accept the mitigation measures presented to them. In eight such instances, the parties withdrew their notices and abandoned the transactions due to commercial reasons (which could also include reasons related to perceived CFIUS risk).

Withdrawing and refiling notices also has implications for parties' transaction timelines; when a notice is withdrawn and refiled CFIUS can "restart the clock." This provides the Committee an additional 45 or 90 days (or more) to review the transaction and can add months to the CFIUS review timeline. The withdrawal data from the Annual Report also highlights the increased complexity in the CFIUS process; which further emphasizes the need to develop a thoughtful CFIUS strategy early in transaction negotiations.

2022 Notices Withdrawn

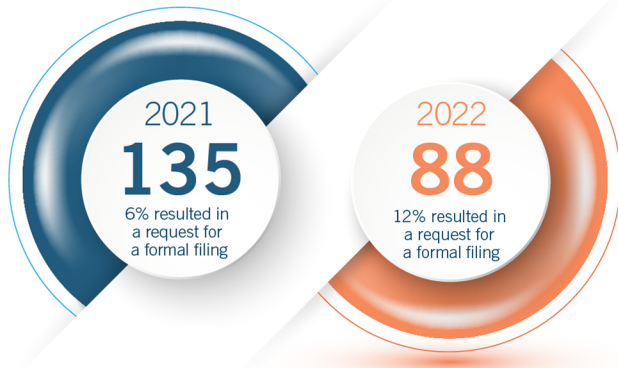


Despite what the Annual Report data shows, CFIUS' office of non-notified transactions team is very busy.

According to the Annual Report, CFIUS identified and requested information regarding 88 "non-notified" transactions (meaning transactions that technically fall within CFIUS' jurisdiction but were not presented to the Committee for review), which is a decrease from 2021 (135). Moreover, of those 88 transactions, only 11 (or 12%) resulted in a request for formal filing, although

this number does not reflect instances in which parties chose to voluntarily file a declaration or notice after engaging with CFIUS regarding the non-notified transaction. In 2021, eight of 135 transactions (or 6%) resulted in a formal request for a filing.

Identified Non-Notified Transactions (2021 vs. 2022)



Although the data from the Annual Report (and its 2021 precedent) reflect a low number of formal requests for a filing, as we reported in May 2023, CFIUS officials have stated that the Annual Report data does not tell the full story. The Annual Report itself bolsters this point, and states that CFIUS member agencies review thousands of transactions in the course of a year. Given the uptick in deals before CFIUS, together with the Committee’s focus on identifying non-notified transactions, it remains important for transaction parties to include CFIUS considerations during transaction diligence.

Non-U.S. investors from “Excepted Foreign States” and U.S. allied countries continue to account for a large share of transactions submitted for CFIUS review.

In 2021, it was noteworthy that investors from China reversed a ten-year decline in transactions presented to CFIUS for review. In 2022, such investors were still a part of the story, but it was investors from allied nations and “excepted foreign states” that dominated the data set. With respect to notices, investors from Singapore accounted for 37 notices submitted for review, with investors from China (36) in second place and investors from the United Kingdom (18) in third place. With respect to declarations, investors from Canada accounted for 22 declarations submitted for review, with investors from Japan (18) in second place and investors from South Korea (11) in third place. In addition, with respect to acquisitions of critical technology, in 2022, investors from Japan (16) came in first with such transactions submitted for review, with investors from France (14) in second place and investors from Canada (13) in third place.

2022 Top Non-U.S. Investors by Country



It is also noteworthy that investors from Australia, Canada, the United Kingdom, and New Zealand (despite the countries’ status as “excepted foreign states” under the CFIUS regulations during 2022) accounted for 17% of all CFIUS filings submitted (though this number is down slightly from 19% in 2021). As nationals of “excepted foreign states,” investors from Australia, Canada, the United Kingdom, and New Zealand enjoy benefits not available to other foreign investors. For example, under certain circumstances, “excepted investors” are not subject to mandatory filing requirements and are shielded from CFIUS’ expanded jurisdiction over non-controlling investments in certain U.S. businesses and certain U.S. real estate transactions. In theory, such benefits may enable such “excepted investors” to present to their potential transaction partners fewer impediments to closing as compared to other foreign investors who condition their investments on the receipt of CFIUS’ approval. In practice, investors from these countries continue to submit transactions for the Committee’s review at a higher rate than other countries, making their status seem like it might be a distinction without a difference.

Clarifications & Amplifications: The Transaction “Completion Date”

If a covered transaction triggers a mandatory filing obligation, the CFIUS regulations state that the parties must submit the required declaration to the Committee for review thirty days before the “completion date” of the transaction. As discussed above, CFIUS’

Annual Report demonstrated that mandatory filings continue to be on the rise, and so transaction parties must remain vigilant with respect to these evolving rules. As we reported in May 2023, CFIUS officials noted an interpretative divide between the Committee and the market in this regard. In CFIUS' view, the "completion date" is the date on which any applicable equity interest in the U.S. business is acquired (even if this occurs prior to the conveyance of any corresponding governance rights). However, in the market's view, the "completion date" is the date on which any applicable equity interest is vested (e.g., when corresponding governance rights have actually been conveyed).

From a rulemaking perspective, it is interesting to note that CFIUS has not amended the regulations on this score. By presenting its position in the form of a new FAQ, CFIUS appears to be taking the position that the rule has always been clear, and the market has been misinterpreting it. While many market participants can point to interactions with government officials over a period of years that would seem to contradict this assertion, at this point it appears CFIUS has "codified" its stance by other means.

The immediate impact? There are potential complications for parties utilizing a "springing rights" structure for certain transactions. In recent years, when a transaction triggered a mandatory filing obligation but transaction timing outpaced the parties' ability to make a CFIUS filing, CFIUS did not object when parties structured transactions so only passive interests and rights were conveyed at closing while non-passive equity interests (e.g., certain governance rights) would not be conveyed (or "spring") until a CFIUS review had been completed and CFIUS clearance had been obtained. However, with the publication of the new FAQ, this longstanding market strategy will require refinement.

Transaction parties subject to a mandatory filing obligation must now submit a CFIUS filing 30 days prior to the conveyance of any equity interest. However, the FAQ only states that a CFIUS filing needs to be submitted (not concluded) 30 days prior to closing, which means that the transaction can still close ahead of the receipt of CFIUS clearance as long as such closing occurs at least 30 days after the submission of the CFIUS filing. Some ambiguity remains, however, with respect to whether the clock starts upon submission of the CFIUS filing or upon the Committee's acceptance of the CFIUS filing (which can occur up to 10 business days after formal submission).

Know Your Limited Partners

In another recent update to its FAQs, CFIUS clarified that it can "request follow-up information with respect to all foreign investors that are involved, directly or indirectly, in a transaction, **August 2023**

including limited partners in an investment fund." During his May 31, 2023 [testimony](#) before the Senate Committee on Banking, Housing, and Urban Affairs, Assistant Secretary of the Treasury for Investment Security Paul Rosen stated that while CFIUS "does not have the regulatory framework to require the specificities" of limited partners, any parties to a transaction subject to CFIUS review will be "highly motivated" to provide that information. In sum, parties should expect more focus from the Committee on non-U.S. limited partners in investment funds that are involved in a covered transaction.

Specifically, the FAQ notes that CFIUS can request such information "regardless of any arrangements that may otherwise limit the disclosure of such [non-U.S. person's] identity." It also notes that the Committee can "request information with respect to any governance rights and other contractual rights that investors collectively or individually may have in an indirect or direct acquirer or the U.S. business....to facilitate the Committee's review regarding national security risk-related considerations."

While parties already provide certain information to the Committee regarding indirect non-U.S. investors participating in a transaction (and CFIUS already has the right to ask for the same), the new FAQ emphasizes the importance of knowing your limited partners and giving careful consideration to transaction arrangements. For example, who are the ultimate beneficial owners of the limited partners? What rights do the limited partners have with respect to the control and management of the investment fund and/or its general partner or managing member equivalent? What rights do the limited partners have with respect to the control and management of the investment fund's portfolio companies and/or the U.S. business to be acquired? More than ever before, transaction parties should be prepared to engage with CFIUS on these questions.

More Military Installations, More Problems

On May 5, 2023, Treasury [published](#) a proposed amendment to the CFIUS real estate regulations at 31 C.F.R. Part 802 to amend the definition of "military installations" and add eight new locations identified by the U.S. Department of Defense as important to national security (the "Proposed Real Estate Amendment"). Treasury completed the notice-and-comment period for the Proposed Amendment on June 5, 2023.

The newly added military installations are in Arizona, California, Iowa, North Dakota, South Dakota, and Texas and are the following:

- Luke AFB – Glendale, Arizona

- Air Force Plant 42 – Palmdale, California
- Iowa National Guard Joint Force Headquarters – Des Moines, Iowa
- Grand Forks AFB – Grand Forks, North Dakota
- Ellsworth AFB – Box Elder, South Dakota
- Dyess AFB – Abilene, Texas
- Lackland AFB – San Antonio, Texas
- Loughlin AFB – Del Rio, Texas

The above additions to the list of military installations come at a time in which the CFIUS real estate regulations (and their perceived shortcomings) have been in the spotlight.

In 2021, a Chinese company acquired a 300-acre parcel of land 12 miles from Grand Forks AFB in order to build a corn-milling plant. The transaction caught the attention of locals and Congress alike. It also raised the specter of “gaps” in CFIUS’ jurisdiction when the Committee determined that it did not have jurisdiction to review the transaction (notwithstanding the U.S. Air Force’s assertion that the base is central to U.S. air and space operations, the Pentagon did not include it on the initial list of sensitive military installations in the CFIUS regulations). While the transaction did not go through after the U.S. Air Force raised concerns with local officials, the transaction (and CFIUS’ lack of involvement) was national news for over a year. As the discussion below makes clear, foreign acquisitions of U.S. farmland and other land intended for agricultural uses remain in the spotlight.

Lend a Hand on the Land – Protecting America’s Heartland

The situation in Grand Forks also highlights the continued attention being devoted to protect America’s farmlands and agricultural industry from foreign ownership. Even though the statistics in CFIUS’ Annual Report do not signal many reviews in the agricultural investment space, the amendments contemplated here signal heightened attention around land ownership, and we should expect to see statistics regarding CFIUS’ review of transactions in the agricultural increase in future years. A number of bills have been proposed in Congress during 2023 to expand CFIUS’ powers in this regard, including the following:

On January 31, 2023, U.S. Senators Jon Tester (D-MT) and Mike Rounds (R-SD) introduced the *Promoting Agriculture Safeguard and Security Act* (the “PASS Act”), which aimed to add the Secretary of Agriculture as a standing member of CFIUS so that the Committee could consider “agricultural needs when making

determinations affecting national security.” The PASS Act additionally prohibited the acquisition of U.S. agricultural land and agricultural businesses by China, Russia, Iran, and North Korea (i.e., U.S. “foreign adversaries”) and required a report to Congress from the U.S. Department of Agriculture on “risks posed by foreign takeovers of U.S. businesses engaged in agriculture.” The PASS Act was also introduced in March 2023 as the *Protecting America’s Agricultural Land from Foreign Harm Act* by Senators Tester, Mike Braun (R-ID), Marco Rubio (R-FL), and Tommy Tuberville (R-AL).

On July 12, 2023, U.S. Representatives Mike Thompson (D-CA) and Mike Gallagher (R-WI), introduced *The Protecting U.S. Farmland and Sensitive Sites From Foreign Adversaries Act*, which picked up where the PASS Act left off. In addition to giving the Secretary of Agriculture CFIUS membership, it would grant CFIUS jurisdiction over almost all acquisitions of land in the United States by “foreign adversaries entities” (i.e., entities from China, Russia, Cuba, Iran, North Korea, and Venezuela). Perhaps most importantly, it would also establish a “presumption of non-resolvability” for land acquisitions near sensitive sites such as military installations and U.S. intelligence facilities.

On July 14, 2023, Senators Chuck Grassley (R-IA), Debbie Stabenow (D-Mich), Joni Ernst (R-IA) and Tester reintroduced legislation aimed at protecting U.S. agricultural interests from foreign acquisition, the *Food Security is National Security Act*. This bill would add both the Secretary of Agriculture and the Secretary of Health and Human Services to CFIUS. It would also require the Committee to consider the potential effects of a covered transaction on “the security of the food and agriculture systems of the United States, including any effects on the availability of, access to, or safety and quality of food.”

Senator Rounds also introduced an amendment to the National Defense Authorization Act for Fiscal Year 2024 (“2024 NDAA”) on July 18, 2023, titled *Review of Agricultural-Related Transactions by Committee on Foreign Investment in the United States*. The amendment would prohibit certain non-U.S. investment in U.S. businesses engaged in agriculture or biotechnology related to agriculture or private real estate used in agriculture. The amendment would also add the Secretary of Agriculture to CFIUS.

Concerns about U.S. food security were also present in the Biden Administration’s Executive Order on Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States issued in September 2022 (which we covered [here](#)). In the Order, the Biden Administration directed CFIUS to focus attention on “elements of the agriculture industrial base that have implications for food security.”

If any of the bills described above (or the amendment to the current draft of the 2024 NDAA) were to become law, the scope of CFIUS' mission and/or its membership would be formally broadened. Even if not further addressed at the federal level by the Biden Administration or Congress, the issue will continue to receive significant attention at the state level. In the last 18 months, almost three dozen state legislatures have either passed laws that restrict certain non-U.S. ownership of, or investment in, agricultural land or proposed bills to that effect that remain under consideration.

The Mysterious Affair of Emerging and Foundational Technologies

In June, the Congressional Research Service (“CRS”) published a summary [report](#) on CFIUS that provided a helpful primer on the Committee and the CFIUS review process. It also identified certain CFIUS issues for Congress to consider, one of which was “[h]ow is the Commerce Department’s process of identifying ‘emerging and foundational technologies’ for export controls facilitating or hindering CFIUS reviews of transactions related to such technologies?”

Seemingly benign, the question touches on a potentially sensitive issue. Pursuant to Section 1758 of the Export Control Reform Act of 2018, the U.S. Commerce Department's Bureau of Industry and Security (“BIS”) is required to identify foundational and emerging technologies that are essential to U.S. national security and to impose appropriate export controls. The identification of technologies as “foundational” or “emerging” has implications for the CFIUS review process because the definition of “critical technologies” under the CFIUS regulations is tied to an item’s export control classification. Of course, CFIUS’ review of transactions regarding “critical technologies” has consistently been a large part of CFIUS’ national security agenda and continues to be, as demonstrated by the increasing statistics in the Annual Report. Although BIS has identified and implemented controls on certain new technologies since beginning its review, the process has been slow going. It remains to be seen whether the CRS report will pressure BIS to move more quickly.

Someday Outbound Review Will Come

As we have previously reported, the establishment of a U.S. outbound investment review mechanism still appears to be on the not-so-distant horizon – and may be announced as soon as this week. The word remains that the Biden Administration is finalizing its proposal and that CFIUS will play an important role in the implementation of the outbound investment review mechanism (although it will not be a “reverse CFIUS” process).

Once established, the outbound investment review mechanism will be the first of its kind in a major western economy (though we note that China, Taiwan, and South Korea each has a form of outbound investment review mechanism). Currently, the Biden Administration is focused on garnering support, and determining coordination, among allied countries.

In the meantime, Congress has put forth another proposal of its own (note that earlier Congressional proposals introduced in 2021 regarding outbound investment, which you can read more about [here](#), stalled in the face of bipartisan disagreement). On July 26, 2023, the U.S. Senate overwhelmingly passed a 2024 NDAA amendment introduced by U.S. Senators Bob Casey (D-PA) and John Cornyn (R-TX) that introduces new rules for certain U.S. outbound investment. The amendment would require U.S. investors to notify Treasury when they invest in non-U.S. companies connected to countries of concern (e.g., China and Russia) within certain sensitive sectors (e.g., artificial intelligence and quantum computing). The proposed amendment appears to be in line with what has been reported regarding the Biden Administration’s imminent Executive Order, which will focus on U.S. entities involved in “key advanced technologies that are critical to the United States” (e.g., artificial intelligence, semiconductors, and quantum computing) and notification regarding in-scope investments as a means for the U.S. Government to gather information (as opposed to blocking certain in-scope transactions). The U.S. Senate must now reconcile its version with the U.S. House’s version (which has its own amendments). We will continue to track the 2024 NDAA process as it unfolds.



Conclusion

The Committee remains active as it adjusts its mission to protect U.S. national security in a constantly evolving risk landscape and an increasingly anxious world. Transaction parties contemplating investments (whether direct or indirect) by non-U.S. investors in U.S. businesses should continue to evaluate CFIUS considerations early in the transaction process to avoid surprises and delays on their preferred path to closing.

Dechert represents a wide range of clients through CFIUS reviews, including major operators and investors in the high tech, telecommunications, energy, defense, and infrastructure industries. We regularly advise foreign and domestic entities (“buyers” and “sellers,” as well as other interested third parties) through the CFIUS review process, helping them determine whether or not to bring a transaction before the Committee (and whether or not CFIUS review is required), to assemble the required information and materials for a filing, and then (as necessary) to negotiate national security agreements with CFIUS in a manner that minimizes both delay and the imposition of conditions that might threaten the transaction. We also give counsel on strategies for identifying and addressing political and policy considerations that may arise.

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