

FOREIGN INVESTMENT WATCH

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Key Takeaways from 2022 and Bold Predictions for 2023: Insights from advisors, partners and readers

We reached out to former CFIUS officials, our Editorial Advisory Board, our Founding Advisors, and many of you, to provide key takeaways from 2022. Inside are key insights on changes to the national security calculus, the prospects for enforcement actions, supply chain scrutiny and more.

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Key 2022 Takeaway: Excessive Degree of “Foreignness” in Sensitive Sectors

The issuance of Executive Order No. 14083 by President Biden on September 15, 2022, was the most important CFIUS development in 2022. Much of the attention given to the Order has centered on the specific activities/sectors it directs CFIUS to enlarge its deal review focus on: (i) shoring up the resiliency and diversification of U.S. supply chains; (ii) enhancing U.S. cybersecurity—not only in the public sector but also in the private, educational and not-for-profit sectors; (iii) ensuring protection of U.S. citizens’ sensitive personal data, and (iv) maintaining U.S. leadership in advanced technologies, investment in R&D and, innovation.

But the most far-reaching review criterion specified in the Order — which is embodied in FIRRMA as a factor that CFIUS may consider in its deliberations — is a requirement that CFIUS is to take a cross-cutting integrative approach in its assessment of a particular transaction in sensitive sectors. These are defined in FIRRMA as “critical infra-structure, energy assets, critical material or critical technology.”

Rather than making such judgments *seriatim*, under the Order, CFIUS must assess the national security impacts of a prospective transaction in light of the nature, magnitude and scope of the existing cumulative foreign investment or the trend of foreign investment in the sector in question. In other words, the Order is instructing CFIUS to guard against sensitive sectors in the U.S. from becoming dominantly owned by foreign parties.

The objective is not fostering competition—the purview of antitrust officials in the Department of Justice, which is, of course, a CFIUS member. Rather, the goal is ensuring there is not an excessive degree of foreignness in the sector—[regardless of the strength of competitive forces](#), which is measured by the number and size distribution of firms in a market typically without regard to nationality.

Bold 2023 Prediction: Sustainability, ESG Coming for CFIUS Assessments

We economists have a mixed (some might say “very mixed”) track record on making accurate predictions, let alone bold ones. Subject to that disclaimer, I predict the Biden White House will issue an Executive Order that mandates CFIUS assessments to include assessments of the impacts of inbound foreign investment on U.S. sustainability or ESG.

To the uninitiated, ESG (environment, social and governance) impacts of economic activity are almost always thought of in terms of downside risks. Think: pollution in the U.S. emanating from a foreign firm’s industrial processes; foreign businesses paying below-market wages to U.S.; or foreign firms’ policies or conduct unduly (perhaps exclusively) focused on perquisites accruing to management overseas rather than being shared with local shareholders/stakeholders.

But there can be, of course, ESG upsides to how foreign businesses operate (just as there can be for domestically owned firms). Think of the inverse of the examples posed above. My own view is that a business that grasps the import to its bottom line of integrating sustainability practices into its operations is working towards maximizing its long-run profitability.

Given the seriousness with which the Biden administration views ESG-related matters, it may not be too farfetched for the White House to consider issuing an Executive Order proclaiming that threats to U.S. sustainability are tantamount to undermining U.S. national security. To that end, the Order could require CFIUS deliberations to consider the impacts on sustainability of proposed transactions involving foreign parties.