FOREIGN INVESTMENT WATCH

OCTOBER 15, 2023

Ex-CFIUS member: The Committee should overhaul, enhance its reports

Over the last several years, numerous Foreign Investment Watch readers have complained about the value of the CFIUS annual reports to Congress, calling them everything from "opaque" to "lacking." For insights on this matter, we turned to Harry Broadman, partner and managing director of Berkeley Research Group, where he chairs both the firm's CFIUS and Emerging Markets practices. A former member of CFIUS, Broadman has also served as U.S. Assistant Trade Representative, Chief of Staff for the President's Council of Economic Advisers, and Chief Economist at PwC.

CFIUS' Annual Reports to Congress are pored over by companies, investors, policymakers, and other economic stakeholders both in the U.S. and abroad to glean insights from the data presented about Washington's national security disposition toward foreign capital inflows. Regrettably, like previous versions, the new *2022 Annual Report to Congress*, released in July, provides scant economically meaningful information about CFIUS' actions.

Harry Broadman is a partner and managing director of Berkeley Research Group, where he chairs both the firm's CFIUS and Emerging Markets practices.

Providing such data *can* be done without running afoul of security and confidentiality protocols. Omitting them erodes the global and domestic economic prospects of the U.S. In these reports, CFIUS likely conveys a distorted and perhaps an erroneous portrait of the stance of U.S. foreign investment policy.

Indeed, even if CFIUS' decisions amount to U.S. policy becoming more welcoming to foreign direct investment — whether in certain sectors or writ large — the absence of credible economic information presented by CFIUS can amount to engendering a chilling effect on the nation attracting such investment.

CFIUS' Economic Policy Context

The United States has long been the global champion for "open" inflows of foreign investment. Over the last two decades, however, amidst the intensification of national economic security threats from other nation-states — notably China and other authoritarian countries — and more recently following the enactment of FIRRMA, designed to help inoculate the country from these threats, the U.S. has shifted to a "conditionally open" foreign investment regulatory regime.

As most Foreign Investment Watch readers know, FIRRMA notably enhanced the power of CFIUS. Established in 1975, today CFIUS has become the envy of the world's other major democracies also intent on mitigating national economic security threats. Several have established CFIUS-like bodies and have enacted laws and regulations to underpin their authority or are in the process of doing so.

Whether that envy is fully deserved, however, is an open question — literally. This is because most of the data submitted to CFIUS by the parties to the transactions it reviews are not publicly disclosed. Of course, this practice is driven by obvious proprietary, confidentiality, and financial security reasons. Even considering such constraints, CFIUS' annual reports comprise data that not only overly summarize the Committee's decisions and other activities it undertook for the preceding calendar year, but actually serve to obfuscate generating clarity in U.S. policy toward foreign direct investment.

Number of Deals Reviewed Versus Transactions' Financial Value

Most telling in this regard is the reports focus on CFIUS's disposition by *number* of transactions it annually reviews — whether voluntarily submitted to CFIUS by the involved parties or proactively assessed by the Committee. Not surprisingly, such data do not contain information about the *financial value* of the transactions in question — suitably blinded. For example, what percentage of the total dollar value of inbound foreign direct investment in the U.S. was cleared? Blocked? Or subject to CFIUS mitigation measures?

By the same token, CFIUS does not provide an assessment of the nature of the risks it mitigated through its decisions, and perhaps even a rough monetary assessment of the risks averted.

The result? There is little information systematically available on which *economically meaningful* judgments can be made as to the risks CFIUS' actions have mitigated; or conversely, to evaluate whether CFIUS' actions mitigating or blocking a foreign investment have prevented the realization of otherwise additional value within the U.S. economy, such as the production of goods and services and/or the creation of new jobs, and if so, enable a determination of the scale and composition of such outcomes.

CFIUS' tabulations of its actions by number of deals *regardless* of their financial value prevents economically meaningful assessments of:

- The extent to which CFIUS' actions *per se* have been making U.S. policy toward foreign investment more stringent or less restrictive year to year.
- Whether particular sectors in the U.S. have been easier or more difficult for foreign investors to participate in, and if so, to what degree, on what basis, and an estimate of the relative magnitude of the value of national economic security risks mitigated.
- Whether firms from various source countries versus others have had an easier or more difficult time entering the U.S. market in particular sectors; and

- The extent to which the U.S. foreign investment policy regime has become more or less inviting than those of competitor nations — presumably a key performance indicator for policymakers who believe cross-border capital investment is source of domestic economic growth.

CFIUS' Key Messages in Its 2022 Annual Report

Among the several headline findings highlighted by CFIUS in its most recent annual report, two deserve attention as being problematic for interpretation owing to the paucity of causal explanation.

The first is that CFIUS indicates that in 2022 it "reviewed a record number of covered transactions," where "covered" refers to transactions subject to assessment by the Committee as defined by U.S. foreign investment law and regulations. But was this "record" driven because the U.S. policy regime toward foreign investment has become *more restrictive? Or more lenient*?

Governmental entities charged with mitigating foreign investment risks may well have a natural inclination to tout the number of deals they had to review. Conversely, a "record" may have been set because the overall *level* of U.S. foreign direct investment inflows rose significantly. By the same token, was the record set due to a change in the *sectoral composition* of foreign investment toward more sensitive sectors?

CFIUS gives little, if any, insight into the answers to such questions. Yet they are fundamental in understanding what factors in the U.S. foreign investment policy framework are most potent in affecting foreign investors' decisions on whether to deploy capital in the U.S. economy.

The second is that the annual report notes that "CFIUS continues to clear a majority — 58 percent of distinct transactions." Frankly, it is hard to determine the economic meaning of this figure and what it indicates about the nature of the judgments made by CFIUS and hence the stance of U.S. policy toward foreign direct investment.

Would the alternative but equally valid formulation — "42 percent of distinct transactions were not cleared" — convey a different message?

The Committee's portrayal of these two statistics is not an academic matter. Like other economies, the U.S. competes with other countries to attract capital from abroad. You can be sure investors will struggle trying to decipher the value of this CFIUS report.

MORE INFORMATION

Harry Broadman is partner and managing director of Berkeley Research Group, where he chairs both the firm's CFIUS and Emerging Markets practices. He can be reached at harry@harrygbroadman.com.

This Guest Column draws on Dr. Broadman's recent monthly *Forbes* Leadership Strategy column, "Does New CFIUS Data Show U.S. Constraints On Foreign Investment Intensifying?"