

CFIUS 2020 ANNUAL REPORT SHEDS LIGHT ON CFIUS REVIEW PROCESS AND TRENDS

The Committee on Foreign Investment in the United States ("**CFIUS**") has released its 2020 Annual Report to Congress ("**Report**"), which provides data on transactions reviewed by CFIUS in the prior year. Because CFIUS filings and outcomes are generally not publicized, the Report is an essential source of information on CFIUS' priorities, processes, and timelines. This year's report is the first to cover transactions reviewed post-implementation of new CFIUS regulations under the Foreign Investment Risk Review Modernization Act ("**FIRRMA**"), which among other things, expanded CFIUS' jurisdiction to cover certain real estate transactions and implemented mandatory filing requirements. Our prior briefings on FIRRMA and the changes to filing requirements can be found [here](#) and [here](#). In a first for these annual reports, CFIUS included data on non-reported transactions (discussed more below) – a sign of CFIUS' significantly increased resources and focus on non-reported transactions.

BACKGROUND

CFIUS has jurisdiction to review any proposed or pending transaction where a foreign person is directly or indirectly investing in a US business ("**covered transactions**") that could potentially put US national security interests at risk. CFIUS notifications can be either short-form Declarations (subject to a 30-day assessment period) or full Notices (subject to 45-day review periods, and, as needed, a 45-day investigation period and 15-day presidential review period). Notifications can be mandatory or voluntary, depending on the specific transaction circumstances. Mandatory filings are only required in limited circumstances involving certain "Critical Technology," "Critical Infrastructure," or "Sensitive Personal Data" US businesses ("**TID US Business**"). Covered transactions that do not trigger a mandatory filing (including real estate transactions) are voluntary

in nature, but are often made to gain Safe Harbor from CFIUS' power to unwind or otherwise investigate transactions post-closing.

1. Investigating Non-Notified Transactions

For the first time, CFIUS provided information on covered transactions that were not notified to CFIUS ("**non-notified transactions**"). In 2020, CFIUS utilized various methods to identify non-notified and non-declared transactions including tips from the public, interagency referrals, media reports, commercial databases, and congressional notifications. The Committee identified 117 non-notified transactions – of these, the parties in 17 transactions were directed to submit a post-closing filing. The report also noted that potential methods for improving identification of non-notified and non-declared transactions include increasing training of staff across CFIUS member agencies to enhance coordination as well as increasing public awareness of the CFIUS "tip" mailbox. The identification of the 117 non-notified transactions is evidence CFIUS' increasingly proactive role in monitoring and investigating foreign investment into the United States.

2. Declarations and Notices Filed

a. *Declarations*

CFIUS received 126 declarations in 2020, compared to 94 in 2019 and 20 in 2018 (under the Critical Technology Pilot Program). 2020 was the first year that declarations could be made on a voluntary basis and therefore open to lower-risk transactions compared to the Critical Technology businesses subject to the Pilot Program from November 10, 2018 to February 12, 2020. Of the 126 Declarations submitted, 34 were subject to mandatory filing requirements and in 28 cases, CFIUS requested the parties to file a full notice. 81 declarations were cleared outright, while in 16 cases, CFIUS informed the parties they unable to complete action (the CFIUS "No Action" letter, previously referred to as the "shrug".) Of the declarations submitted, only one party withdrew its declaration for business reasons, but the Report noted that the parties to that declaration filed a full notice in 2021 for a "substantially similar covered transaction." CFIUS did not reject any declarations in 2020.

b. *Notices*

There were 187 notices filed in 2020 compared to 231 in 2019 and 229 in 2018. The proportion of notices proceeding to a full investigation dropped slightly to 47%, with 88 of the 187 notices filed in 2020 going to a full investigation compared to 113 in 2019. That is a significant drop from the approximately 69% of notices that proceeded to a full investigation in 2018. The Report noted that though the number of notices filed declined in 2020, the overall number of *transactions* reviewed increased due to the option to file a declaration as a method for filing any type of covered transaction with the Committee.

The proportion of withdrawals increased in 2020, with parties withdrawing from the process in ~16% of cases, up from ~13% in 2019. Of those withdrawn in 2020, all but one withdrew during the full investigation, with

one withdrawal during the initial review. 75% of withdrawn notices were refilled, 15 in 2020 and another six in 2021. The parties abandoned the transaction in six of the remaining seven cases after CFIUS informed them that it was unable to identify suitable mitigation measures or the parties refused the mitigated measures offered. One transaction was reportedly abandoned for unrelated commercial reasons.

Also new for 2020 was CFIUS' authority to review real estate transactions involving foreign persons. Three of the Notices and two of the Declarations were reviewed under this authority.

Taking the declaration and notice statistics together: (1) parties in "lower risk" transactions are more likely to appear before CFIUS now that the declaration process is available, which is reflected in the increased adoption of declarations; and (2) parties in "higher risk" transactions are less likely to appear before CFIUS – as shown by the decrease in notice proceeding to a full investigation. This is also supported by the decrease in CFIUS' use of mitigation measures detailed below.

3. Mitigation Measures

CFIUS adopted mitigation measures to resolve national security concerns in 16 of the 187 Notices (~9%), down slightly from 2019 where 28 of the 231 Notices (~12%) were resolved using mitigation measures. The Report noted that in three cases where the parties withdrew and abandoned the transaction, CFIUS imposed mitigation measures to address residual national security risks regardless, which is a rare measure and should be noted by parties evaluating transactions with respect to the national security risks associated with US businesses.

Further, in another three cases, conditions were imposed in letters issued by the US Treasury Department granting the withdrawal and abandonment of the transaction. Lastly, CFIUS imposed measures to mitigate interim risk with respect to one notice filed in 2020.

4. Timing of Filing Acceptance and Reviews

The average number of business days that elapsed between the submission date of a Draft Notice and the Committee providing written comments was 7.7 days in 2020, compared to 10.6 days in 2019. The average number of business days between submission of a Final Notice and CFIUS issuing the "Day One" letter was 9.1 days in 2020 compared to 7.8 days in 2019. As in 2019, CFIUS took an average of 45 days to complete their review of notices in 2020, while cases that went to a full investigation took an extra day on average – 86 days in 2020 compared to 85 days in 2019. No cases in 2020 were subject to a 15-day extension.

For Declarations, the average number of business days that elapsed between the submission date of a Declaration and CFIUS issuing the Day One letter was 4.7 days. On average, Declaration reviews were completed in 29.8 days.

5. Top Investor Countries and Level of Chinese Investment Compared to Prior Years

Between 2018 and 2020, China accounted for the largest proportion of Notices filed. Investors from Japan, Canada and France followed with respect to filed Notice numbers. However, in 2020, Japanese investors filed the most Notices while the volume of Chinese investments appearing before CFIUS have declined from 55 notices in 2018, to 25 notices in 2019, to 17 notices in 2020. In terms of Declarations, Chinese investor activity increased slightly, with Chinese investors appearing as parties to five declarations in 2020 compared to three in 2019. While China leading the way in terms of submission numbers is consistent with years past, it also indicates that Chinese foreign investors may not have been significantly deterred by the increased scrutiny under the Trump administration.

The report also noted that the July 14, 2020 President's Executive Order on Hong Kong Normalization (E.O. 13936) eliminated differential treatment between China and Hong Kong for Committee reporting purposes. Though this was noted in the report, the Committee also identified one declaration and three notices from a Hong Kong investor in 2020 indicating the CFIUS reviews for those transactions were completed prior to the issuing of E.O 13936.

6. Top Sectors for Case Activity

The Finance, Information, and Services sector made up the largest proportion of case activity, accounting for 43% of transactions, up from 39% in 2019. The Manufacturing sector dropped from 44% in 2019 to 36% in 2020. Mining, Utilities and Construction increased from 9% in 2019 to 11% in 2020. Finally, Wholesale Trade, Retail Trade, and Transportation remained static at 10% of cases. Canada, China, and Japan together accounted for approximately 40 percent of cases from 2018-2020, with generally consistent distribution of Notices across these sectors among the three countries. However, Canadian investors were disproportionately represented in the Mining, Utilities, and Construction sector.

CONCLUSION

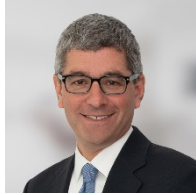
While CFIUS is no longer a true regulatory "black box," the Report provides helpful insight into recent trends and the CFIUS process. The 2020 Report's reporting on post-FIRMMA CFIUS reviews and never-before reported data on non-notified transactions provide an invaluable view of the modern CFIUS landscape and the effect of the new mandatory filing requirements and real estate jurisdiction. We encourage transaction parties, investors, and companies to consult their CFIUS counsel to gain a fulsome understanding of CFIUS, the review process, and how to effectively account for national security risk in their transactions.

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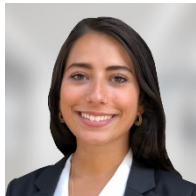
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