

CFIUS 2021 ANNUAL REPORT REVEALS RECORD FILINGS AND NON-NOTIFIED TRANSACTIONS AND EXPOSES ENCOURAGING TRENDS

INTRODUCTION

On August 2, 2022, the U.S. Department of the Treasury, as the Chair of the Committee on Foreign Investment in the United States ("**CFIUS**"), released the public version of its Annual Report to Congress for calendar year 2021 ("**Annual Report**"). The Annual Report highlights key indicators of CFIUS' process and provides statistics on transactions that were filed with CFIUS in 2021—the first full calendar year in which CFIUS operated pursuant to the new regulations implementing the Foreign Investment Risk Review Modernization Act of 2018 ("**FIRREA**").¹

As discussed in more detail below, the 2021 Annual Report demonstrates a significant uptick in CFIUS activity. As discussed in detail herein, CFIUS is reviewing a record number of transactions, proactively identifying more non-notified transactions, and continuing to prioritize the controls over U.S. critical technologies and sensitive data.²

BACKGROUND

CFIUS has jurisdiction to review any proposed or pending transaction in which a non-U.S. person is directly or indirectly investing in a U.S. business ("**covered transactions**") that could potentially put U.S. 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. Mandatory filings are only required in limited circumstances involving certain "Critical Technology," "Critical Infrastructure," or "Sensitive Personal Data" U.S. businesses ("**TID US Business**"). Covered transactions that do not trigger a mandatory filing (including real estate transactions) may be notified to CFIUS voluntarily. Such voluntary notifications are often made to secure Safe Harbor from CFIUS' power to unwind or otherwise investigate transactions post-closing.

¹ U.S. Department of the Treasury, Press Release, *Treasury Releases CFIUS Annual Report for 2021* (Aug. 2, 2022).

² *Id.*

KEY HIGHLIGHTS

Record Number of Cases Filed and Cleared

The 2021 Annual Report confirmed a marked increase in CFIUS activity, which may be in part attributed to 2021 being the second year during which declarations could be made on a voluntary basis. While the overall number of covered transactions increased substantially from 2020 to 2021, CFIUS cleared a record high of nearly 60 percent of cases. Further, while 2021 reflected a record in cases cleared, overall CFIUS filings increased 40% from 2020.

2021 was also the first year since 2016 when no presidential actions were taken on transactions – meaning the President did not block any transactions.

Declarations and Notices Filed

Declarations

CFIUS received 164 declarations in 2021, compared to 126 in 2020 and 94 in 2019. During 2021, and for the second year, any transaction subject to FIRMMA could be notified to CFIUS. Of the 164 declarations, 47 were subject to mandatory filing requirements and in 30 cases, CFIUS requested the parties to file a full notice following an assessment. Given the voluntary nature of the regime, 120 declarations were cleared outright, compared to 81 declarations in 2020. In 12 cases, CFIUS informed the parties they were unable to conclude action (the CFIUS "No Action" letter, colloquially referred to as the "shrug".) One of the submissions was a real estate declaration. CFIUS rejected two declarations in 2021, one of which was re-filed as a notice. No declarations were withdrawn in 2021.

Notices

The number of notices filed increased significantly in 2021, as 272 notices were filed in 2021 compared to 187 in 2020 and 231 in 2019. CFIUS conducted a review of all notices and 130 were subject to subsequent investigations. Pursuant to Section 721(b)(2)(C)(ii)(I), three notices were subject to a 15-day extension of the investigation period due to "extraordinary circumstances". Notably, 74 of the 272 notices were withdrawn. In 63 of these cases, the parties filed a new notice. In nine of these cases, however, the parties withdrew and abandoned the transactions after CFIUS determined national security concerns and the parties were unable to identify mitigation measures or unwilling to accept those measures. In two of these cases, the parties withdrew due to commercial reasons. No notices were rejected in 2021.

The number of transactions subject to CFIUS' jurisdiction increased from 114 in 2012 to 272 in 2021, marking the highest number of notices reviewed by the Committee. The proportion of notices proceeding to investigation was higher than in 2020 but one percent lower than in 2019.

Taking the declaration and notice statistics together, it is clear that the number of short-form declarations, which were introduced after the passage of FIRRMA in 2018, have increased considerably and are becoming an alternative to the more customary written notice process.

Timing of Filing Acceptances and Reviews

CFIUS appeared to process cases in similar timeframes as 2020. In 2021, the average number of days that elapsed between the submission date of a draft notice and the Committee providing comments was 6.2 days, compared to 7.7 days in 2020. The average number of days between submission of a Final Notice and CFIUS issuing the "Day One" letter was 6.0 days, compared to 9.1 days in 2020. CFIUS took a little longer to complete their review of notices in 2021, with an average of 46.3 days as compared to 45 days in 2019 and 2020. The cases that went to a full investigation, however, took significant less time than previous year with an average of 65.0 days, compared to 86 days in 2020.

For Declarations, the average number of days that elapsed between the submission date of a Declaration and CFIUS issuing the Day One letter was 5.48 days, compared to 4.7 days in 2020. On average, Declaration reviews were completed in 29.9 days.

Mitigation Measures

CFIUS adopted mitigation measures to resolve national security concerns in 31 of the 272 Notices (~11%), down slightly from 2020, during which CFIUS adopted mitigation measures on 12 percent of the notices. The Report noted that for 26 notices, CFIUS concluded action after the parties adopted mitigation measures. With respect to four notices that were voluntarily withdrawn and abandoned, CFIUS adopted mitigation measures to address residual national security concerns or imposed conditions that did not include mitigation agreements.

Further, CFIUS reported having conducted 29 site visits in 2021 for purposes of monitoring compliance with imposed mitigation agreements.

Non-Notified Transactions

One clear takeaway from the 2021 Annual Report is that CFIUS is actively investigating non-notified transactions. In 2021, CFIUS identified 135 transactions through the proactive investigation of non-notified transactions, and eight inquiries resulted in a request for filing. CFIUS investigative methods included interagency referrals, tips from the public, media reports, commercial databases, and congressional notifications. The Annual Report further indicated CFIUS' willingness to continue to enhance these methods by increasing hiring of dedicated officers and training.

Top Investor Countries

Between 2018 and 2020, China accounted for the largest proportion of Notices filed, a trend which continued in 2021. Chinese investors filed the highest number of notices (44), which accounted for 16% of the filings. Notably, this number also represents an increase of 159% from 2020. The number of notices filed by Chinese investors, however, does not necessarily indicate a significant increase of overall investment into the United States. Instead, it likely reflects a combination of several factors, such as the inclusion of Hong Kong into China's data (following the 2020 President's Executive Order eliminating differential treatment for CFIUS purposes), non-notified transactions, and Chinese investors being more inclined to notify transactions voluntarily, given CFIUS' heightened scrutiny of China and heightening geopolitical tensions.

Other countries with significant filing numbers (a cumulative total of 93 notices) include Canada, Japan, Singapore, South Korea, and the United Kingdom. Interestingly, in 2021, 18 notices were filed by Cayman Island entities, which, compared to 2019 and 2020, represent an increase of 157 percent in the number of notices filed.

In terms of Declarations, Chinese investors filed only one declaration in 2021. Investors from Canada accounted for the largest number of filed declarations in 2021, with 22 declarations filed, or 13% of the total. Countries that present a lower national security risk were also amongst the top of the list, including Australia, France, Germany, Japan, Singapore, South Korea, and United Kingdom. These countries filed, cumulatively, a total of 71 declarations in 2021.

Top Sectors for Case Activities

Consistent with 2020, the Finance, Information, and Services sector made up the largest proportion of case activity, accounting for 55% of transactions, up from 43% in 2020. Within this sector, Professional, Scientific, and Technical Services continued to be the largest subsector, accounting for 39 percent of transactions. Other subsectors that topped the list included the Publishing Industries and Data Processing, Hosting, and Related Services. The manufacturing sector dropped from 36% in 2020 to 28% in 2021. Within this sector, the subsector with the most transactions remained Computer and Electronic Product Manufacturing, followed by the Chemical Manufacturing sector. Mining, Utilities, and Construction increased slightly from 11% in 2020 to 12% in 2021. Within this sector, the Utilities subsector accounted for the large majority of transactions (94%), followed by the Heavy and Civil Engineering Construction and Specialty Trade Contractors subsectors. Finally, Wholesale Trade, Retail Trade, and Transportation decreased significantly from 10% in 2020 to 4% in 2021. Within this sector, Support Activities for Transportation remained the largest subsector, accounting for 50 percent of transactions.

Critical Technologies

CFIUS reviewed 184 covered transactions involving acquisitions of U.S. critical technology companies in 2021, representing an almost 51 percent increase compared to the 2020 data. Among these critical technology reviews, U.S.-allied countries continue to account for the majority of the transactions, including United Kingdom (16); Germany (16); Japan (15), South Korea (13). Notably, investors from the Cayman Islands filed 12 critical technology transactions in 2021. In addition, Russia and China account for 5 and 10 critical technology reviews, respectively.

With respect to the sectors of U.S. target company, the largest number of notices filed with CFIUS in 2021 involved foreign acquisitions of U.S. companies in the Professional, Scientific, and Technical Services as well as the Computer/Electronic Product Manufacturing sectors, consistent with the 2020 data.

CONCLUSION

The new trends outlined in the Annual Report reflect the continuing expansion of CFIUS' resources since the enactment of FIRRTA. As we have previously reported, CFIUS has actively monitored more covered transactions from year to year. Business should anticipate increased government scrutiny of investments by foreign entities. 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 risks in their transactions.

If you have any questions concerning the material discussed in this alert, please contact the members of our CFIUS practice.

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