

## Six Takeaways From the CFIUS 2021 Annual Report

***The report reflects CFIUS' work during the first full year since the Foreign Investment Risk Review Modernization Act implementing regulations took effect.***

On August 2, 2022, the Committee on Foreign Investment in the United States (CFIUS) published the public version of its [Annual Report to Congress for Calendar Year 2021](#) (the Report), which highlights key indicators of the CFIUS process and statistics on transactions filed in calendar year 2021.

This Client Alert presents six takeaways from the Report.

### **1. CFIUS reviewed a record number of transactions in 2021, while also improving response times**

CFIUS reviewed 436 transactions in 2021, which consisted of 272 full notices and 164 declarations. This reflects a nearly 40% increase from 2020, when CFIUS reviewed 187 notices and 126 declarations. Despite increased volumes, CFIUS improved the response times in which it provided comments on draft notices (down to 6.2 business days from 7.7 in 2020) and formally accepted notices to start the review process (down to 6.0 business days from 9.1 in 2020). The average response time in which CFIUS accepted declarations submitted in 2021 was 5.48 days, which is a slight uptick compared to the average of 4.7 in 2020.

### **2. CFIUS and transaction parties are becoming more comfortable with declarations**

The record number of transactions reviewed in 2021 was due in part to the increased number of declarations. With the enactment of the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), CFIUS introduced declarations as an alternative to the traditional notice process, allowing transaction parties to submit a short-form filing regarding a transaction. Following the review of a declaration, CFIUS may (1) approve the transaction, (2) request that the parties submit a full notice, or (3) issue a "no action" letter, stating that CFIUS is unable to conclude action on the basis of the declaration (letting the parties determine whether to file a full notice). Compared to a full notice, declarations are often less resource-intensive and are subject to shorter review periods (30 calendar days versus at least 45 calendar days for a full notice), and generally less expensive (with no filing fee for declarations). As such, declarations are an appealing option for investors who believe CFIUS will not request a full notice filing.

As shown in the chart below, transaction parties filed 164 declarations in 2021 — an increase of 30% from 2020 (when 126 declarations were filed). Of these, 73% (or 120) were cleared during the 30-day assessment period. In comparison, CFIUS cleared only 64% of declarations in 2020, indicating that CFIUS, too, is becoming more comfortable with clearing transactions pursuant to this short-form process.

Declarations and Withdrawals, 2018-2021		
Year	Number of Declarations	Declarations Withdrawn
2018	20	1
2019	94	1
2020	126	1
2021	164	0
<b>Total</b>	<b>404</b>	<b>3</b>

Of the 44 remaining declarations filed in 2021, CFIUS requested that the parties to 30 declarations (18% of all declarations) file a full notice. CFIUS took no action with respect to a further 7% (or 12 declarations), and rejected 1% (or two declarations), one of which was re-filed as a notice.

### 3. While CFIUS continued to work with parties to clear transactions in a timely manner, the number of withdrawn notices increased

As shown in the chart below, transaction parties filed 272 notices in 2021, marking a 45% increase from the number filed in 2020 (187) and a 15% increase from the previous high in 2017 (when 237 notices were filed). Despite this increased volume, the proportion of filings that required a second-stage investigation remained steady at 48%, materially the same as 2020 (47%) and 2019 (49%).

Covered Transactions, Withdrawals, and Presidential Decisions 2012-2021					
Year	Number of Notices	Notices Withdrawn During Review Phase	Number of Investigations	Notices Withdrawn After Commencement of Investigation	Presidential Decisions
2012	114	2	45	20	1
2013	97	3	49	5	0
2014	147	3	52	9	0
2015	143	3	67	10	0
2016	172	6	79	21	1
2017	237	4	172	70	1
2018	229	2	158	64	1
2019	231	0	113	30	1
2020	187	1	88	28	1
2021	272	2	130	72	0
<b>Total</b>	<b>1829</b>	<b>26</b>	<b>953</b>	<b>329</b>	<b>6</b>

Source for both charts: [CFIUS Annual Report to Congress \(Report Period: CY 2021\)](#)

In 2021, 27% of notices (74) were withdrawn. This figure represents a significant increase compared to 2020 and 2019, when 15% and 13% of notices were withdrawn, respectively, but not quite a return to 2017 and 2018 levels when withdrawn notices peaked (31% of notices were withdrawn in 2017 and 28% in 2018). In most instances, the notices were withdrawn and subsequently refiled to allow additional time to negotiate mitigation terms after CFIUS identified a national security risk. Of the withdrawn notices in 2021, 85% (63) were ultimately refiled (compared to 72% in 2020 and 60% in 2019), indicating that filings involving mitigation generally took longer to clear in 2021. The other 15% of withdrawn notices were withdrawn because the parties abandoned their transaction (12% after CFIUS informed the parties that it was unable to identify mitigation measures that would resolve national security risks and 3% due to commercial reasons).

In 2021, the US president did not block or unwind a transaction, although parties often prefer to withdraw a notice if CFIUS has unresolved national security concerns rather than be subject to a public decision by the president to stop the transaction from proceeding.

#### **4. Investors from Canada accounted for the largest overall number of reviewed transactions**

Transactions involving investors from Canada accounted for the largest proportion of reviewed transactions (11%) in 2021, including 28 notices (10% of all notices filed in 2021) and 22 declarations (13% of all declarations), overtaking Japan, which accounted for the largest proportion of transactions in 2020. The number of Canadian transactions in 2021 rose 61% from 2020 levels (and 43% from 2019).

Investors from China accounted for the second-largest proportion of transactions in 2021 (10%), including 44 notices (16% of all notices), but just one declaration (less than 1% of all declarations). The lack of short-form declarations filed by investors from China is not surprising considering that CFIUS treats Chinese investments as high-risk. Despite coming in second behind Canada, the number of filings by Chinese investors increased 105% from 2020 levels (and 61% from 2019). Investors from Japan, slightly behind China, accounted for approximately 8% of all 2021 transactions, including 26 notices (10% of all notices) and 11 declarations (7% of all declarations). These numbers are consistent with 2020 levels, but represent a 38% decrease from 2019.

After two years of minimal activity, transactions involving Russian investors jumped in 2021. Russian investors filed just one notice in 2019 and one declaration in 2020, compared to seven notices and one declaration in 2021. However, given the increased US sanctions and export controls in connection with Russia's invasion of Ukraine in 2022, the number of filings regarding new transactions involving Russian parties is likely to decrease.

#### **5. The percentage of cases in which CFIUS imposed mitigation remained steady**

For approximately 11% of the notices filed in 2021 (31 of the total 272), CFIUS required the parties to agree to mitigation measures as a condition of clearance. This is consistent with recent years (12% in 2020 and 12% in 2019). The mitigation measures imposed by CFIUS were also consistent with those from previous years; the Report does not identify new mitigation measures. The mitigation measures imposed in 2021 included:

- prohibiting or limiting the transfer or sharing of certain intellectual property, trade secrets, or technical information;

- establishing guidelines and terms for handling existing or future contracts with the US government or its contractors, US government customer information, and other sensitive information;
- ensuring that only authorized persons have access to certain technology, systems, facilities, or sensitive information;
- ensuring that certain facilities, equipment, data, and operations are located only in the US;
- establishing a corporate security committee, voting trust, and other mechanisms to limit foreign influence and ensure compliance, including the appointment of a US government-approved security officer and/or member of the board of directors and requirements for security policies, annual reports, and independent audits;
- notifying customers or relevant US government parties when ownership changes in the US business;
- notifying, and obtaining approval from, security officers, third-party monitors, or relevant US government parties in advance of visits to the US business by foreign nationals;
- security protocols to ensure the integrity of products or software sold to the US government;
- Assurances of continuity of supply to the US government for defined periods, notification and consultation prior to taking certain business decisions, and reserving certain rights for the US government in the event that the company decides to exit a business line; establishing meetings to discuss business plans that might affect US government supply or raise national security considerations;
- exclusion of certain sensitive US assets from the transaction;
- ensuring that only authorized vendors supply certain products or services;
- prior notification to and approval by relevant US government parties in connection with any increase in ownership or rights by the foreign acquirer; and
- divestiture by the foreign acquirer of all or part of the US business.

## 6. CFIUS identified more transactions through the non-notified process

If CFIUS believes that a transaction that has not been notified may raise national security concerns, it may reach out to the parties and request information regarding the transaction.

In 2021, CFIUS identified 135 transactions through the non-notified process and requested filings for eight such transactions (6%). This represents an increase in CFIUS' identification of non-notified transactions compared with the 117 transactions that CFIUS identified in 2020, but a reduction in the number of transactions for which CFIUS actually requested a filing (in 2020, CFIUS requested a full filing for approximately 14% of transactions identified through the non-notified process). Notably, CFIUS did not request filings for 94% of the identified transactions, a reflection of the fact that CFIUS often inquires about transactions without knowing whether it has jurisdiction to review them. In many cases, CFIUS takes no further action once the parties provide responses establishing that CFIUS lacks jurisdiction.

The Report does not elaborate on certain important aspects of the non-notified transactions. For example, it does not provide a geographic breakdown of the originating countries for the identified transactions. However, CFIUS is clearly continuing to proactively identify non-notified transactions. The Report notes that “CFIUS will continue to enhance methods for improving the identification of non-notified/non-declared transactions.” These methods include increased hiring of non-notified investigation staff and increasing public awareness of the CFIUS “tip mailbox,” which allows the public to submit tips/referrals to CFIUS of non-notified deals.

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