

CFIUS Releases 2020 Annual Report

July 29, 2021

The Committee on Foreign Investment in the United States (CFIUS or the Committee) released a public version of its annual report to Congress for the calendar year 2020. The report covers transactions filed with the Committee in 2020 and describes the CFIUS process following the full implementation of its new authority under the Foreign Investment Risk Review Modernization Act (FIRRMA). Notably, CFIUS declarations increased nearly 35% from the previous year, with those from Canada and Japan topping the list, while formal notices decreased nearly 20% from 2019, with those from Japan and China topping that list. Also, CFIUS brought in 17 deals as a result of its non-notified process but subjected fewer deals to mitigation measures and a further investigation stage. The following provides further highlights.

Highlights of the 2020 Annual Report

Treasury issued regulations to fully implement FIRRMA reforms. FIRRMA, enacted in August 2018 by Congress as part of the Fiscal Year 2019 National Defense Authorization Act (NDAA), expanded the jurisdiction and authority of the Committee, in important part by broadening the scope of “covered transactions” subject to CFIUS review. On October 11, 2018, the U.S. Department of the Treasury (Treasury) issued an interim rule to begin the Critical Technologies Pilot Program, which instituted mandatory filing requirements for certain non-controlling, non-passive foreign investments in U.S. businesses that produce, design, test, manufacture, fabricate, or develop one or more “critical technologies.” On January 13, 2020, Treasury issued final regulations which fully implemented FIRRMA – including its mandatory filing regime and an end to the Pilot Program with new, expanded provisions governing the examination of transactions involving critical technologies – effective February 13,

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2020.

Covered transaction declarations and notices. Prior to February 13, 2020, short-form declarations were available only for transactions within the scope of the Pilot Program. After February 13, CFIUS expanded the availability of this option to permit parties to submit either a declaration or notice to notify CFIUS of any covered transaction, not just transactions subject to mandatory filing requirements.

Further, following the conclusion of the Pilot Program, declarations remained mandatory for control transactions and certain noncontrolling investments in U.S. businesses involved in critical technologies. In addition, the new regulations expanded the mandatory filing requirement to certain covered transactions that involve a “T.I.D. U.S. business” (i.e., critical technology, critical infrastructure, or sensitive personal data) by a foreign person in which a foreign government has a substantial interest.

CFIUS received 126 declarations in 2020, up from 94 declarations in 2019 and 20 in 2018 under the Pilot Program. While the number of declarations increased, the number of notices decreased to 187, from 231 in 2019 and 229 in 2018. Overall, the number of transactions reviewed or assessed by CFIUS increased, which the report attributes to the introduction of declarations as a method for filing.

CFIUS’s 2020 report also notes that the number of notices reaching the additional investigation stage declined significantly three years in a row. Of the 187 notices filed in 2020, 88 (47%) proceeded to the investigation stage. The Committee commenced 171 investigations in 2017 (73%), 158 in 2018 (69%), and 113 in 2019 (49%). FIRRMA lengthened the initial CFIUS review period from 30 days to 45 days, and CFIUS’s 2019 report noted that this extended review period “substantially reduced the proportion of notices proceeding to investigation in 2019.”

Investigating non-notified transactions. CFIUS utilized interagency referrals, tips from the public, media reports, commercial databases, and congressional notifications to identify non-notified/non-declared transactions in 2020. 117 non-notified transactions were put forward to the Committee for consideration, and 17 resulted in a request for filing.

Real estate reviews. FIRRMA provided new authorities for CFIUS to review and take action to address national security concerns arising from certain real estate transactions involving foreign persons. In 2020, two of the 126 declarations involved real estate declarations and three of the 187 notice submissions appeared to involve real estate transactions.

Timing of filing acceptance and reviews. The Committee took an average of 9.1 business days to accept a notice submission, 7.7 days to provide written comments to a draft notice, and 4.7 business days to accept a declaration. To complete its assessment, CFIUS averaged 45 calendar days for a notice review, 86 days for a notice that moved to the investigation stage, and 29.8 days for a declaration review.

Withdrawals. In 2020, the Committee approved the withdrawal of 29 notices (one withdrew during review and 28 withdrew during investigations). Of the notice withdrawals, 15 were resubmitted in 2020, and six were resubmitted in 2021, seven notices were withdrawn and the transactions were subsequently abandoned

altogether, although one of those transactions was abandoned for non-CFIUS reasons. CFIUS adopted interim mitigation measures to address remaining national security concerns with respect to three notice submissions, even though the notices were ultimately withdrawn and the transactions were ultimately abandoned. Separately, CFIUS imposed conditions on withdrawal and abandonment for three other notices. Only one declaration was withdrawn.

Presidential order. The report highlighted the 2020 Presidential order prohibiting the acquisition of the social media application musical.ly by ByteDance, Ltd. to the extent that Musical.ly or any of Musical.ly's assets are used in support of or relating to Musical.ly's activities in interstate commerce in the United States. ByteDance, Ltd., which owns the social media application TikTok, is a Cayman Islands entity, but has its headquarters in Beijing, and, according to the U.S. government, it has significant and close ties to the Chinese Communist Party.

Chinese transactions continue to decline. While acquisitions by Chinese investors represented the largest number of notices from 2018 to 2020 and accounted for approximately 15% of all notices filed during that period, notices of Chinese acquisitions declined from 55 in 2018, to 25 in 2019, and 17 in 2020. Chinese investors were party to five declarations in 2020, slightly up from three in 2019.

The Committee additionally noted that the President's Executive Order on Hong Kong Normalization (E.O. 13936) eliminated the differential treatment between Hong Kong and China for CFIUS reporting purposes as of July 14, 2020. The Committee identified three notices and one declaration by a Hong Kong acquirer in 2020, which means CFIUS reviews of those transactions were completed prior to July 14.

Investments in U.S. Critical Technology Companies. Japan continued to be the leading source of acquisitions of U.S. critical technology companies reviewed in 2020. Investors from Japan submitted 18 notices to CFIUS related to the acquisition of U.S. critical technology companies. In declining order, investors from Sweden and Canada each submitted 10 such notices while investors from Germany and United Kingdom submitted nine. By sector, computer and electronic product manufacturing was the leading source of foreign investment in U.S. critical technology companies. In 2020, CFIUS reviewed 28 transactions in the computer and electronic product manufacturing sector and 25 transactions related to the professional, scientific, and technical services sector. The transportation equipment manufacturing sector was a distant third with 10 transactions before the Committee in 2020.

Findings from the U.S. Intelligence Community on Critical Technologies. CFIUS is required to include in its annual report (i) an evaluation of whether there is credible evidence of a coordinated strategy by one or more countries or companies to acquire U.S. companies involved in research, development, or production of critical technologies for which the United States is a leading producer; and (ii) an evaluation of whether there are industrial espionage activities directed or directly assisted by foreign governments against private United States companies aimed at obtaining commercial secrets related to critical technologies. CFIUS's public report stated that a summary of the U.S. Intelligence Community's (USIC) assessment of whether there is credible evidence of a coordinated strategy to acquire critical technology companies could not be provided on an unclassified basis. The report does include the USIC's conclusion that foreign governments are extremely likely

to use a range of methods to obtain critical U.S. technologies. The Committee cited a 2018 National Counterintelligence and Security Center report that highlighted the significant threats to U.S. national security posed by foreign economic and industrial espionage. Moreover, foreign intelligence services and threat actors working on their behalf continue to represent the biggest cyber intelligence threat because of cyber-espionage and theft of U.S. intellectual property.

CFIUS Mitigation. The report provides the following examples of mitigation measures and conditions negotiated and adopted in 2020 that CFIUS required companies to take:

- ensuring that only U.S. citizens handle certain products and services, and ensuring that certain activities and products are located only in the United States;
- establishing a Corporate Security Committee and other mechanisms to ensure compliance with all required actions, including the appointment of a U.S. government-approved security officer and/or member of the board of directors and requirements for security policies, annual reports, and independent audits;
- notifying, for approval, security officers or relevant U.S. government parties in advance of foreign national visits to the U.S. business;
- security protocols to ensure the integrity of goods or software sold to the U.S. government;
- notifying customers regarding the change of ownership;
- assurances of continuity of supply to the U.S. government for defined periods, and notification and consultation prior to taking certain business decisions, reserving certain rights for the U.S. government in the event that the company decides to exit a business line;
- establishing meetings to discuss business plans that might affect U.S. government supply or raise national security considerations;
- exclusion of certain sensitive assets from the transaction;
- ensuring that only authorized vendors supply certain products or services;
- prior notification to and approval by relevant U.S. 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 U.S. business.

The Annual Report is the primary mechanism by which CFIUS communicates publicly. Accordingly, the information provided in the 2020 CFIUS Annual Report should be considered carefully during all stages of deal formation and negotiation.

Wiley has unparalleled CFIUS and National Security practices that draw on senior government-level experience with CFIUS member agencies and numerous representations of domestic and international companies in complex transactions involving nearly every industry sector subject to CFIUS review. **Our team recently updated the firm's CFIUS Handbook, available [here](#).**

Should you have any questions regarding the 2020 CFIUS report please do not hesitate to contact one of the members of our CFIUS and national security practices listed on this alert.

Jillian Quigley, a Wiley 2021 Summer Associate, contributed to this alert.