

CFIUS Reports Significant Uptick in Filings and Non-Notified Inquiries

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Key Points

- According to CFIUS's recently-released Annual Report for 2021, the total number of CFIUS filings increased significantly year-on-year, with transactions involving Chinese investors more than doubling compared to 2020.
- Despite continued COVID-19 related disruptions, CFIUS reviewed a record 436 transactions in 2021, including 164 short-form declarations and 272 long-form notices.
- The trend for increased scrutiny of non-notified transactions continues with CFIUS considering 135 non-notified transactions in 2021, up from 117 in 2020. Even so, CFIUS ultimately requested fewer filings, seeking a filing for just eight of those non-notified transactions.
- Notably for parties undertaking transactions subject to CFIUS jurisdiction, a majority of transactions were cleared within the statutory timeframes (i.e., without a need to withdraw and refile) and without the need for mitigation measures.
- Nevertheless, more than 25 percent of filings required additional time for review, including many more cases of notices being withdrawn and refiled—63—as compared to 21 in 2020.

Background

The Committee on Foreign Investment in the United States (CFIUS) is the inter-agency mechanism through which the U.S. government formally monitors and reviews foreign investment in the United States for possible national security concerns. CFIUS recently issued its [Annual Report](#) for Calendar Year 2021 (the "Report"), providing key insights into trends in CFIUS filings that are otherwise strictly confidential.

This year's Report covers the first full calendar year of filings made under expanded CFIUS jurisdiction and mandatory filing requirements enacted under the Foreign Investment Risk Review Act of 2018 (FIRRMA) and implemented through regulations that were finalized on February 13, 2020. As always the annual report—the only official, public source of information regarding CFIUS filings—provides a useful

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snapshot of filing trends, such as clearance rates, average length of filings from submission to conclusion, number of mitigation agreements concluded, number of filings by investors from each country and number of filings involving specific sectors. Although the Report does not provide more substantive details regarding the transactions that required lengthier reviews, resulted in mitigation or that were ultimately abandoned by the parties, it does include a number of metrics and key insights worth highlighting:

- ***The number of notices, declarations and total filings increased significantly in 2021.*** In 2021, CFIUS saw a significant increase in the number of filings for covered transactions, reviewing a total of 436 transactions, up from 313 in 2020, which is consistent with last year's high level of investment activity involving foreign investors in the United States.¹ Notices continued to represent the majority of filings (272, compared with 164 declarations), but both notice and declaration filings were higher in 2021, up from 187 and 126, respectively.
- ***Most transactions clear without mitigation.*** Out of 272 notices, CFIUS adopted mitigation measures in just 28 filings. 26 of those filings resulted in CFIUS clearance, while mitigation measures for the remaining two filings were imposed despite the parties withdrawing and abandoning the transaction. CFIUS imposed interim mitigation measures prior to concluding action for just one notice filing.
- ***CFIUS continues to direct resources towards reviewing non-notified transactions.*** A total of 135 transactions—up from 117 transactions in 2020—were identified through the non-notified process in 2021, an effort that likely involved reviewing hundreds, if not thousands, of non-notified transactions before those 135 transactions were selected for the Committee's formal consideration. Of those 135 transactions, however, only eight resulted in a request for filing, thus demonstrating that CFIUS inquiries regarding non-notified transactions do not necessarily mean a filing is inevitable. Looking ahead, CFIUS confirmed that it continues to hire additional staff and hone its methods for improving identification of non-notified transactions of interest.
- ***Despite the additional time afforded under FIRRMA, CFIUS cases are not concluded within the statutory period nearly 25 percent of the time.*** A large number of notice filings—63 of the 272 notices filed in 2021—were withdrawn and refiled. And, in the case of the 164 declarations it considered, CFIUS requested the parties submit a subsequent notice filing in 30 cases, and informed the parties that it was unable to conclude action in an additional 12 cases, leaving it to the parties to decide if they wanted to seek clearance by submitting a notice filing.
- ***CFIUS is becoming more efficient in its review of declarations.*** CFIUS concluded its review of declarations within the 30-day review period in 74 percent of cases, which is a significant increase from 2019 when it did so in just 40 percent of cases. In addition to greater efficiency by CFIUS, this change may also be related to parties and their counsel developing a better sense of when filing a declaration will be successful.
- ***CFIUS made use of its new authority to add 15 days to the 90-day notice period for the first time in 2021.*** For the first time since receiving it under FIRRMA, CFIUS invoked its authority to extend the second 45-day investigation period by an additional 15 days in three cases.

- **Transactions involving Chinese investors more than doubled.** CFIUS filings involving Chinese investors increased from 22 in 2020 to 45 in 2021. This represents a notable departure from the trend in recent years, which saw notices involving Chinese investors decline from 55 in 2018, to 26 in 2019, before reaching just 17 in 2020. Chinese investors also accounted for the greatest number of notice filings, with 44 (and only one declaration), while Canadian investors accounted for the overall highest number of filings at 50, including the greatest number of declarations at 22. Because the Report does not provide foreign investor details for the transactions that were abandoned or required mitigation, it is not clear how many of those transactions involving Chinese investors were among the notices that were withdrawn and abandoned (11 notices) or required additional time (63 notices) and/or mitigation to clear (26 notices).
- **Transactions involving “critical technologies” comprised a substantial portion of filings.** Approximately 42 percent of the transactions filed with CFIUS (184) involved target companies that are involved in research, development or production of “critical technologies,” which are generally speaking export-controlled items. Investors from Germany and the United Kingdom were involved in the most critical technology transactions at 16 filings each, with Japan closely behind at 15. Chinese investors were involved in 10 critical technologies transactions.
- **Approximately one-quarter of declarations were mandatory, continuing a trend from 2020.** Based on parties’ stipulations, 47 (28.7 percent) of the 164 declarations submitted in 2021 were subject to mandatory reporting requirements. The Report did not include statistics for the number of mandatory filings submitted as notices, so the reported figure does not reflect the total number of filings that were subject to mandatory filing requirements.
- **Transactions involving U.S. companies involved in electric power generation had the highest sector-specific number of filings with software publishers a close second.** Looking at transactions by specific sectors, transactions involving electric power generation, transmission and distribution companies had the highest number of filings at 39, with those involving software publishers a close second at 38. Other sectors rounding out the top ten included: computer systems design and related services (27); scientific research and design services (20); telecommunications, including wired and wireless telecommunications carriers and satellite telecommunications (18); semiconductor and other electronic component manufacturing (16); data processing, hosting and related services (16); management of companies and enterprises (15); insurance carriers, agencies, brokerages and other insurance-related activities (14); and aerospace product and parts manufacturing (14).
- **Real estate filings were rare.** FIRRMA expanded CFIUS’s jurisdiction over certain real estate transactions. However, in 2021, only one declaration and five notices were filed under the new real estate regulations.
- **No blocked transactions.** For the first year since 2015, there were no presidential blocks or divestiture orders. As noted above, however, parties withdrew their notice and abandoned their transaction nine times last year after being unable to reach agreement with CFIUS on mitigation measures to resolve identified national security concerns, which is two more than the prior year.

Conclusion

The trends outlined in the Report confirm that CFIUS continues to be an important consideration in an increasing number of transactions in the post-FIRRMA world. Accordingly, parties to transactions are well advised to carefully and thoroughly consider CFIUS issues to ensure that any CFIUS-related decisions, such as whether and how to file the transaction with CFIUS, are made on the basis of a thorough and reasoned analysis.

For example, with more than a quarter of declarations requiring a subsequent notice filing to obtain clearance, opting for a declaration filing over a notice in the first instance as a way to shorten the pre-closing timeline may not be the best approach in some cases. In addition, as the low number of requests for filings that ultimately resulted from CFIUS outreach on non-notified transactions demonstrates, taking such inquiries seriously and responding quickly and comprehensively to such requests can help avoid the need for a full filing.

¹ <https://www.bea.gov/news/2022/new-foreign-direct-investment-united-states-2021>.

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