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CFIUS Annual Report for CY 2021: Top Takeaways

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On August 2, 2022, the Committee on Foreign Investment in the United States ("CFIUS" or the "Committee") released its annual report covering calendar year 2021 (the "Annual Report").[1] This report represents the first full calendar year in which the Committee operated pursuant to the new regulations implemented in 2020 under the Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA").[2]

Our top observations from the Annual Report are set forth below.

1. **Amidst the Backdrop of a Strong M&A Market, The Committee Reviewed a Record Number of Filings**

Parties to a covered transaction may initiate CFIUS's national security review of the transaction by filing a short-form declaration or a full-length written notice. Consistent with the robust M&A market in 2021, CFIUS reviewed a record number of 436 total filings in 2021, up 39 percent from 2020. 164 (38 percent) of these filings were declarations, and 272 (62 percent) were written notices, both figures representing significant percentage increases from 2020.[3]

	2020	2021 (?)
Declarations	126	164 (?30%)
Notices	187	272 (?45%)
Total Filings	**313**	**436 (?39%)**

2.

2.

The Use of Short-Form Declarations and CFIUS Clearance Rates of Such Declarations Have Increased Significantly

Short-form declarations were introduced through the passage of FIRRMA in 2018, as both an optional form of filing and pursuant to mandatory requirements under certain conditions. Although a recent introduction, the statistics noted above indicate that declarations are emerging as a viable alternative to the traditional written notice process in certain situations.

Less than a third of declarations filed in 2021 were subject to mandatory requirements (47 of 164 total declarations), indicating that parties are increasingly seeing value in filing a voluntary declaration, which has fewer requirements and a shorter review timeline. Although, there is always a risk with a declaration that the overall CFIUS timeline and burden could be lengthened should the Committee request the parties to file a written notice or determine it is unable to conclude action on the basis of the declaration after the 30-day declaration review. Thus, deciding whether to file a declaration versus a notice should be based on an overall risk calculus of many factors. As the numbers reflect, the

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availability of the declaration process does not replace notices as a filing of choice in all instances.

Committee Action	Number of Declarations (164 Total)
Request parties file a written notice	30 (18%)
Unable to conclude action	12 (7%)
Clearance	120 (73%)
Rejected	2 (1%) [4]

To put these numbers into perspective, Committee clearance of declarations increased from less than 10 percent in 2018, to 37 percent in 2019, to 64 percent in 2020, and 73 percent this past year.[5] CFIUS also requested slightly fewer written notices from parties who filed declarations (18 percent, down from 22 percent), and reduced the number of instances in which the parties were informed that CFIUS was unable to conclude action on the basis of the declaration—from 13 percent to 7 percent.[6]

3. **There was a Significant Jump in Withdrawn Notices – But the Percentage of Abandoned Transactions Remained Consistent with 2020**

A notable uptick was seen in the number and percentage of withdrawn notices in 2021 – 74 in 2021 (27 percent) versus 29 in 2020 (15.5 percent).[7] Similar to 2020, just under half of all notified transactions proceeded to the subsequent 45-day investigation phase (130).[8] It was during this investigation phase that nearly all (72) of the 74 notices were withdrawn.[9] Most notices were withdrawn after CFIUS informed the parties that the transaction posed a national security risk and proposed mitigation terms.[10] In the vast majority of withdrawn notices in 2021 (85 percent), parties filed a new notice.[11]

Eleven notices, representing four percent of the total number of notices filed in 2021, were withdrawn and the transaction ultimately abandoned either because (i) CFIUS informed the parties that it was unable to identify mitigation measures that would resolve the national security concerns, or the parties rejected mitigation measures proposed by the Committee (nine withdrawals); or (ii) for commercial reasons (two withdrawals).[12] This is relatively consistent with the figures on abandoned transactions in 2020 (just above four percent).[13]

Notably, 2021 was the first year since 2016 in which no Presidential decisions were issued.[14]

4. **Canadian Acquirers Accounted for the Largest Number of Declarations, while Chinese Investors Greatly Preferred and Led in the Number of Notices Submitted**

Investors from Canada accounted for the largest number of declarations filed in 2021 (22), representing approximately 13 percent of the total.[15] Other countries commonly characterized by the U.S. government as presenting lower national security risks also topped the list of declarations, with Australia, Germany, Japan, South Korea, Singapore and United Kingdom cumulatively accounting for 62—or approximately 38 percent—of the 164 declarations submitted in 2021. [16] These numbers are generally consistent with previous years' trends. From 2019 to 2021, Canadian investors submitted 54 declarations, more than any other country. [17] Japanese and United Kingdom investors accounted for the second and third-most declarations filed over the same three-year period. [18]

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While Canadian investors may be increasingly utilizing the declaration process, they also still account for a significant number of full-length notices (28, approximately 10 percent of total notices filed, more than any other country except China). The high volume of Canadian declarations and notices is reflective of the significant business activity between the U.S. and Canada, particularly in sectors that may present national security risk, as discussed in insight #5 below.

In contrast to the Canadian utilization of both declarations and notices, Chinese investors largely eschewed the declaration process, filing only one declaration in 2021. [19] Chinese investors filed the highest number of notices last year, with 44 notices, or 16 percent of the total. [20] This represents a 159 percent increase from 2020, and a 76 percent increase from 2019. [21] This increase may not be fully reflective of economic factors in 2021, as this increase comes as CFIUS is intentionally focusing on non-notified historic transactions.

China's 2021 numbers are also consistent with the last three years, over which Chinese investors submitted 86 notices, but only nine declarations. [22] As noted in our discussion in insight #2, this apparent preference of Chinese investors to forego the short-form declaration in favor of the *prima facia* lengthier notice process may indicate a calculus that amidst U.S.-China geopolitical tensions, the likelihood of the Committee clearing a transaction involving a Chinese acquiror through the scaled down declaration process is quite low, and therefore a declaration filing may merely result in the Committee requesting after 30 days that the parties submit a notice, thus actually adding time to the process overall.

The low number of declarations also indicates that Chinese investors may be shying away from the more sensitive transactions, such as those involving critical technologies, which would require mandatory declarations.

5. **2021 Figures Confirm Focus on Business Sectors Associated with Critical Technologies and Sensitive Data**

Consistent with previous years, a high majority of CFIUS filings in 2021 involved the Finance, Information and Services and Manufacturing sectors, with those two sectors collectively accounting for over 80 percent of CFIUS filings.[23]

Business Sector	Notices
Finance, Information, and Services	55%
Manufacturing	28%
Mining Utilities and Construction	12%
Wholesale Trade, Retail Trade and Transportation	4%

In 2021, CFIUS reviewed 184 covered transactions involving acquisitions of U.S. critical technology companies.[24] In contrast to the 2020 data, the number of critical technologies filings have increased by 51 percent.[25] Consistent with the 2020 data, the largest number of notices filed remained to be the Professional, Scientific, and Technical Services subsector of the Finance, Information and Services sector (35) and Computer / Electronic Product Manufacturing subsector of the Manufacturing sector (31).[26]

Further, consistent with the observations made in insight #4 above, countries seen as traditionally U.S.-allied, such as Germany, United Kingdom, Japan, and South Korea, accounted for the most acquisitions of U.S. critical technology in 2021.[27] These four countries accounted for approximately 33 percent of such transactions. Of note, Canada and China each accounted for approximately five percent of transactions involving the

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acquisition of U.S. critical technologies.[28]

In light of the new policy mandate, critical technologies is expected to be a continuous focus of the Committee in coming years. Although the Annual Report does not specifically report on covered transactions involving acquisitions of U.S. companies with sensitive data, the sector-specific statistics indicate that this continues to be a focus area.

6. **The Committee Shortened Its Response Times to Respond to Draft Notices and Accept Formal Notices, but Continues to Take Advantage of the Full Time Periods to Complete its Actual Reviews**

Parties submitting draft notices to the Committee in 2021 received comments back from the Committee on average in just over six business days, an improvement from the 2020 average of approximately nine days.[29] Similarly, the Committee averaged six business days to accept a formal written notice after submission, which is an improvement from the average of 7.7 business days reported in the 2020 Annual Report.[30]

In terms of the Committee's turnaround times once a declaration or notice has been filed/accepted, the Committee in 2021 generally utilized the entire available regulatory periods available. With respect to a declaration, the Committee is required to take action [31] within 30 business days after receiving a declaration. Upon acceptance of a formal notice, the Committee has an initial 45 business days to review the filing and may extend the review period into a further investigation period of 45 business days.

Regarding declarations submitted in 2021, it took the Committee, on average, the entire 30-day period to conclude action. [32] Similarly, it took the Committee an average of 46.3 calendar days to close a transaction review during the initial review stage. [33] If the Committee extended the review into the subsequent investigation phase, the Committee completed the investigation, on average, within 65 calendar days. [34] However, this number may be misleading, and in practice parties should expect the Committee to complete investigations closer to the full 90-day deadline because the Annual Report indicates that the median for investigation closures was 89.5 calendar days. [35]

7. **No Significant Changes Regarding Mitigation Measures and Conditions**

In 2020, CFIUS adopted mitigation measures and conditions with respect to 23 notices or 12 percent of the total number of 2020 notices. [36] On a percentage basis, 2021 saw a marginal overall decrease in the adoption of mitigation measures and conditions. The Committee adopted mitigation measures and conditions with respect to 31 notices or 11 percent of the total number of 2021 notices. [37] For 26 notices, CFIUS concluded action after adopting mitigation measures. [38] With respect to four notices that were voluntarily withdrawn and abandoned, CFIUS either adopted mitigation measures to address residual national security concerns, or imposed conditions without mitigation agreements.[39] Lastly, as in 2020, measures were imposed to mitigate interim risk for one notice filed in 2021.[40]

It is worth noting that the Committee conducted 29 site visits in 2021 for the purpose of monitoring compliance with mitigation agreements. [41] Where non-compliance was identified, monitoring agencies worked with the parties to achieve remediation. [42]

While CFIUS reviews are highly fact-specific and nuanced, based on historical data points, we can expect the Committee to complete action on a majority of transactions in 2022 without conditions or mitigating measures.

8. **Real Estate Transactions Comprise a Minute Portion of CFIUS Reviews**

Despite CFIUS's expanded authority to review real estate transactions that may present a national security risk, such as proximity to sensitive U.S. military or government facilities, such transactions remain a very small portion of the total transactions reviewed by the

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Committee. Only five notices and one declaration concerning real estate were reviewed in 2021.[43] While the lack of real estate CFIUS filings could be tied to economic factors, this space remains one to watch in future years.

9. **Requested Filings For Non-Notified/Non-Declared Transactions Decreased**

In addition to transaction parties proactively filing with the Committee, the Committee may also identify and initiate unilateral review of a transaction, and may request the parties to submit a filing. The 2020 Annual Report was the first report to contain data relating to the number of non-notified/non-declared transactions identified and put forward to the Committee for consideration.

While CFIUS identified 135 non-notified/non-declared transactions in 2021—compared to 117 in 2020—fewer transactions resulted in a request for filing. [44] Out of 117 identified transactions in 2020, 17 resulted in a request for filing versus just eight requests for filing in 2021.[45]

Given that the number of transactions identified increased, the Committee appears committed to enhancing and utilizing methods for improving the identification of non-notified/non-declared transactions. In fact, in the press release announcing the Annual Report, the Department of Treasury noted as a "key highlight" that CFIUS continues to hire talented staff to support identifying transactions that are not voluntarily filed with the Committee, as well as monitoring and enforcement activities.[46] As such, the trends in the number of non-notified/non-declared transaction will be an important space to watch.

Conclusion

The record increase in CFIUS filings this year reflects the continuing expansion of the Committee's scope and resources since the enactment of FIRRMA, as well as the recognition by foreign acquirers of the increased risks and sensitivities when it comes to transactions involving U.S. businesses that may pose potential national security risks in the eyes of the Committee. CFIUS has consistently reviewed more covered transactions from year to year, and we see no indication this trend will not continue.

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[1] Committee on Foreign Investment in the United States, "Annual Report to Congress, Report Period: CY 2021", available at: https://home.treasury.gov/system/files/206/CFIUS-Public-AnnualReporttoCongressCY2021.pdf.

[2] For further detail on the impact of FIRRMA, see our previous alert "CFIUS Reform: Top Ten Takeaways from the Final FIRRMA Rules," Feb. 19, 2020, available at: https://www.gibsondunn.com/cfius-reform-top-ten-takeaways-from-the-final-firrma-rules/.

[3] Annual Report at 4, 15.

[4] In one of these instances, the parties re-filed as a notice.

[5] Committee on Foreign Investment in the United States, "Annual Report to Congress, Report Period: CY 2018," at 31 (the "2018 Annual Report") available at: https://home.treasury.gov/system/files/206/CFIUS-Public-Annual-Report-CY-2018.pdf; ; Committee on Foreign Investment in the United States, "Annual Report to Congress, Report Period: CY 2019," at 33 (the "2019 Annual Report") available at: https://home.treasury.gov/system/files/206/CFIUS-Public-Annual-Report-CY-2019.pdf; Committee on Foreign Investment in the United States, "Annual Report to Congress, Report Period: CY 2020," at 4 (the "2020 Annual Report") available at: https://home.treasury.gov/system/files/206/CFIUS-Public-Annual-Report-CY-2020.pdf.

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[6] 2020 Annual Report at 4; Annual Report at 4.

[7] 2020 Annual Report at 15; Annual Report at 15.

[8] Annual Report at 15.

[9] Annual Report at 37.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] 2020 Annual Report at 15.

[14] Annual Report at 15; 2020 Annual Report at 17.

[15] Annual Report at 11.

[16] Annual Report at 11-12.

[17] Annual Report at 11

[18] Annual Report at 11-12.

[19] Annual Report at 11

[20] Annual Report at 32.

[21] *Id*.

[22] Annual Report at 11, 32.

[23] Annual Report at 20.

[24] Annual Report at 48.

[25] 2020 Annual Report at 51.

[26] Annual Report at 50.

[27] Annual Report at 49.

[28] *Id*.

[29] 2020 Annual Report at 18; Annual Report at 18.

[30] 2020 Annual Report at 18; Annual Report at 18.

[31] Upon receiving a declaration, the Committee may request that the parties file a written notice, inform the parties that the Committee is unable to complete action under the initial review phase on the basis of the declaration, initiate a unilateral review, or notify the parties it has completed all action with respect to the transaction. 50 U.S.C. § 4565(b)(1)(C)(v)(III)(aa).

[32] Annual Report at 13.

[33] Annual Report at 18. Considering that the figure of 46.3 days is expressed in calendar

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days and not business days, we take the view that the time taken by the Committee to close a transaction review is acceptable.

[34] Annual Report at 18.

[35] *Id*.

[36] 2020 Annual Report at 40.

[37] Annual Report at 38.

[38] *Id*.

[39] *Id*.

[40] *Id*.

[41] Annual Report at 44.

[42] *Id*.

[43] Annual Report at 4, 22.

[44] Annual Report at 45.

[45] 2020 Annual Report at 48; Annual Report at 45.

[46] "Treasury Releases CFIUS Annual Report for 2021," (Aug. 2, 2022) available at: https://home.treasury.gov/news/press-releases/jy0904.

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