

CFIUS 2020 Annual Report

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International Alert

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In July 2021, the Committee on Foreign Investment in the United States (CFIUS) released its annual report to Congress. The report covers transactions filed with CFIUS for the calendar year 2020 and describes the CFIUS process since the implementation of the Foreign Investment Risk Review Modernization Act (FIRRMA).

While the total number of CFIUS declarations increased approximately 35% in the 2020 period, formal notices decreased approximately 20% from the previous year—with the most significant decline in formal notices seen in transactions involving Chinese and Japanese investors. There are likely multiple factors causing this decline, including the COVID-19 pandemic and heightened political tensions between the U.S. and Chinese governments. Generally, across the three-year period from 2018 to 2020, China accounted for 15% of all notices filed—the largest percentage of any single country of origin, with Japan a close second at 14.8%.

During the 2018-2020 CFIUS reporting period, “Manufacturing” and “Finance, Information, and Services” continue to be the two most significant industries, with each accounting for approximately 39% of all notices submitted. The annual report highlighted the following:

DECLINE IN CHINESE INVESTMENT IN U.S. COMPANIES

Although Chinese investors represented the largest percentage of notices filed with CFIUS during the 2018-2020 period (approximately 15%), the number of total notices filed by Chinese investors experienced a sharp decline. In 2018, a total of 55 notices were filed—compared to 17 in 2020. These figures may reflect Presidential Executive Order on Hong Kong Normalization (E.O. 13936) (signed July 14, 2020) which eliminates differential treatment between investments originating from Hong Kong or mainland China for the purposes of CFIUS reporting.

EXPANDED CFIUS JURISDICTION

FIRRMA expanded the jurisdiction and authority of CFIUS and broadened the scope of “covered transactions” which may be subject to CFIUS review. The U.S. Department of the Treasury (Treasury) issued interim rules in 2018, under the Critical Technologies Pilot Program (Pilot Program), that created mandatory filing requirements for certain non-controlling, non-passive foreign investments in U.S. business if those businesses were involved in the production, design, testing, manufacture, fabrication, or development of one or more “critical technologies.” Now that the Pilot Program has ended, the Treasury has formally adopted the FIRRMA reporting requirements effective February 13, 2020. In addition, FIRRMA provides additional authority for CFIUS intervention in certain real estate transactions which involve foreign persons.

CRITICAL TECHNOLOGIES INVESTMENTS

Japanese entities were the leading investors in U.S. critical technology in 2020, with a total of 18 notices submitted to CFIUS. Computer and electronic product manufacturing was the leading source of foreign investment in critical technologies—amounting to approximately 27% of total foreign investment across all critical technologies. Approximately 24% of foreign investment in critical technology was in professional, scientific and technical services, with approximately 9% of investment in transportation equipment manufacturing.

EXPANDED USAGE OF SHORT-FORM DECLARATIONS

Until February 2020, short-form declarations were only available for transactions that fell within the scope of the Pilot Program. CFIUS has expanded the use of short-form declarations to permit declaring parties to make a short-form declaration for any covered transaction. But mandatory declarations are still required for control transactions and certain noncontrolling investments in U.S. business involved in critical technologies.

TURNAROUND TIMES FOR ACCEPTANCE AND REVIEW

On average CFIUS took 9.1 business days to accept a notice submission, 7.7 business days to provide written comments, and 4.7 business days to accept a declaration. Start-to-finish, notice reviews took 45 calendar days on average, while notices that progressed to the optional investigative stage took an average of 86 calendar days to complete. Declaration reviews took 29.8 days, on average.

CFIUS IMPOSED MITIGATION MEASURES

The report highlights examples of mitigation measures and conditions imposed by CFIUS on applicants during the 2020 period, including:

- ensuring that only authorized persons have access to certain technology; that only authorized persons have access to U.S. Government, company, or customer information; and that the foreign investor not have direct or indirect access to systems that hold such information;
- 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 customers regarding the change of ownership;
- 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 investor; and
- divestiture by the foreign investor of all or part of the U.S. business

If you have any questions or would like further information on CFIUS reporting requirements please contact Gary P. Biehn (biehng@whiteandwilliams.com; 215.864.7007), David J. Creagan (creagand@whiteandwilliams.com; 215.864.7032) or Evan F. Poulgrain (poulgraine@whiteandwilliams.com; 215.864.7163).

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