

ONPOINT / A legal update from Dechert's International Trade and
Government Regulation Practice Group

Highlights from Recent CFIUS Annual Report

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Dechert
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Key Takeaways

- The U.S. Treasury Department recently published the Committee on Foreign Investment in the United States (“CFIUS or the “Committee”) [Annual Report to Congress](#) on key activities, including notices, declarations, and withdrawals through 2021 (“Annual Report”). The Annual Report holds important insights for dealmakers contemplating non-U.S. investments in U.S. businesses.
- **Record Year for CFIUS:** 2021 was the Committee’s most active year to date; there were a record 436 filings (both declarations and notices) presented to the Committee for review. This data reflects both the expansion of the Committee’s jurisdiction in recent years and a surge in global M&A to record levels in 2021.
- **Chinese Investments Reviewed by Committee Double:** 2021 may mark the return of Chinese investors. Prior to 2021, Chinese investments notified to the Committee were on a ten-year decline. However, the Annual Report shows that Chinese investors submitted 44 notices to the Committee for review, which is over a dozen more than the country with the second highest number of notices submitted for review (Canada). This may signal an increased openness from both Chinese investors and the Committee to negotiating mitigation agreements to resolve potential national security risks.
- **Declarations Appropriate for Certain Transactions:** 2021 also saw an increase in short-form declarations submitted to the Committee for review (164 in 2021 versus 126 in 2020). A greater portion of these declarations (75% versus 64%) also resulted in clearance, suggesting that CFIUS and the market are finding greater alignment on transactions appropriate for short form filings.
- **Continued Use of Mitigation Agreements:** The Annual Report data identifies a greater number of mitigation agreements – CFIUS adopted mitigation measures with respect to 31 notices in 2021, up from mitigation measures being imposed with respect to 23 notices in 2020 – although on a percentage basis there was little change. 74 notices were withdrawn from CFIUS review in 2021 as compared to 29 notices withdrawn from CFIUS review in 2020. At the same time, most of these notices were refiled (64 of 74), suggesting that a meaningful percentage of the withdrawn notices were withdrawn and refiled in connection with negotiation of mitigation agreements necessary to achieve clearance.
- **Use of New Authorities:** CFIUS utilized its authority to extend an investigation by 15 days in “extraordinary circumstances” for the first time in 2021, doing so three times.
- **Nine Transactions Abandoned:** While the President did not issue any blocking decisions in 2021, in nine instances, parties withdrew their CFIUS filings and abandoned transactions after the Committee informed the parties that it was unable to identify national security measures that would resolve national security concerns or in circumstances where the Committee identified mitigation measures that parties elected not to accept.

- Below, we identify six highlights from the most recent Annual Report. To revisit our OnPoint that covers the 2020 Annual Report, please find it [here](#). You can also find our recent OnPoint on CFIUS recent trends and developments [here](#).



Background

CFIUS is an interagency committee, principally comprising of nine members and chaired by the Secretary of the Treasury, which has broad powers to review foreign investments in and acquisitions of U.S. businesses to determine the potential impact on U.S. national security. The Committee has the authority to impose mitigation measures, suspend transactions and, where appropriate, recommend that the President block or unwind transactions.

CFIUS has broad authority (expanded in recent years by the Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA")) to review transactions involving U.S. businesses and non-U.S. investors, including:

- Mergers, acquisitions and takeovers that could result in a non-U.S. person acquiring control (defined broadly) of a U.S. business;
- Certain non-controlling investments by non-U.S. persons in U.S. businesses associated with critical technology, critical infrastructure, and sensitive personal data (with mandatory filing requirements for transactions involving certain U.S. businesses dealing in critical technologies or non-U.S. persons affiliated with non-U.S. governments); and
- Transactions involving the purchase or lease by, or concession to, a non-U.S. person of certain U.S. real estate that might raise national security concerns.

Transactions are brought to the Committee's attention through filings that take the form of either "notices" or "declarations." Notices are multi-page, in-depth descriptions of the transaction and parties that result in a four- to six-

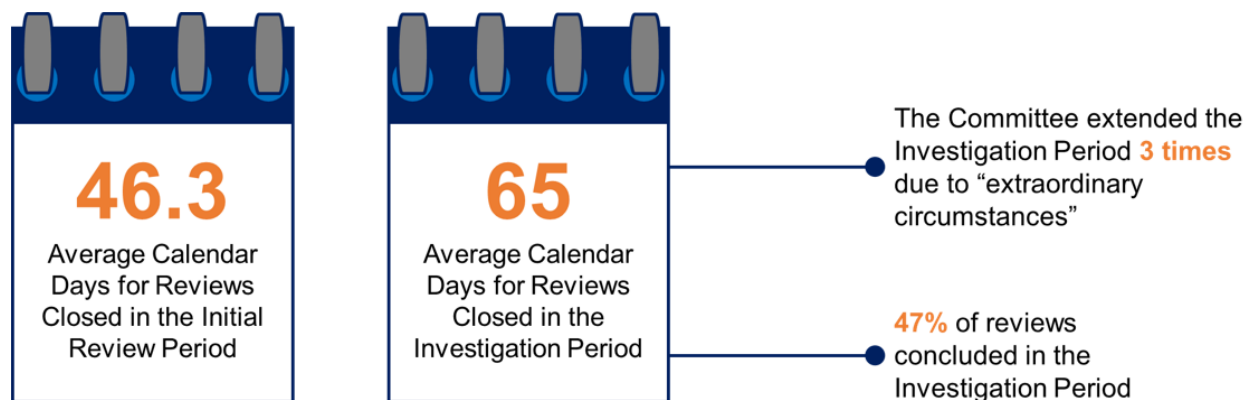
month review process and possible investigation. Declarations are typically no longer than five pages and present a simplified method of informing CFIUS of a transaction, including (but not only) when a filing is mandated (see our prior OnPoint [here](#)).

Annual Report Highlights for Dealmakers

1. *Almost half of all CFIUS reviews continue to extend into an investigation period. In addition, CFIUS utilized its authority to extend an investigation in “extraordinary circumstances” in 2021 for the first time.*

Pre-FIRRMA, in the normal course the longest possible review timeline for the Committee (prior to submission for Presidential consideration) was 75 days: CFIUS would conduct a 30-day review and could conduct an additional investigation of up to 45 days under certain circumstances. Absent a withdraw/refile, post-FIRRMA, the longest possible review timeline is now 105 days: the initial review period is 45 days, after which CFIUS can conduct an additional 45-day investigation if determined necessary and, in extraordinary circumstances, can extend the investigation period by an additional 15 days (prior to submission for Presidential consideration).

As in 2020 (47%) and 2019 (48%), in 2021 almost half of all notices went into an investigation period (47%). Notably, the average investigation in 2021 lasted only 65 days, which is down from 2020’s 86-day average. In contrast however, the Committee exercised its authority to extend an investigation by 15 days three times in 2021. As provided above, this authority can be exercised in “extraordinary circumstances,” (which are undefined in the CFIUS regulations) and has never been invoked by the Committee before. While the Annual Report does not provide insight into the reasons three notices were subject to the Committee’s investigation extension powers, the use of this authority indicates the Committee’s willingness to utilize all the tools available to it during the review of a proposed transaction to assess whether it raises a risk to U.S. national security.



The Annual Report also provides other valuable data on Committee timing. In 2021, it took CFIUS on average less time than it did in 2020 to provide parties with written comments on draft notices submitted to the Committee and to accept a formal notice for review once it has been submitted. In 2021, on average the Committee provided written comments on draft notices in six business days and accepted a formal notice for review six days after submission. By contrast, in 2020 on average the Committee provided written comments on draft notices in seven business days and accepted a formal notice for review nine days after submission. Transaction parties no doubt appreciate that the Committee is handling these early stages more efficiently even as the total number of filings to be handled continues to increase.

2. It remains important to consider potential mitigation measures early in the transaction process.

CFIUS can impose mitigation measures on a non-U.S. acquirer's investment in or acquisition of a U.S. business to resolve any national security risks that the Committee identifies during its review. The Annual Report included examples of mitigation measures negotiated in 2021 that required the parties involved to take specific and verifiable actions. These actions included the following:

- Prohibiting or limiting the transfer or sharing of certain intellectual property, trade secrets, or know-how;
- Establishing guidelines and terms for handling existing or future US Government ("USG") contracts, USG customer information, and other sensitive information;
- Ensuring that only authorized persons have access to certain technology, that only authorized persons have access to USG, company or customer information, and that the non-U.S. acquirer not have direct or remote access to systems that hold such information;
- Establishing a Corporate Security Committee and other mechanisms to ensure compliance with all required actions, including the appointment of a USG-approved security officer or member of the board of directors and requirements for security policies, annual reports, and independent audits;
- 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;
- Exclusion of certain sensitive assets from the proposed transaction;
- Prior notification to approval by relevant U.S. government parties in connection with any increase in ownership or rights by the non-U.S. acquirer; and
- Divestiture of all or part of the U.S. business.

The data in the Annual Report reflects a similar percentage of transactions requiring mitigation measures in 2021 (31, which represented 11% of all transactions reviewed by the Committee) in comparison to 2020 (23, which represented 12% of all transactions reviewed by the Committee) and 2019 (28, which represented 12% of all transactions reviewed by the Committee).

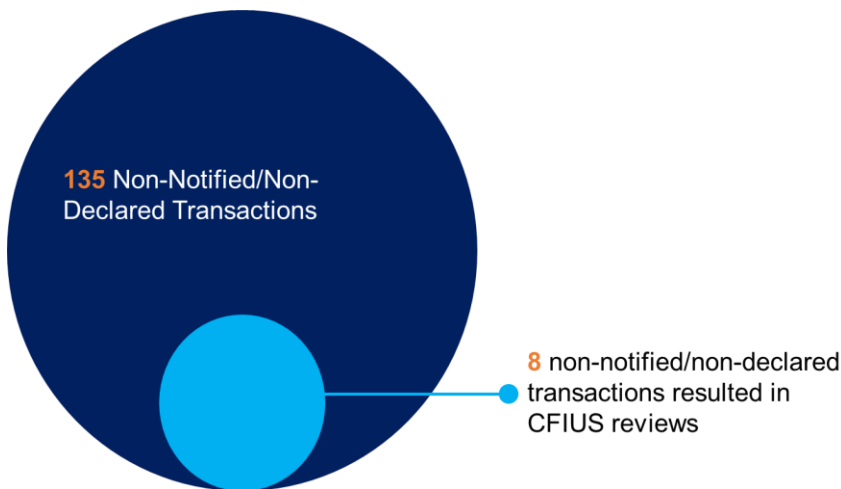
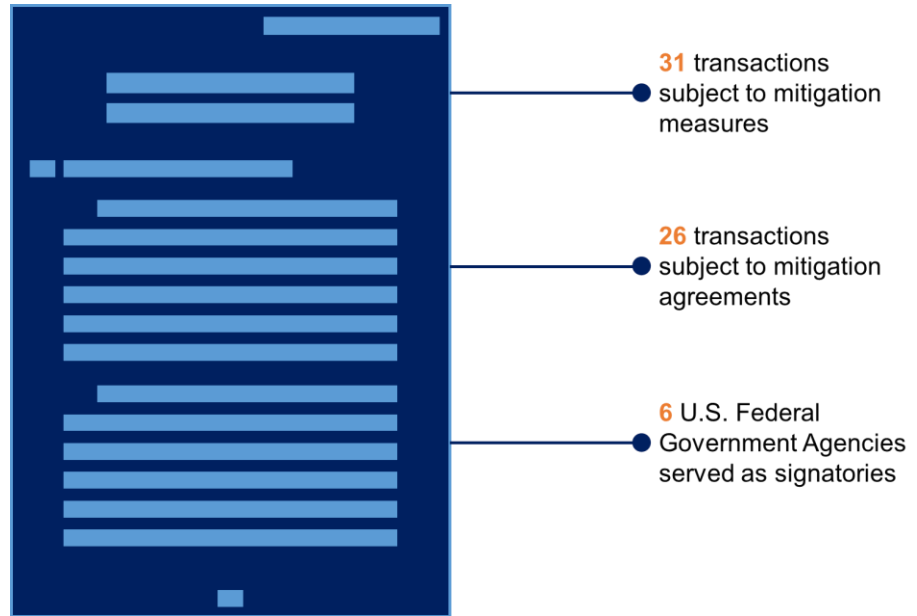
However, 2021 also represents a marked increase in the number of notices withdrawn from CFIUS review (74) as compared to 2020 (29) and 2019 (30). Although most of the notices withdrawn were resubmitted to the Committee for review (64), this still means that there were nine transactions withdrawn from the CFIUS review process (and not resubmitted) because either CFIUS could not identify mitigation measures that would resolve the Committee's national security concerns, or the parties were unwilling to accept the mitigation measures presented to them. Withdrawing and refiling notices also has implications for parties' transaction timelines; when a notice is withdrawn and refiled CFIUS can "restart the clock." This provides the Committee an additional 45 or 90 days (or more) to review the transaction and can add an additional few months to the CFIUS review timeline.

In addition, withdrawing a notice from CFIUS review is not always the end of the story; CFIUS still can impose mitigation measures to address residual national security risks. In 2021, CFIUS adopted mitigation measures (i.e., National Security Agreements or “NSAs”) for two withdrawn transactions, adopted certain other mitigation conditions (short of NSAs) with respect to two other withdrawn transactions and imposed interim mitigation measures with respect to one withdrawn transaction.

Transaction parties should continue to evaluate in advance of CFIUS’ review what mitigation measures might be required and determine whether, and to what extent, such measures might impact the feasibility of proceeding with the transaction (and on what timetable).

3. CFIUS is actively identifying “non-notified” transactions for review.

One of the overarching changes under FIRRMA was the strengthening and broadening of the Committee’s authority to review foreign investments in and acquisitions of U.S. businesses, including with respect to review of so-called “non-notified/non-declared” transactions, meaning transactions that technically fall within CFIUS’ jurisdiction but were not presented to the Committee for review. According to the Annual Report, CFIUS identified and requested information regarding 135 “non-notified/non-declared” transactions, which is a slight increase from 2020 (117). From these 135 transactions, however, only eight resulted in a formal request for a filing; in 2020, 17 transactions resulted in a formal request for filing.



Given the uptick in deals before CFIUS and M&A, together with the Committee’s focus on identifying non-notified transactions, it is notable that the number of transactions the Committee requested information, or a formal filing, remained relatively even in recent years. One potential explanation may be that transaction parties are, overall, taking a cautious approach to submitting transactions for CFIUS’ review on a proactive basis.

The Annual Report also identified several methods that CFIUS utilizes for identifying such transactions, such as the following: tips from the public, media reports, commercial databases, interagency referrals, and congressional notifications.

Going forward, the Committee plans to improve its methods for identifying “non-notified/non-declared” transactions through increased training and staffing across the CFIUS member agencies to facilitate greater coordination and effective identification of transactions of potential interest and increased public awareness of the CFIUS tips mailbox. This highlights the importance of including CFIUS considerations during the due diligence process.

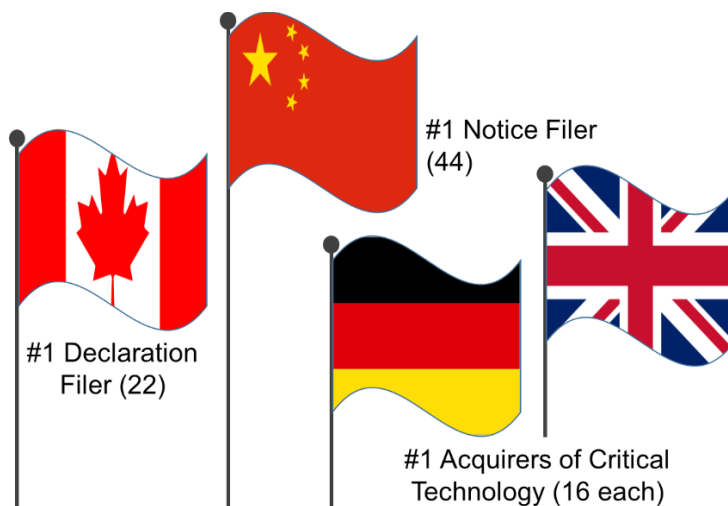
4. China has reversed its downward investment decline, becoming (again) the country with the most notices submitted to the Committee for review and the only non-U.S. ally in the group of top investors for 2021.

Prior to 2021, CFIUS filings by Chinese investors were in a ten-year decline. However, in 2021, Chinese investors joined investors from U.S. allied countries in the group of investors responsible for the largest share of notices filed with the Committee. China accounted for 44 notices submitted for review, with Canada (28) in second place and Japan (26) in third place. China was also the country with the seventh most acquisitions of U.S. critical technology (10), with Germany (16) and the United Kingdom (16) tied for first in that category. With respect to declarations, Canadian investors were responsible for the largest share of declarations filed with the Committee (22), followed by a four-way tie for second between Germany (11), Japan (11), Singapore (11) and South Korea (11). One potential explanation (borne out by our experience) for the uptick amidst near-constant China-U.S. geopolitical tension is that the Committee and Chinese investors may be more willing now than in prior years to negotiate mitigation agreements.

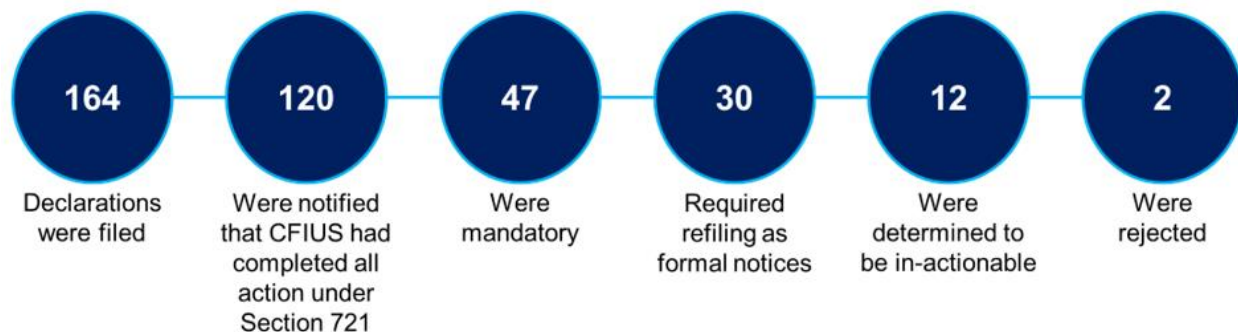
Other than the uptick for CFIUS filings by Chinese investors in 2021, it is also noteworthy that Australia, Canada and the United Kingdom (despite the countries’ status as “excepted foreign states” under the CFIUS regulations during 2021) accounted for 16% of notices and 24% of declarations. As “excepted foreign states,” Australia, Canada, the United Kingdom, and New Zealand (which was added to the list in January 2022) enjoy benefits not available to other foreign investors. For example, under certain circumstances, “excepted investors” are not subject to mandatory filing requirements and are shielded from CFIUS’ expanded jurisdiction over non-controlling investments in certain U.S. businesses and certain U.S. real estate transactions. In theory, such benefits may enable such “excepted investors” to present to their potential transaction partners fewer impediments to closing as compared to other foreign investors who condition their investments on the receipt of CFIUS’ approval. In practice, investors from these countries continue to submit transactions for the Committee’s review at a higher rate than other countries.

5. The use of declarations continues to hold steady, and more declarations are being cleared than before.

When filing a declaration, there are a range of possible outcomes (as opposed to the filing of a notice, which provides parties with a clear-cut response from the Committee). CFIUS may respond to a declaration by



informing parties that it: (1) cleared the transaction, (2) initiated a unilateral review, (3) requested that the parties submit a full formal notice, or (4) is unable to reach a decision regarding clearance based on the declaration alone. The data from the Annual Report shows how these options continue to play out for non-U.S. investors.



In 2021, CFIUS was “unable to complete action” in a smaller percentage (7%) of the declarations filed as compared 2020, where CFIUS was “unable to complete action” on 12% of declarations filed. In addition, a larger percentage (75%) of transactions were cleared through the declaration process as compared to 2020, where only 64% of transactions were cleared this process. The number of declarations filed by parties that did not have a mandatory declaration filing requirement also continues to remain high (71%).

In general, the gap between declarations and notices filed in 2021 was slightly wider than the gap in 2020, where there were 126 declarations filed to 187 notices filed, and 40% of all transactions notified to the Committee in 2020 were made via declaration. In 2021, there were 164 declarations filed to 272 notices and 37% of all transactions notified to the Committee were made via declaration. 2021 also remains a marked departure from 2019, when only 29% of all transactions notified to the Committee were filed via declaration. However, the data from the Annual Report suggests that transaction parties and the Committee are beginning to find greater alignment on the types of transactions (considering both investors/acquirers and targets) for which declarations are appropriate. Accordingly, the market may continue to see an increased use of declarations to take advantage of the compressed review timeline in the years ahead.

6. Failure to obtain CFIUS Approval resulted in transaction parties abandoning nine transactions in 2021.

While the Committee sees hundreds of filings each year, it rarely blocks or requires the unwinding of a deal: to date, only seven transactions have ever been formally blocked by Presidential Order. At the same time, mandated blocking/unwinding of deals has occurred more frequently in recent years. President Trump ordered the blocking of two transactions and the unwinding of two others. President Biden did not formally block any transactions during his first year in office, and it remains to be seen how the Biden Administration will use this authority over its remaining term. Of course, transactions are not only subject to formal disruption via Presidential Order but also may be withdrawn in anticipation of such orders.



Abandoned Transactions in 2020



Abandoned Transactions in 2021

During 2020, for example, according to CFIUS seven transactions were withdrawn from the CFIUS review process (and ultimately abandoned) because either CFIUS could not identify mitigation measures that would resolve the Committee’s national security concerns or the parties were unwilling to accept the mitigation measures presented to them as a condition of clearance. In 2021, the Annual Report states that parties abandoned transactions in nine instances.

Conclusion

Given the uptick in both deal volume and review activity at the Committee, transaction parties contemplating investments by non-U.S. investors in U.S. businesses should evaluate CFIUS considerations early in the transaction process to avoid surprises and delays on their preferred path to closing.

Dechert has represented many clients through CFIUS reviews, including major operators and investors in the high tech, telecommunications, energy, defense, and infrastructure industries. We regularly advise foreign and domestic entities (“buyers” and “sellers,” as well as other interested third parties) through the CFIUS review process, helping them determine whether or not to bring a transaction before the Committee (and whether or not CFIUS review is required), to assemble the required information and materials for a filing, and then (as necessary) to negotiate national security agreements with CFIUS in a manner that minimizes both delay and the imposition of conditions that might threaten the transaction. We also give counsel on strategies for identifying and addressing political and policy considerations that may arise.

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