

CFIUS Releases 2019 Annual Report to Congress

Key Takeaways

- On July 31, 2020, the U.S. Treasury Department, as chair of the Committee on Foreign Investment in the United States (“CFIUS” or the “Committee”), published its [Annual Report to Congress](#) on all notices filed with CFIUS in 2019, the most recent year for which data has been declassified, and all reviews or investigations completed during the year (“Annual Report”).
- The Annual Report also marks the second data set for reviews and investigations completed since the [Foreign Investment Risk Review Modernization Act of 2018](#) (“FIRRMA”) became law.
- Compared to 2018, CFIUS received slightly more filings (231 vs. 229) but conducted many fewer second-stage investigations (49% vs. 69%) and saw fewer abandoned deals.
- There was also a notable drop (over 50%) in filings involving Chinese investment and a new leading foreign acquirer – Japan.

2019 At A Glance	
231	Notices were filed with CFIUS for review
15	Notices were withdrawn and refiled
12	Notices were withdrawn and not refiled
113	Investigations were initiated
1	Notices were rejected for failing to satisfy requirements
1	Transaction was referred to the President and blocked

The report holds important insights for foreign acquirers contemplating acquisitions and other investments in the United States. Below, we highlight some of the key data in the Annual Report.¹ To revisit our OnPoint that covers the 2018 Annual Report, please find it [here](#).

¹ Law Clerk Sofia Panero contributed to this OnPoint.

Background

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

On August 13, 2018, President Trump signed into law the [Foreign Investment Risk Review Modernization Act of 2018](#) (“FIRRMA”), which made several substantial changes to the CFIUS process, including by:

- Expanding the scope of CFIUS jurisdiction to permit review of a wider range of transactions;
- Authorizing CFIUS to mandate notifications regarding certain types of transactions involving critical technologies;
- Adopting a new, short-form declaration process to notify the Committee about potentially covered transactions;
- Authorizing collection of filing fees with respect to covered transactions for which a written notice is filed; and
- Strengthening the Committee’s authority to restrict transactions that threaten U.S national security.

FIRRMA’s implementation has since been rolled out in phases, starting with the implementation of the so-called “Pilot Program” in October 2018 and culminating with the release of two sets of final regulations that took effect in February 2020. Our coverage of final regulations for transactions involving critical technology, critical infrastructure, and sensitive personal data (“[TID Final Regulations](#)”) and the final regulations pertaining to provisions of FIRRMA that expand CFIUS jurisdiction over certain real estate transactions (“[Real Estate Final Regulations](#)”) is available [here](#) and [here](#).

Implementation of FIRRMA and fine tuning of the national security review process remains ongoing. For example, between March and July 2020, CFIUS released and finalized a rule to establish filing fees for CFIUS reviews of notices of transactions (“[Final Filing Fee Rule](#)”). Our coverage of the Final Filing Fee Rule is available [here](#). In addition, in May 2020, CFIUS published a proposed rule that would modify the mandatory declaration provision for covered transactions involving critical technology and clarifies the “substantial interest” test used for determining mandatory declaration requirements for certain investments by non-U.S. governments (the “[Proposed Rule](#)”). Our coverage of those changes is available [here](#).

Annual Report Highlights for Dealmakers

- The last nine years at a glance show the high volume of transactions that CFIUS has reviewed.*

2010 – 2019: Transactions, Withdrawals, and Presidential Decisions



1574

Notices were filed with CFIUS for review



30

Notices were withdrawn during the initial review phase



52%

Of notices required an investigation

240

Notices were withdrawn during the investigation phase



6

Transactions were referred to the president

- Dealmakers should continue to be conservative when estimating the length of CFIUS reviews.*

The average investigation in 2019 lasted 85 calendar days (11 additional days compared to 2018). Since the implementation of FIRRMA, the Committee has demonstrated that it will utilize the additional time afforded it under the Act. Pre-FIRRMA, the initial review phase was conducted over 30 days and the average investigation spanned up to 45 days. FIRRMA, however, extended the initial review phase by 15 days (two weeks) and in 2019, similar to 2018, the average initial review phase spanned the full 45 days.

Closing in Review (2018)		Closing in Review (2019)		Closing in Investigation (2018)		Closing in Investigation (2019)	
44	Average Calendar Days	45	Average Calendar Days	74	Average Calendar Days	85	Average Calendar Days
45	Median Calendar Days	45	Median Calendar Days	75	Median Calendar Days	91	Median Calendar Days

However, while (and perhaps because) the initial review period now lasts longer, a higher percentage of transactions are cleared at the conclusion of the review stage, and fewer transactions require investigations. In 2019, less than half of all reviews proceeded to investigation, a decrease from both 2017 when 73% proceeded to investigation and 2018 which saw 69% of all reviews investigated.

% of Transactions that Required an Investigation	
2016	45% of transactions under review
2017	73% of transactions under review
2018	69% of transactions under review
2019	49% of transactions under review

The Annual Report also provides other valuable data on Committee timing. In 2019, it took CFIUS on average ten business days to provide written comments on draft notices submitted to the Committee. In addition, it took on average seven days for CFIUS to accept a formal notice for review once it had been submitted.

3. 2019 saw no Presidential Orders on CFIUS.

While the Annual Report states that one transaction was referred to the President for review in 2019, no Presidential Orders were issued during the 2019 calendar year. However, 2019 was bookended by two Presidential Orders on CFIUS issued in 2018 and 2020.

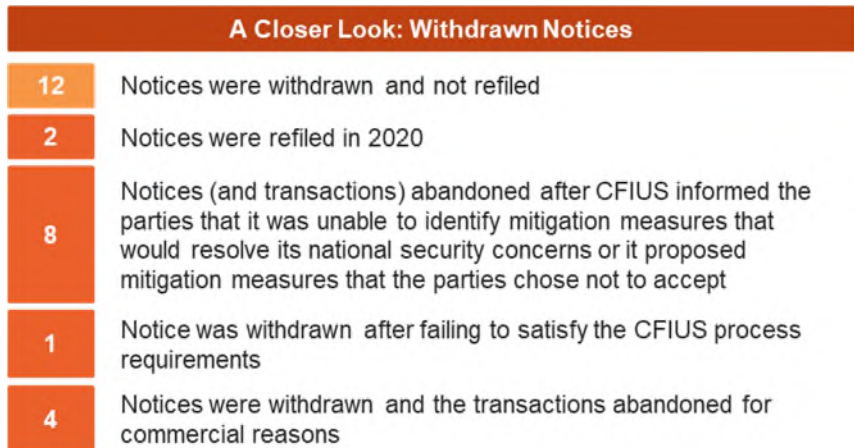
In March 2018, President Trump blocked microchip maker Broadcom Ltd. from acquiring Qualcomm Inc. and ordered the parties to abandon the \$117 billion proposed transaction. Two years later, in March 2020, President Trump issued an order requiring Beijing Shiji Information Technology Co. (“Shiji Group”) to divest the U.S.-based cloud-based hotel management software company StayNTouch, Inc. (“StayNTouch”). The order came 18 months after the Shiji Group acquired StayNTouch in September 2018. These Presidential Orders were only the fifth and sixth of their kind in CFIUS’ 40 year history.

CFIUS Presidential Orders	
1990	President Bush directed the China National Aero-Technology Import and Export Corporation, a Chinese state owned entity, to divest its acquisition of the airplane components manufacturer MAMCO
2012	President Obama directed the Ralls Corporation, a privately-owned Chinese company, to divest itself of an Oregon wind farm project
2016	President Obama blocked the acquisition of Aixtron, a semiconductor company, for \$670 million by Fujian Grand Chip Investment Fund, a privately owned Chinese fund
2017	President Trump blocked the acquisition of Lattice Semiconductor Corp. for \$1.3 billion by Canyon Bridge Capital Partners, a Chinese investment firm partially funded by the Chinese Government
2018	President Trump blocked the \$117 billion acquisition of semiconductor chip maker Qualcomm by Broadcom, a Singapore based company
2020	President Trump ordered Beijing Shiji Information Technology Co, a subsidiary of the public Chinese company Shiji Group, to divest its acquisition of the U.S. hotel software developer StayNTouch

4. The number of withdrawn and abandoned transactions decreased in 2019.

While the total number of notices filed slightly increased in 2019 over 2018, the Annual Report highlights that the number of withdrawn notices and number of transactions abandoned in 2019 decreased compared to 2018.

Of note, eight of the 12 notices that were withdrawn and not refiled were abandoned because CFIUS and the transaction parties could not agree upon mitigation measures.



5. A steady use of mitigation measures underscores the importance of considering potential mitigation early on in the transaction process.

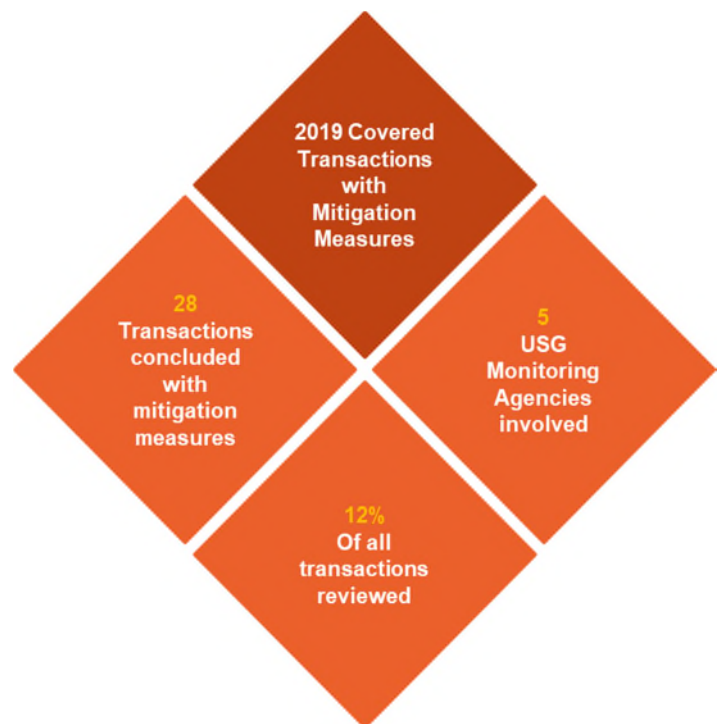
The data in the 2019 Annual Report reflects a similar theme seen in 2018: more transactions requiring mitigation measures since the implementation of FIRRTA. The percentage of reviewed transactions that required mitigation measures in 2019 (12%) reflects the level of concern seen in 2018 (13%), both of which roughly doubled the number of transactions involving mitigation in 2017.

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.

The Annual Report included examples of mitigation measures negotiated in 2019 – identical to those adopted in 2018 – 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 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 foreign acquirer not have direct or remote 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 USG-approved security officer or member of the board of directors and requirements for security policies, annual reports, and independent audits;
- Exclusion of certain sensitive assets from the proposed transaction; and
- Divestiture of all or part of the U.S. business.

6. Japan overtook China to represent the top country for FDI in the United States.

Investors from China, Canada and Japan accounted for 40% of all notices filed with the Committee in 2019. In a change from previous years, Japanese investors were responsible for the largest share, representing 20% of all transaction notices and 20% of all foreign acquisitions of U.S. critical technologies. Also notable is the overall decline in Chinese acquisitions, which decreased by over 50% compared to the number of notices filed in both 2018 and 2017. Chinese investment in critical technologies also dropped by over 50%.

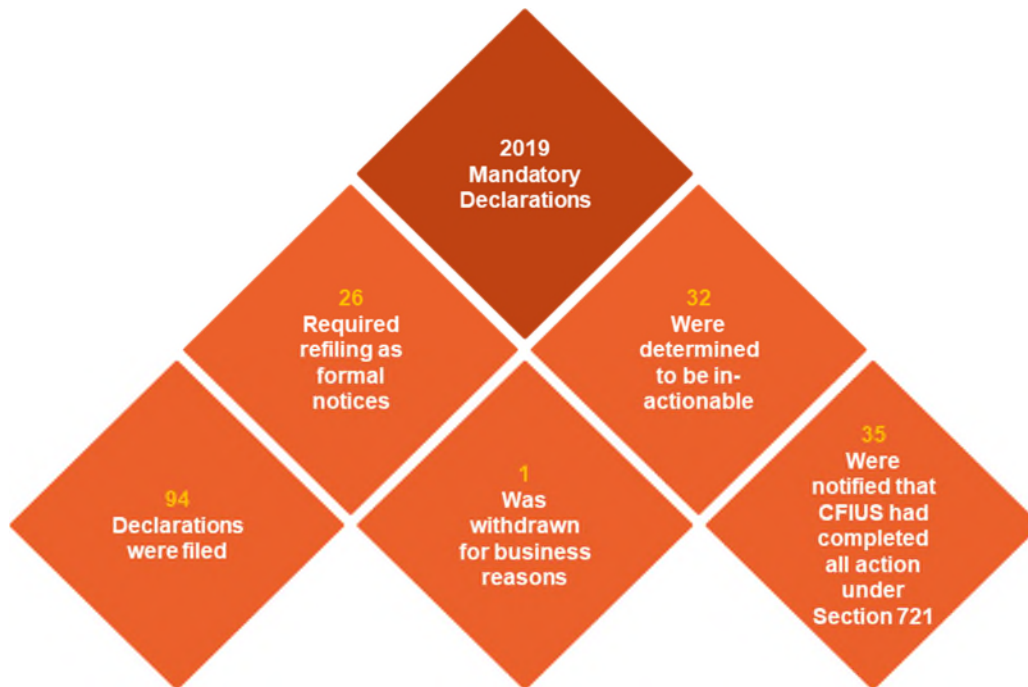
While the data in the Annual Report demonstrate that transactions involving Chinese entities are still numerous and possible, the sharp decline in such transactions clearing Committee review illustrates the complexities currently facing Chinese acquirers. The data also show that investors from other countries, such as Japan, are increasingly seeking CFIUS clearance for investments in the United States as compared to prior years, particularly with respect to investments in critical technologies.



7. An increase in “in-actionable” determinations leaves more parties unsure whether to submit formal notice or play a waiting game.

One of the key changes under FIRRMA was the introduction of a mandatory filing requirement for certain covered transactions. In October 2018, CFIUS launched a Critical Technology Pilot Program (the “Pilot Program”) to protect the U.S. national security innovation base and to address what policymakers view as key shortfalls in regulators’ ability to secure the predominance of U.S. innovation and the industries and businesses that support it. The Pilot Program was intended to expire in March 2020, but has been adapted and absorbed into the TID Regulations.

Mandatory declarations must be no longer than five pages and must be filed at least 45 days prior to the expected completion date of a proposed transaction. CFIUS may respond to a declaration by informing parties that it has: (1) cleared the transaction, (2) initiated a unilateral review, (3) requested that the parties submit a full formal notice, or (4) been unable to reach a decision regarding clearance on the basis of the declaration alone. The data from the Annual Report shows how these options played out in real time during the first year of implementation.



CFIUS did not take action in over 70% of the declarations filed; only 27% of the proposed transactions required the submission of a formal filing. Notably, the Committee determined that it was “unable to complete action” in 34% of the transactions, leaving parties with the choice of waiting or submitting a voluntary notice. It is clear that going forward more parties will need to evaluate whether it is preferable to submit a full formal notice from the outset in order to be guaranteed a final response from CFIUS rather than an in-actionable determination.

Conclusion

The 2019 Annual Report provides another data set demonstrating how FIRRMA’s implementation has altered the CFIUS regime. The new landscape includes longer timelines, more mitigation measures and an increased number of mandatory filings as well as CFIUS determinations that leave parties uncertain on what course of action to take next. Foreign acquirers should continue to consider CFIUS implications early on when developing plans to pursue investments in or acquisitions of U.S. businesses so that they can enter the CFIUS process prepared to address its potential risks and obstacles.

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.