

CFIUS Annual Report - A Banner Year for Filings and Inquiries to Parties of Non-Notified Transactions

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Last week, the Committee on Foreign Investment in the United States (“CFIUS”) released its much-anticipated Calendar Year 2021 Annual Report that provides useful insights into how CFIUS operates, the types of transactions it is reviewing, and areas of continued focus. A copy of the report is available [here](#). Below, we outline key findings that companies should understand as they plan future cross-border transactions.

Overview of CFIUS.

For those who are unfamiliar with CFIUS, it is an interagency committee authorized to review certain foreign investments and certain real estate transactions to determine their impact on U.S. national security. Under Section 721 of the Defense Production Act of 1950 (“DPA”), and as amended by the Foreign Investment Risk Review Modernization Act of 2018 (“FIRRMA”), the President has broad power to investigate, amend, and prevent foreign inbound investments, or even to require divestment of closed transactions. The DPA and FIRRMA grant CFIUS with the power to review foreign investments in U.S. businesses, and they set forth the scope of transactions that are subject to CFIUS’s jurisdiction. These same laws also provide parties with the means to limit the President’s authority to prohibit foreign inbound investments or to order post-closing divestitures, by allowing companies to submit their transaction to CFIUS for review.

Since FIRRMA’s passage, certain types of transactions require mandatory notification to CFIUS at least 30 days before closing. Failure to submit a filing when mandatory could lead to hefty penalties in addition to the risk of divestment or mitigation measures that fundamentally alter the transaction post-closing. Submissions can be in the form of a traditional “notice” or a shorter “declaration.”

The CFIUS process is broken into two distinct periods – a 45-day review period and a further 45-day investigation period at CFIUS’s option. CFIUS uses this time to assess the transaction and make its determination.

Related People

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Related Capabilities

- Corporate Governance & Compliance
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2021 Was a Record Year for CFIUS Filings.

In 2021, companies filed a staggering 272 notices with CFIUS. This number is by far the most notices ever received and represents an increase of over 45% compared to 2020. Nearly 48% of all notices filed continued beyond the review period into the investigation period, extending the time CFIUS has to review transactions. Further, companies elected to withdraw their notices after the commencement of the investigation period in 72 instances (about 26%). In 63 of these withdrawn filings, the parties elected to refile their transaction, presumably to allow CFIUS additional time to assess risks of the proposed transaction or to negotiate a mitigation agreement that would allow CFIUS to approve the submission. In nine cases, the parties withdrew from the CFIUS process altogether and abandoned their deal after receiving word that CFIUS identified national security risks that could not be mitigated (meaning that the transaction would be referred to the President for a what would likely be a prohibition). Unlike in past years, there were, however, no Presidential decisions to order post-closing divestiture or prohibition of any transactions.

Because of the significant likelihood that notices likely will enter the investigation period (meaning CFIUS will have at least 90 days to assess the national security risks), companies should factor this extended timeline into their deal-making decisions to allow sufficient time for closing. This time factor applies whether the parties decide to voluntarily file a notice, or are required to make a submission to CFIUS. If the parties opt for a shorter declaration, they need to be aware of the risk that CFIUS could require that they resubmit a lengthier notice instead, which would further extend the timeline (see below).

The Declaration Process is Thriving.

Beginning in 2018, CFIUS allowed companies to submit a short form declaration for certain transactions and has since authorized companies to submit a declaration for any transaction. There are many benefits to the declaration process, including fewer information requirements, no filing fees, and a shorter timeline. However, while CFIUS has the option of approving the transaction based on the declaration, it can also take no action, or request that parties submit a traditional notice following its assessment of the declaration.

In addition to the increase of notices received, companies submitted 164 declarations in connection in 2021 as well. This is a significant increase over prior years, and we expect that trend will increase, particularly for companies from allied or “friendly” nations and for those who have previously been through the CFIUS process. Of the 164 filed Declarations, CFIUS cleared or approved over 70%. However, CFIUS requested a formal written notice in 30 instances (about 18%) and took no action in 12 cases (about 7%). Only one declaration related to a real estate transaction.

While CFIUS does not disclose information about specific transactions that resulted in a request for a lengthier notice or the reasons CFIUS took no action, companies should carefully consider the facts of their transactions before electing to submit a declaration in

lieu of submitting a formal notice in the first instance. This includes evaluating whether a proposed transaction presents risk factors that would likely result in CFIUS requesting a traditional notice following an assessment of a declaration. Such request will both delay the process and add to the parties' expenses.

Given that FIRRMA was enacted in part to counter perceived threats from investments from China, it is not surprising that the parties to a Chinese investment opted for a declaration in only one instance in 2021. By contrast, 44 notices filed in 2021 related to transactions that involved Chinese investments. This disparity suggests that the parties to such transactions perceive appreciable risk that CFIUS would require a lengthier notice anyway and opted for that lengthier submission in the first instance.

Mitigation as a Powerful Tool.

In certain instances, CFIUS may conclude that a proposed transaction presents a risk to national security but assesses that the risk can be addressed if the transaction parties are willing to enter into a mitigation agreement with CFIUS. Mitigation can take all forms, from simple supply assurance agreements, placing limitations on supply chain vendors, or requiring certain investors to remain completely passive in their ownership. These measures vary according to the unique circumstances of each transaction.

Companies may only have a short window to review a proposed mitigation agreement and determine whether they can accept the terms proposed by CFIUS. If the terms are acceptable, CFIUS designates at least one lead member agency to monitor compliance with the agreement. Implementation costs can be significant, and may include requirements for regular third-party auditing and monitoring.

In 2021, CFIUS required mitigation and conditions in connection with 31 notices, which constituted about 10% of notices filed in 2021. In two instances, where the parties voluntarily withdrew and abandoned their transactions, CFIUS adopted residual measures to address national security risks after the abandonment. In one instance, CFIUS ordered interim mitigation measures while it reviewed the transaction.

Non-Notified Outreach.

After FIRRMA's enactment in 2018, CFIUS established a new monitoring and enforcement unit that is devoted to examining media reports and other sources to uncover non-notified transactions that may be subject to CFIUS's jurisdiction. Since then, CFIUS's approach to non-notified transactions has become significantly more aggressive. Companies that elect not to present their transaction voluntarily run the risk that CFIUS may reach out to and request information about an investment or acquisition either pre- or post-closing. CFIUS notes that it has access to multiple sources of information to determine if a non-notified transaction may be subject to its jurisdiction.

In 2021, CFIUS reports that it identified 135 such transactions that prompted CFIUS to seek information through the non-notified process. Of those transactions identified, CFIUS reports that it only requested a filing in eight instances. CFIUS does not report

whether those eight cases resulted in any post-transaction divestments or mitigation measures.

Even when CFIUS does not request a formal filing, this unplanned outreach can be disruptive to transactions and business operation. Companies often receive lengthy requests for information and multiple follow-up question sets with short deadlines. Because these non-notified requests typically occur after the transaction has closed, they create significant risk that a buyer's expectations would become frustrated if CFIUS orders any mitigation measures or the President requires divestment. Companies should carefully weigh the risks of not submitting a notice and the potential consequences that could result from a non-notified outreach.