

## Eight Highlights from CFIUS' Latest Annual Report

22 May 2020

On May 19, 2020, the Committee on Foreign Investment in the United States (“CFIUS” or the “Committee”) released its [annual report](#) covering calendar year 2018 (the “Annual Report”), along with summary statistics for joint voluntary notices (“JVNs” or “notices”) in calendar year 2019. While the information in the Annual Report is somewhat dated, the data it contains remain useful. Among other things, the data demonstrate CFIUS remains a key hurdle, and thus an important gating item for deal professionals to consider as they contemplate, negotiate and structure cross-border transactions across diverse subsectors, a trend that we anticipate will persist throughout 2020 and beyond. Moreover, the Annual Report makes clear that CFIUS evaluates national security risk holistically and that outcomes are not binary (i.e., approval or rejection) as CFIUS continues to impose mitigation to address identified national security concerns in a significant proportion of cases.

We discuss below eight important highlights of the Annual Report and offer related takeaways.

**1. The President has now taken action to prohibit or unwind a transaction in each year since 2016, which was rare throughout most of CFIUS' history.**

In each of the past four years, the President has taken action to block or unwind a transaction upon CFIUS' recommendation. Since CFIUS was established in 1975, the President has taken such action on only six transactions, four of which have occurred in the last four years and two in the preceding forty years.

**2. A significant proportion (21%) of transactions were abandoned due to the parties' inability or unwillingness to address CFIUS' identified national security concerns, subjected to mitigation imposed by CFIUS, or prohibited by the President.**

In 2018:

Withdrawn and the underlying transaction abandoned	18 out of 229 JVNs	8%
Approved, but conditioned on the parties' acceptance of mitigation measures	13 out of 229 JVNs	13%
Prohibited by the President	1 out of 229 JVNs	<1%
<b>Total:</b> Abandoned, subject to mitigation or prohibited	48 out of 229 JVNs	21%

### 3. **Extended case review timelines remain the new normal.**

By statute, CFIUS has 45 days to review transactions once it accepts the filing as complete. If CFIUS is unable to complete its review during this initial phase, it can extend the review into a second stage investigation for an additional 45 days.

CFIUS' statistics show a reversion to the historical mean proportion of cases that went into an investigation in 2019, likely as a result of increased staffing resources at CFIUS. We anticipate, however, that challenges arising from the COVID-19 pandemic may result in an increase in the percentage of CFIUS reviews continuing into the investigation period in 2020.

<b>Year</b>	<b>Total Notices</b>	<b>Investigations</b>
2019	231	111 (48% of notices)
2018	229	159 (69% of notices)
2017	237	172 (73% of notices)
2016	172	79 (46% of notices)
2015	143	66 (46% of notices)

### 4. **CFIUS' Pilot Program increased the total number of submissions to CFIUS, and CFIUS did not approve the vast majority of declarations within the 30-day assessment period.**

Twenty-one declarations were submitted from November 10 to December 31, 2018, or approximately 150 declarations on an annualized basis, in addition to the 229 notices. CFIUS only approved two of the 21 declarations at the conclusion of

the 30-day assessment period, indicating that parties should not expect the “safe harbor” against future adverse action that is only provided when an approval is obtained.

CFIUS requested full filings for five of the declarations, could not conclude action on 11 (meaning that the transaction parties could submit a full filing if they wished to seek the “safe harbor” provided by approval, but were not required to do so), and found one declaration was not subject to the jurisdiction of the Pilot Program. The remaining declaration was withdrawn for business reasons.

**5. CFIUS remains keenly interested in reviewing transactions with a direct or indirect nexus to China.**

Despite a precipitous decline in Chinese investment in the U.S. in 2018, transactions involving Chinese acquirers constituted the largest single category of all JVN filings with CFIUS for the seventh year in a row, a reflection of CFIUS’ scrutiny of Chinese acquisitions. CFIUS also remains focused on transactions presenting “third-party risks” arising from prospective buyers’ unrelated commercial relationships in or with China and other countries or entities of interest.

In 2018, the top five countries of origin for acquirers were as follows:

<b>2018 Rank</b>	<b>Country</b>	<b>Notices Filed For 2018</b>
1	China	55
2	Japan	31
3	Canada	29
4	France	21
5	Germany	12

**6. New data required by changes to the CFIUS statute provides greater transparency to transaction parties.**

The [Foreign Investment Risk Review Modernization Act](#) (“FIRRMA”), landmark legislation that reformed and modernized CFIUS that was signed into law in August 2018, requires that the Annual Report include, among other things, the median and average number of days required to complete reviews and

investigations. The review timelines for 2018 were as follows:

<b>Covered Transaction Reviewed In 2018</b>	<b>Average Calendar Days</b>	<b>Median Calendar Days</b>
Closing in review, pre-FIRRMA	30	30
Closing in review, pre-FIRRMA	44	45
Closing in investigation	74	75

The Annual Report notes that two events impacted these figures in 2018: (1) FIRRMA extended the statutory review period from 30 to 45 days for all reviews beginning on or after August 13, 2018; and (2) a lapse in appropriations (due to the “shutdown” of the U.S. government) for certain U.S. government agencies, including Treasury and several other CFIUS member agencies, meant that reviews and investigations closing on or after December 24, 2018, had their closing date tolled into 2019 when funding was restored.

FIRRMA requires CFIUS to include in its annual reports: (1) the average number of business days that elapsed between the date of submission of a draft notice and the date on which the Committee provided written comments on the draft notice; and (2) the average number of business days that elapsed between the date of submission of a formal written notice and the date on which the Committee accepted or provided written comments on the formal written notice. The Annual Report states that CFIUS did not have the resources to provide this information for 2018, but that these two data points will be included in the 2019 report and will provide greater clarity about the overall CFIUS timeline.

**7. CFIUS continues to focus on addressing risks arising from potential foreign access to sensitive personal data.**

Consistent with its conclusion in the 2016–2017 Annual Report, CFIUS included in its discussion of potential adverse effects of covered transactions a determination that the U.S. business “hold[s] substantial pools of potentially sensitive data about U.S. persons and businesses that have national security importance.”

While this concern may be most acute in healthcare transactions involving companies that collect and store significant amounts of personal identifier

information, it can also be present in transactions involving technology, software and insurance companies, among others.

**8. The U.S. Intelligence Community determined that foreign governments are “extremely likely to use a range of collection methods to obtain critical U.S. technologies.”**

Each annual report since 2009 has expressed the same conclusion. The Annual Report highlighted that “foreign intelligence services, and threat actors working on their behalf, continue to represent a persistent and pervasive cyber intelligence threat tied to economic espionage and the potential theft of U.S. trade secrets.” These threat actors regularly target federal research institutions, universities and corporations.

In 2018, the top five countries of origin for acquirers of critical technology companies were as follows:

<b>2018 Rank</b>	<b>Country</b>	<b>Completed Transactions In 2018</b>
1	Canada	9
1	Japan	9
3	China	8
4	France	7
4	Germany	7

## Takeaways

**CFIUS remains a key hurdle for many cross-border transactions.** A CFIUS filing can have significant impacts on transaction timing, feasibility, certainty and costs. CFIUS due diligence should be an integral and early part of transaction planning.

**Anticipate longer CFIUS reviews when assessing transaction timing.** CFIUS continues to require second stage investigations for a substantial number of notices. The Annual Report reveals that approximately 59% of CFIUS cases in 2018–2019 extended into the additional 45-day investigation phase. As a result, parties should build in at least four to six months from signing – and potentially longer – for resolution of a CFIUS filing.

**Buy-side self-due diligence is critical.** Prospective foreign acquirers should carefully evaluate how CFIUS may view their independent value-chain exposure to countries and parties that CFIUS may consider “risky” (e.g., through joint ventures or commercial relationships in China or Russia). U.S. private equity sponsors considering syndication should also carefully consider the CFIUS risk profiles of potential co-investors, including those that participate in transactions through U.S. sponsor-managed vehicles.

**Buy-side self due diligence should include a thorough evaluation of the buyer’s export control licensing profile.** A [proposed new rule](#) recently issued by CFIUS would tether the “trigger” for a mandatory CFIUS filing more closely to export control licensing requirements applicable to a foreign investor or certain foreign persons in the investor’s ownership chain.

**Sell-side self due diligence is critical.** Prospective targets should assess their CFIUS risk profile at the outset of a sale process to help determine the projected closing timeline, inform the selection of a bidder in a competitive process, and understand the probability CFIUS will approve a transaction if a filing is required or warranted, among other things.

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