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Seven Highlights from CFIUS' Latest Annual Report

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On July 26, 2021, the Committee on Foreign Investment in the United States (“CFIUS” or the “Committee”) released its [annual report](#) covering calendar year 2020 (the “Annual Report”). Among other things, the data provided in the Annual Report demonstrate that CFIUS is continuing to be an important gating item for deal teams and investment professionals to consider, especially as CFIUS continues to ramp up its outreach on so-called “non-notified” transactions, a trend that we anticipate will persist throughout 2021 and beyond. Moreover, the Annual Report shows that the total number of CFIUS filings barely decreased during 2020, despite the disruption to M&A activity following the initial outbreak of the COVID pandemic, demonstrating that foreign investors from a variety of countries (including close U.S. allies) continue to value the transaction certainty provided by CFIUS clearance.

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

1. CFIUS requested filings for a meaningful number of transactions that investors did not proactively file with CFIUS.

For the first time in CFIUS' history, its annual report includes data relating to the number of non-notified transactions identified and put forward to the Committee for its consideration (117), along with the number of notices requested by CFIUS on such transactions (17). Transactions that are not voluntarily filed with CFIUS are identified to CFIUS through a variety of methods, including interagency referrals, tips from the public, media reports, commercial databases, and/or congressional inquiries. CFIUS staff has stated that the number of filings requested for non-notified transactions in 2020 is double the number of those from 2019 and 2018 combined and that 2021 is on track to exceed the number from 2020, coinciding with a significant increase in the

allocation of resources to CFIUS' non-notified enforcement team in 2020 pursuant to [the Foreign Investment Risk Review Modernization Act of 2018](#) and its implementing regulations.

While these are important new data points, they do not tell the whole story. In particular, the numbers do not account for (i) cases where parties filed a notice after CFIUS' initial outreach but prior to receiving a formal request to make a filing, or (ii) notices that may have been requested (or will be requested) from this batch of 117 in 2021. It seems likely that the annual report for 2021 will provide a more complete picture of the impact of CFIUS' non-notified outreach.

2. The total number of joint voluntary notices (“JVNs”) decreased (likely due to the slowdown in global M&A resulting from COVID), while clearance rates during the review period are slightly up.

In 2020, CFIUS cleared its highest proportion of JVNs in the last five years during the initial, 45-day review period. Of the 187 JVNs filed in 2020, CFIUS cleared 99 JVNs in the review phase, demonstrating increased efficiency as a result of its increased staffing and resources.

Year	Total JVNs	Clearance During Review
2020	187	98 (52% of JVNs)
2019	231	118 (51% of JVNs)
2018	229	69 (30% of JVNs)
2017	237	61 (26% of JVNs)
2016	172	87 (51% of JVNs)

CFIUS continued the trend of referring a transaction to the President for a decision each year since 2016, with President Trump issuing an order prohibiting the acquisition of musical.ly by ByteDance, the Chinese parent of video-sharing social networking service TikTok. This matter currently remains under review by the Biden administration. Since CFIUS was established in 1975, the President has taken action to prohibit or unwind a transaction on only eight transactions, six of which have occurred in the last six years versus two in the preceding forty years.

3. Clearance rates for short-form declarations increased substantially, making the declaration an increasingly viable option for foreign investors in U.S. businesses.

Following the expiration of the critical technology “Pilot Program,” the short-form declaration filing became an option for all transactions subject to CFIUS’ jurisdiction – not just transactions for which a filing was mandatory. The Annual Report reveals a substantial increase in the total number of declarations filed in 2020 (126 versus 94 in 2019), which is unsurprising given this expanded scope for declarations. In addition, the proportion of declarations that were cleared by CFIUS increased substantially (from 37% in 2019 to 64% in 2020) despite the increased number of filings, as shown below.

Outcome	Number of Declarations	% of Declarations
Cleared	81 of 126	64%
JVN requested	28 of 126	22%
Unable to complete action, but no JVN requested	16 of 126	13%
Withdrawn	1 of 126	<1%

Investors from U.S. partners and allies (e.g., Canada, Japan, UK, Germany) accounted for a majority of declarations submitted to CFIUS, which likely played a role in the increased clearance rate. By contrast, investors from China/Hong Kong and Russia submitted only six declarations and one declaration, respectively, in 2020.

While the declaration process can provide a faster timeline to clearance for suitable investors and investment targets, the declaration is typically not suitable for investors from countries that are not close U.S. security allies, as reflected by the declaration numbers in the Annual Report.

Investors considering making filings on transactions subject to CFIUS’ jurisdiction must assess carefully whether a declaration may be appropriate, weighing the likelihood of receiving CFIUS clearance in the 30-day declaration assessment period against the uncertainty that could result from CFIUS not completing its action and not

requesting a JVN, or the lengthening of the overall CFIUS timeline that can result if CFIUS requests a JVN following its review of a declaration.

4. Increased resources have resulted in CFIUS taking less time to process filings.

In 2020, the average number of days between the date of submission of a draft JVN and the date on which CFIUS provided comments on the draft JVN decreased from 10.6 to 7.7 business days. At the same time, the Annual Report also shows that there was a slightly longer time between submission of the final JVN addressing CFIUS' comments and CFIUS' acceptance of the filing (9.1 business days in 2020 versus 7.8 business days in 2019). This could be due to a number of factors outside of CFIUS' control, including delays in filing fee payment or submission of the required personal identifier information.

Nonetheless, CFIUS' net processing times improved by almost 2 full business days, as CFIUS has continued to allocate resources to increasing staff numbers, which is an encouraging sign for investors and companies participating in transactions that are especially time-sensitive.

5. Investors from U.S. security partners and allies continue to account for an increasing proportion of filings.

As shown in the following table, in 2020 investors from the United Kingdom and its territories, Japan and Canada topped the list of most frequent filers, accounting for approximately one-third of all filings (JVNs plus declarations). As the number of filings from investors in China/Hong Kong, who were the most frequent filers prior to 2019, continues to decrease, investors from "lower-risk" countries continue to make a significant number of filings.

2020 Rank	Country	Total Filings in 2020	Total Filings in 2019
1	United Kingdom and British territories	38	35
2	Japan	37	60
3	Canada	31	35

4	China/Hong Kong	26	32
5	Germany	17	20
6	Sweden	17	9
7	France	16	15
8	Singapore	14	13
9	Australia	12	11

6. Filings from Chinese investors continue to decrease, but connections to China remain a key focus area for CFIUS.

In 2020, foreign investors from China/Hong Kong made a total of 26 filings (20 JVN and 6 declarations), down from a total of 32 filings (29 JVN and 3 declarations) in 2019 and 56 filings (55 JVN and 1 declaration) in 2018. The decrease in filings parallels the increase in trade tensions between the U.S. and China in recent years, which among other things has resulted in increased scrutiny of Chinese investment in U.S. companies, particularly companies that have a nexus to critical technologies, critical infrastructure, sensitive personal data, U.S. government customers, or other key vectors of national security risk.

Despite the decrease in filings from Chinese investors, China remains a key focus area for many CFIUS reviews. The Annual Report numbers do not provide any details regarding non-Chinese investors' connections to China, such as commercial ties to China or, in the context of investment funds, limited partner and co-investor relationships with Chinese investors. However, in practice and as alluded to in the Annual Report, CFIUS has taken interest in transactions involving a seemingly benign investor or company based on actual or perceived exposure to Chinese influence as a result of such connections. The Annual Report indicates that the potential for transfer of export controlled technologies to third parties not directly related to the buyer can be a source of national security risk.

7. Thirteen percent of JVN resulted in the imposition of mitigation measures by CFIUS, or in the transaction being abandoned or prohibited in connection with identified national security concerns.

As summarized in the table below, CFIUS imposed mitigation measures (i.e. conditions to clearance) on approximately 9% of JVNs filed in 2020, a slight decrease from 12% in 2019. The decrease could be connected to the decrease in filings from Chinese investors, whose investments have historically faced an increased risk of mitigation.

In addition, seven filings in 2020 (versus eight in 2019) were withdrawn and abandoned after CFIUS was either unable to identify mitigation measures to resolve national security concerns, or proposed mitigation measures that the transaction parties chose not to accept.

Outcome	Number of JVNs	Percentage
Approved, but conditioned on the parties' acceptance of mitigation measures	16 out of 187 JVNs	9%
Withdrawn and the underlying transaction abandoned	7 out of 187 JVNs	4%
Prohibited by the President	1 out of 187 JVNs	<1%
TOTAL:	24 out of 187 JVNs	13%

Takeaways

- Evaluate the likelihood of outreach if a CFIUS filing is not made.** CFIUS staff has indicated that outreach by CFIUS regarding transactions for which a filing was not made are on track to increase by 50% from 2020 to 2021, from already elevated levels in 2020. With CFIUS requesting filings for non-notified transactions at an increasing pace, it is critical for foreign investors to conduct CFIUS due diligence and assess whether a transaction may prompt outreach from CFIUS before or after closing if a voluntary filing is not made. Parties should also consider whether they

would need to disclose future non-notified outreach to the public or to investors when evaluating the risk of forgoing a filing.

- **Buy-side self due diligence should include a comprehensive risk assessment of any ties to countries of interest to CFIUS.** Buy-side due diligence should include an assessment of connections to China and other countries and parties that CFIUS may consider to warrant scrutiny (e.g., Russia). Foreign investors should assess their exposure to such countries and parties, including investors' commercial ties, operations, vendors, and overall value chain. U.S. and other private equity sponsors should also assess the CFIUS risk profile of their limited partners and any co-investors.
- **Consider whether a declaration makes sense within the context of a transaction.** The short-form declaration may represent the quickest way to obtain CFIUS clearance for many investors, particularly those from countries considered more benign. As clearance rates are increasing, the declaration process represents a more viable potential path to receiving the safe harbor against future adverse action that is provided by CFIUS clearance. Recognizing, however, that nearly a third of declarations result in a request for a JVN, it is important to assess whether the declaration process makes sense in the context of a specific transaction and for the specific transaction parties, as the filing of a declaration could result in an inconclusive outcome or lead to a request for a JVN that could cause unnecessary delay.

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Related Services

Practices

- International Trade & National Security

Suggested Reading

- 10 August 2021 Press Release Kirkland Represents NortonLifeLock on its ~\$25 Billion Combination with Avast
- 04 August 2021 Article Deal Maker Takeaways From Latest CFIUS Annual Report
- 27 July 2021 Press Release Kirkland Counsels Janus International Group, Inc. on Agreement to Acquire DBCI

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