Fried Frank International Trade and Investment *Alert*™

CFIUS Releases 2020 Annual Report

The Committee on Foreign Investment in the United States ("CFIUS") recently delivered its unclassified Annual Report to Congress for the calendar year 2020 ("Annual Report"), as well as a summary of notices, declarations, withdrawals, and presidential decisions through 2020. CFIUS continued to be very busy, as reflected in the high number of notices and declarations filed, as well as its monitoring of non-notified transactions. This is the first Annual Report to contain data on the voluntary declaration process, which began on February 13, 2020 and allows for short-form filings, pursuant to the Foreign Review Risk Review Modernization Act of 2018 ("FIRRMA"). The percentage of notice filings that proceeded to the investigation phase, as well as the number of withdrawn notices, was consistent with recent years, with CFIUS responsible for scuttling seven deals in 2020.

As in previous years, the Annual Report summarizes CFIUS's activities during the covered period, including the number and disposition of CFIUS notices, the nature and prevalence of mitigation arrangements, and the geographic source and sector concentration of covered transactions. In addition, the Annual Report describes its 2020 calendar year activities in comparative and cumulative perspective for the years 2010 to 2020. In accordance with the legal prohibition against public disclosure of such information, the Annual Report contains no information with respect to specific transactions. Nonetheless, it remains a remarkable window into the reach and operation of CFIUS, and its impact on transactions involving U.S. businesses.

We have set forth below a brief summary of the key data points of the Annual Report, along with a discussion of emerging trends in the CFIUS review process.

Key Data Points

A. Notices Filed and Country of Origin

Consistent with anecdotal reports, CFIUS continued to be very busy. In 2020, 187 CFIUS notices were filed and determined to describe "covered transactions," or transactions within CFIUS's regulatory purview, which is a notable decline from the 231 notices that CFIUS reviewed in 2019. It is also the first time since 2016 that CFIUS received fewer than 200 notices. However, this decline can be explained by some acquirers opting to file voluntary declarations, a short-form filing option that was authorized by FIRRMA and became available in February 2020. With 126 declarations filed in 2020, there were a total of 313 combined CFIUS filings last year.

Transaction notices were filed from 40 different countries in 2020. Japan was the largest filer, and the following countries accounted for the greatest number of notices:

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Country	Number of Notices
Japan	19
China	17
United Kingdom	14
Canada	11
France	11

While CFIUS activity involving Chinese acquirers remains high, the number of notices filed by Chinese acquirers in 2020 continued a three-year downward trend after reaching a high of 60 notices in 2017. Seventeen notices by Chinese acquirers is the lowest figure since 2011. This may be the result of a perceived hostile CFIUS environment and particularly strict scrutiny by CFIUS of inbound Chinese investment, including high-profile decisions by the President to block transactions involving Chinese acquirers.

Notices were filed by acquirers in the following countries that had not filed notices in 2019: Brazil, British Virgin Islands, Chile, Czech Republic, Finland, Jersey, Kuwait, Malaysia, Norway, the Philippines, and South Africa. While most countries with at least 10 notices saw a decline from 2019, the number of notices filed by acquirers in Sweden increased modestly (from 7 in 2019 to 10 in 2020), and the number of notices filed by acquirers in France held steady (at 13 in 2019 and 11 in 2020). Similarly, the number of notices filed by acquirers in the United Kingdom held steady (at 13 in 2019 and 14 in 2020) after reaching a low of only five notices in 2018.

B. Declarations Filed and Country of Origin

On October 10, 2018, the U.S. Department of the Treasury issued interim regulations implementing FIRRMA's expanded jurisdiction to review certain non-controlling investments involving critical technologies. The Pilot Program required mandatory declarations for both control and non-control transactions regarding critical technologies. The Pilot Program ran from November 10, 2018 to February 12, 2020. Following the conclusion of the Pilot Program, any transaction could be notified to CFIUS by declaration or notice, including certain transactions subject to mandatory filing requirements.

In 2020, CFIUS completed assessments of 126 declarations filed for covered transactions, including two real estate declarations, under both the Pilot Program and current declaration regulations. CFIUS is required to clear the transaction, initiate a unilateral review, request the parties to file a written notice, or inform the parties that CFIUS cannot conclude its review of the transaction based on the information provided in the declarations. CFIUS resolved the declarations submitted in 2020 as follows:

CFIUS Action	Number of Declarations
Request that the parties file a written notice	28
Inform the parties that CFIUS cannot conclude action	16
Initiate a unilateral review	0
Clear the transaction	81

It is notable that almost two-thirds of declarations were cleared outright. In contrast, only 37% of the 94 declarations submitted in 2019 and 10% of the 21 declarations submitted in 2018 were approved. This

change is likely the result, at least in part, of parties submitting voluntary declarations beginning in February 2020 for transactions that are not subject to mandatory filing requirements.

Acquirers from 34 countries filed declarations in 2020, up from 24 in 2019 and 11 in 2018, the year in which the Pilot Program began. During that time period, Japan (37 declarations) was responsible for the largest number of declarations, followed closely by Canada (34 declarations). This trend held true in 2020, with the United Kingdom, Germany, and Sweden rounding out the top five countries of origin for declarations. Chinese acquirers filed only five declarations in 2020, compared with three in 2019.

Country	Number of Filings
Canada	20
Japan	18
United Kingdom	12
Germany	10
Sweden	7

C. Investigations and Presidential Review

In 2020, 47% (88) of the 187 notices went into the 45-day investigation phase, following the 45-day review phase. This is consistent with 2019, when 49% of notices went into the investigation phase. The clearance rate during the review period has increased considerably since the August 13, 2018 effective date of FIRRMA, which extended the statutory review period from 30 to 45 days. In 2017, prior to the implementation of FIRRMA, 73% of notices proceeded to the investigation phase. Similarly, 76% of notices filed in 2018 before FIRRMA's effective date proceeded to investigation. The rate of investigation in 2020 may reflect not only CFIUS's time pressure easing as a result of the additional time in the review period, but also the decrease in inbound sensitive Chinese investment that often triggered a CFIUS investigation.

From 2016 through 2020, CFIUS referred just a single transaction to the President each year. The President blocked each transaction. In three cases, the ultimate owners of the acquiring company were Chinese acquirers, and in the third case (Qualcomm's proposed acquisition of Broadcom), the national security risk was largely from Chinese competition in the 5G telecommunications sector. In 2020, President Trump ordered the divestment of Beijing Shiji Information Technology Co., Ltd.'s interest in StayNTouch, Inc., a U.S. Company that provides mobile technology and property-management software for hotels. The transaction was completed in 2018, but not notified to CFIUS at the time. Instead, CFIUS instructed the parties to submit a notice post-closing.

D. Withdrawn Notices

The number of notices withdrawn and refiled or withdrawn and abandoned held steady in 2020, following a downward trend that began in 2018. This was the result of a slight increase in the number of notices withdrawn and refiled (from 18 in 2019 to 21 in 2020) and a modest decrease in the number of notices withdrawn and abandoned (from 12 in 2019 to 8 in 2020). Combined with the data showing decreased Chinese acquirers filing CFIUS notices, this may indicate that Chinese inbound investment is slowing, particularly in sensitive sectors.

Of the 187 notices filed in 2020, 29 total notices were withdrawn. Fifteen of those notices were refiled in 2018, and six of those notices were refiled in 2019. In seven instances, the parties withdrew the notice

and abandoned the transaction after CFIUS could not identify mitigation measures to resolve the national security concerns or parties chose not to accept the proposed mitigation measures. In one instance, parties abandoned the transactions for failing to satisfy CFIUS requirements and for commercial reasons.

E. Mitigation Measures

In 2020, 16 (or 9%) notices were approved by CFIUS, subject to the acceptance of mitigation arrangements. This is a slightly lower rate compared to 2019 (12%) and 2019 (12%).

Pursuant to these arrangements, the parties are required to take one or more of the following actions. None of these measures were new in 2020.

- Prohibiting or limiting the transfer or sharing of certain intellectual property, trade secrets, or know-how;
- Ensuring that only authorized persons have access to certain technology and information;
- Establishing a Corporate Security Committee and other mechanisms to ensure compliance with all required actions, including the appointment of a U.S. Government ("USG") approved security officer or member of the board of directors and requirements for security policies, annual reports, and independent audits;
- Establishing guidelines and terms for handling existing or future USG contracts, USG customer information, and other sensitive information;
- Ensuring that only U.S. citizens handle certain products and services, and ensuring that certain activities and products are located only in the U.S.;
- Assurances of continuity of supply for defined periods, and notification and consultation prior to taking certain business decisions, with certain rights in the event that the company decides to exit a business line, as well as establishing meetings to discuss business plans that might affect USG supply or national security considerations;
- Notifying, for approval, security officers or relevant USG parties in advance of foreign national visits to the U.S. business;
- Notifying customers regarding the change in ownership;
- Security protocols to ensure the integrity of goods or software sold to the U.S. Government;
- Exclusion of certain sensitive assets from the transaction;
- Ensuring that only authorized vendors supply certain products or services;
- Prior notification to and approval by relevant USG parties in connection with any increase in ownership or rights by the foreign acquirer; and
- Divestiture of all or part of the U.S. business.

CFIUS member agencies also have various procedures to monitor compliance with the mitigation arrangements that companies are subject to, including:

- Periodic reporting to USG agencies by the companies;

- On-site compliance reviews by USG agencies;
- Third-party audits when required by the terms of the mitigation measures; and
- Investigations and remedial actions if anomalies or breaches are discovered or suspected.

F. Industry Sectors

As in previous years, notices were filed in connection with transactions in a wide variety of sectors, with the bulk of transactions in the Finance, Information, and Services and Manufacturing sectors. The notices filed in 2020 were divided among four industry sectors as follows:

Sector	**Share of 2020 Notices**
Finance, Information, and Services	43%
Manufacturing	36%
Mining, Utilities, and Construction	11%
Wholesale Trade, Retail Trade, and Transportation	10%

For the fourth time in the last five years, the plurality of notices were in the Finance, Information, and Services sector. The share of notices in the Manufacturing sector, which accounted for the plurality of filings until 2016, dropped from 44% in 2019 to 36% in 2020, consistent with its share in 2018 and 2017. The percentage of notices filed in each of the other sectors increased slightly from 2019.

The Manufacturing subsector with the most notices was again Computer and Electronic Product Manufacturing, at 42% of the notices in the Manufacturing sector. Machinery Manufacturing (9%), Chemical Manufacturing (13%), and Transportation Equipment Manufacturing (9%) were other large subsectors of notices. In the Wholesale Trade, Retail Trade, and Transportation sector, the two largest subsectors in 2018 were Support Activities for Transportation (37%) and Merchant Wholesalers, Durable Goods (16%). The Finance, Information, and Services subsector with the most notices was again Professional, Scientific, and Technical Services at 36%. Other subsectors with a large number of notices included Publishing Industries (18%) and Telecommunications (11%). The Mining, Utilities, and Construction sector was dominated by the Utilities subsector at 86%, with the second most notices in the Oil and Gas Extraction subsector at 10%.

As with the notices, most of the declarations filed fell within the Finance, Information, and Services and Manufacturing sectors.

Sector	**Share of 2020 Declarations**
Finance, Information, and Services	41%
Manufacturing	39%
Mining, Utilities, and Construction	15%
Wholesale Trade, Retail Trade, and Transportation	5%
Public Administration	1%

G. Critical Technologies

In 2020, CFIUS found that 76 cases involved acquisitions of U.S. critical technology companies, with acquirers from 24 countries and territories. The countries with the highest number of notices regarding critical technologies were as follows:

Country	Number of Acquisitions
Japan	18
Sweden	10
Canada	10
United Kingdom	9
Germany	9

Most cases involved activities in the Computers and Electronics, Professional, Scientific, and Technical Services, and Transportation Equipment Manufacturing sectors. Computers and Electronics and Professional, Scientific, and Technical Services remain the top two sectors, as they have been since 2016.

As discussed in previous reports, the Annual Report noted that foreign governments are "extremely likely to use a range of collection methods to obtain critical U.S. technologies." As in previous years, the Annual Report also noted that foreign intelligence agencies represent the most "persistent and pervasive cyber intelligence threat tied to economic espionage and the potential theft of U.S. trade secrets and proprietary information."

H. Non-Notified Transactions

The CFIUS Monitoring & Enforcement team was formally created post-FIRRMA and given resources to monitor for non-notified transactions and enforce violations of CFIUS rules and agreements. In 2020, CFIUS identified and considered 117 transactions that were not notified to CFIUS. CFIUS became aware of these transactions through interagency referrals, tips from the public, media reports, commercial databases, and congressional notifications. Of the 117 transactions, CFIUS requested that parties file notices for 17 transactions.

If you have any questions regarding CFIUS or how it may affect your business, please reach out to the contacts listed below.

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This alert is not intended to provide legal advice, and no legal or business decision should be based on its contents. If you have any questions about the contents of this alert, please call your regular Fried Frank contact or the attorneys listed below:

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