

CLIENT ALERT

2021 CFIUS Annual Report Reveals Key Trends in Reviews of Foreign Investment

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In the first report covering a complete calendar year since the Foreign Investment Risk Review Modernization Act of 2018 (“FIRREA”) fully went into effect, the Committee on Foreign Investment in the United States (“CFIUS” or the “Committee”) published its [Annual Report to Congress](#) for 2021 (the “Report”) on August 2, 2022. In all, the Committee reviewed a total of 436 declarations and notices in 2021, which is an increase of nearly 40 percent over 2020 levels, and the busiest year in CFIUS history.

Notably, while parties are submitting more transactions to the Committee for review, CFIUS continued to approve the vast majority of transactions without imposing mitigation measures. Moreover, Canadian investors continued to submit the highest number of declarations, while Chinese investors submitted the highest number of notices in 2021 (more than twice the number of notices they submitted the prior year). And despite tensions between the United States and China, the data suggests that CFIUS has cleared at least some of these filings. Below we discuss the top trends that emerge from the 436 filings CFIUS reviewed in 2021.¹

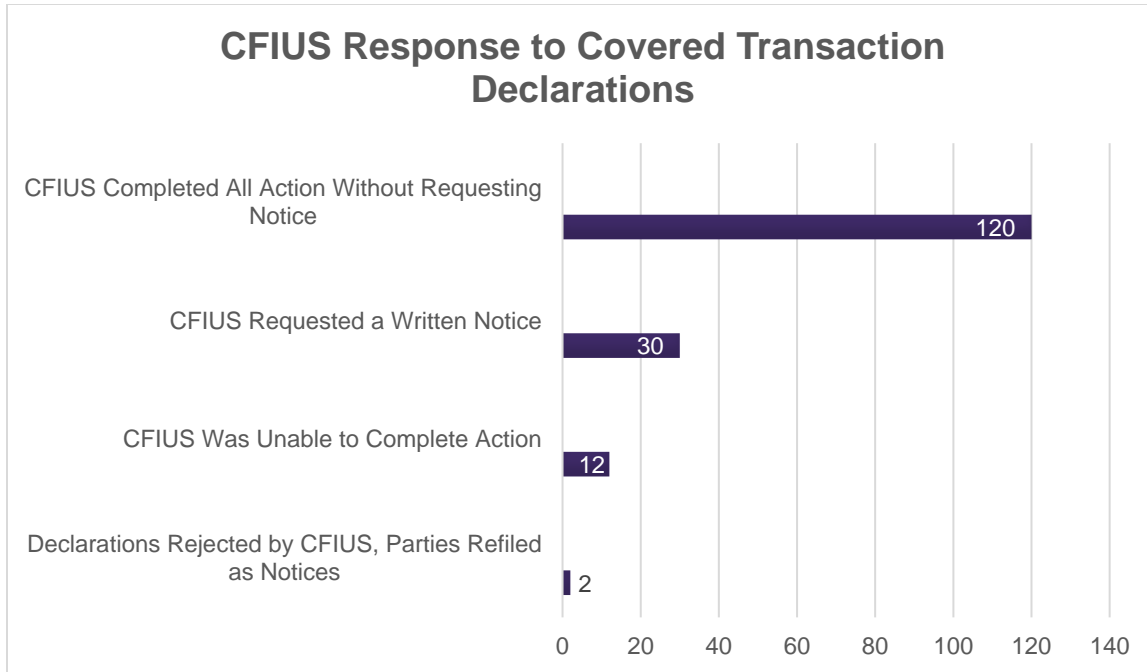
Declarations: Filings and Rate of Clearances Increased

In 2021, CFIUS reviewed **164 “short-form” declarations of covered transactions** (38 percent of all filings), which represents a meaningful increase over the total number of declarations filed in 2020, but a slight decrease in the overall proportion of declarations filed in 2019 (in which declarations represented 40 percent of all filings). Given the significant

¹ Our prior Client Alert covering the 2020 Annual Report to Congress from the Committee is available [here](#).

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increase in notices filed by Chinese investors in 2021, discussed further below, this number may obscure the actual increase in filers who are taking advantage of the short format of declarations. In response to each declaration, CFIUS took one of the following actions:



These numbers show that CFIUS cleared 73 percent of declarations in 2021, an increase over the 64 percent cleared in 2020, 37 percent in 2019, and 10 percent in 2018. The number of cases where CFIUS requested that the parties submit written notices remained stable from the prior year, while the number of cases where CFIUS was unable to complete action (known as a “shrug”) declined. The increase in declarations filed, combined with the increase in declarations that were cleared by CFIUS, reflects a continuing trend from prior years. This trend suggests that parties continue to see value in filing voluntary declarations, which have fewer requirements and a shorter review period than full notices. Whether this trend will continue will likely depend on whether CFIUS continues to clear the majority of declarations.

Notices: Filings Significantly Increased, Rate of Clearances Steady

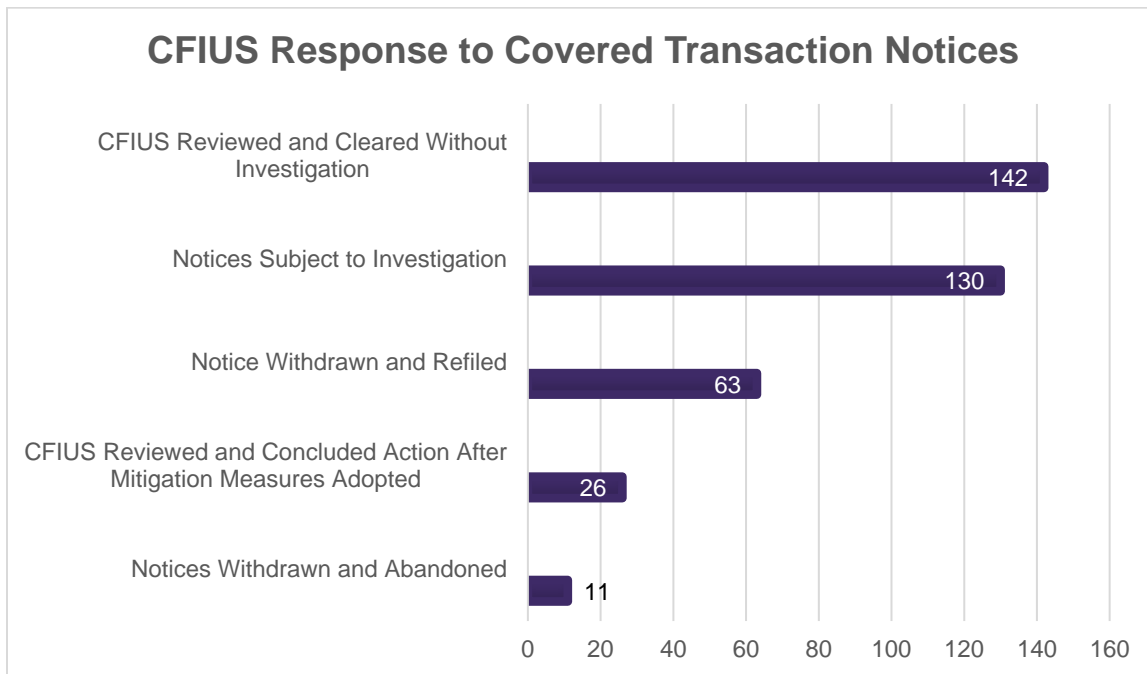
The 272 notices CFIUS reviewed in 2021 (62 percent of total filings) mark an increase from the number of notices reviewed in the prior three years.² The sharp increase from the 187 reviewed in 2020 likely is a result of the COVID pandemic stabilizing and M&A activity increasing as a result. 2021 marked the highest number of notices ever filed,

² Between 2018 and 2020, CFIUS reviewed 229, 231, and 187 notices, respectively.

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significantly surpassing the previous high of 237 in 2017, and the previous peak period of notices between 2017 and 2019, which averaged 232 per year.

Below is a high-level summary of the outcomes of CFIUS’s review of notices. Despite the increase in filings, only 130 notices (47.8 percent) proceeded to investigation, meaning that (with the additional 15 days that FIRRMA added to the review period) CFIUS was able to clear the majority of notices during its initial 45-day review period. This rate remained virtually the same as it was in 2020, 88 (47 percent), which may indicate a return to normalcy for CFIUS in which approximately half of cases from year-to-year go into investigation.



Focus on Non-Notified Transactions

CFIUS has stepped up its enforcement of non-notified transactions in recent years, and this trend continued in 2021. CFIUS relies on interagency referrals, tips from the public, media reports, commercial databases, and congressional notifications to police these types of transactions. The Report notes that CFIUS intends to increased hiring of dedicated staff to help increase coordination and effective identification of transactions-of-interest to pursue. Separately, increasing public awareness of the CFIUS tip mailbox hosted by the Department of the Treasury (“**Treasury**”) could further increase identification of non-notified transactions.

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In 2021, there were 135 transactions identified through the non-notified transaction enforcement process. Eight of those identified transactions resulted in a request for filing. These numbers are comparable to 2020, where CFIUS identified 117 transactions, 17 of which resulted in a request from the Committee for the parties to submit a formal notice for review.

Canada Continues to File the Most Declarations

For the second year in a row, Canadian investors accounted for the most declarations submitted to the Committee in 2021, with 22 declarations filed (representing 13.4 percent of all declarations). Investors from Japan, Germany, South Korea, and Singapore tied for second place, each submitting 11 declarations in 2021. These numbers are not surprising given the close relationship these countries have with the United States. Moreover, Canada (along with Australia, New Zealand, and the United Kingdom) is an excepted foreign state per CFIUS regulations placing investors from those countries outside of certain elements of the Committee's jurisdiction. Thus, Canadian investors will generally undergo less scrutiny from the Committee than those from other countries for the transactions where CFIUS does have jurisdiction.

China Filed the Most Notices

Chinese investors accounted for the vast majority of notices filed in 2021, with 44 notices filed (representing 16 percent of all notices), which is a significant increase in notices filed by Chinese investors from the prior two years. Canadian and Japanese investors submitted the second- and third-highest numbers of notices in 2021.

Notably, declarations from Chinese investors dropped to just one in 2021. This trend likely reflects the current state of affairs between the United States and China, and the intense scrutiny to which Chinese investment is subject by the Committee. The increase in notices filed by Chinese investors may also reflect transactions that were counted multiple times due to being withdrawn and resubmitted. Additionally, Hong Kong investors have been considered Chinese since July 2020, which may also contribute to the uptick in Chinese notices. Regardless, given that the increase in Chinese notices has not correlated with a drastic increase in blocked or mitigated transactions, CFIUS appears to have cleared transactions by a fair number of Chinese investors.

Financial, Information, and Manufacturing Business Sectors Dominate Filings

As in previous years, the vast majority of CFIUS filings concerned the Finance, Information, and Services and Manufacturing sectors. The Finance, Information, and Services sector accounted for over half of all transactions, with 232, or 53.2 percent, while the Manufacturing sector accounted for 123, or 28.2 percent. The Mining, Utilities, and Construction sector was third, with 48, or 11 percent, and the Wholesale Trade, Retail Trade, and Transportation sector was fourth, with 17, or 6.2 percent. This is the same order as in 2020.

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CFIUS Continued to Utilize Extensive Mitigation Measures

The Committee adopted mitigation measures and conditions for 31 notices, or 11 percent of total notices submitted. Of these 31 notices, CFIUS concluded its actions after adopting mitigation measures for 26 notices (representing 10 percent of all notices). CFIUS utilized mitigation measures to address residual national security concerns for two notices that were voluntarily withdrawn and abandoned by the parties. For two other notices, letters issued by the Treasury granting the withdrawal and abandonment imposed conditions, but no mitigation agreements were involved. One notice in 2021 required the imposition of interim risk mitigation measures.

As in 2020, CFIUS continues to utilize several types of practices and procedures through member agencies to ensure a covered transaction remains in compliance with any associated mitigation measures and conditions. Lead agencies carry out their monitoring responsibilities on behalf of the Committee and regularly report back to the Committee. In 2021, such mitigation measures and conditions included, but were not limited to:

- prohibiting or limiting the transfer or sharing of certain intellectual property, trade secrets, or technical information;
- establishing guidelines and terms for handling existing or future contracts with the U.S. Government or its contractors, U.S. Government customer information, and other sensitive information;
- ensuring that only authorized persons have access to certain technology, systems, facilities, or sensitive information;
- ensuring that certain facilities, equipment, data, and operations are located only in the United States;
- establishing a corporate security committee, voting trust, and other mechanisms to limit foreign influence and ensure compliance, including the appointment of a U.S.-Government-approved security officer and/or member of the board of directors and requirements for security policies, annual reports, and independent audits;
- notifying, and approval of, security officers, third-party monitors, or relevant U.S. Government parties in advance of visits to the U.S. business by foreign nationals;
- security protocols to ensure the integrity of products or software sold to the U.S. Government;
- notifying customers or relevant U.S. Government parties when there is a change of ownership in the U.S. business;
- assurances of continuity of supply to the U.S. Government for defined periods, notification and consultation prior to making certain business decisions, and reserving certain rights for the U.S. Government in the event that the

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company decides to exit a business line; establishing meetings to discuss business plans that might affect U.S. Government supply or raise national security considerations;

- exclusion of certain sensitive U.S. assets from the transaction;
- ensuring that only authorized vendors supply certain products or services;
- prior notification to and approval by relevant U.S. Government parties in connection with any increase in ownership or rights by the foreign acquirer; and
- divestiture by the foreign acquirer of all or part of the U.S. business.

These mitigation measures are virtually the same as those utilized by the Committee in 2020.

According to the Report, Committee agencies are currently monitoring 187 mitigation agreements and conditions, 12 of which were modified materially in 2021, including eight which were terminated. All 28 mitigation agreements that were entered into for transaction in 2021 have compliance plans. Monitoring agencies conducted 29 site visits in 2021. Where agencies identified non-compliance, they worked with the parties to remediate as appropriate. No penalties were assessed or unilateral reviews initiated in 2021 as a result of party non-compliance. CFIUS will continue to assess non-compliance on a case-by-case basis as it evaluates whether civil penalties or other measures should be implemented.

Withdrawals of Notices and Declarations

No declarations were withdrawn in 2021, while a total of 74 notices (representing 27 percent of all notices) were withdrawn, two during the review phase and 72 during the investigation phase. These numbers are significantly higher than notice withdrawals in 2020 (29, or 15.5 percent) and 2019 (30, or 13 percent) and are more in line with the withdrawals in 2018 (64, or 28 percent) and 2017 (74, or 31.2 percent).

Real Estate Continues to Be a low Volume Area of Review for the Committee

Of the 436 declarations and notices submitted to the Committee in 2021, only six concerned real estate, which is similar to the level of covered real estate transactions reviewed by the Committee in 2020. The stagnant level of activity with respect to covered real estate transactions indicates that the Committee's jurisdiction in this area remains extremely narrow and/or that parties are not reporting covered real estate transactions. Given the Committee's enhanced review of non-notified transactions, we suspect it is likely the former.

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