

New CFIUS Report Offers a Glimpse of First Data Collected Post-FIRRMA; CFIUS Announces New Web Portal Coming Soon

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CFIUS

Introduction

The Committee on Foreign Investment in the United States (“CFIUS” or the “Committee”) released its Annual Report to Congress regarding foreign acquisitions of, and investments in, U.S. businesses reviewed by CFIUS in 2018. The Committee also released a table reflecting data on the total number of formal reviews (not declarations) in 2019.

These reports reflect the first data collected by the Committee following the enactment of the Foreign Investment Risk Review Modernization Act (“FIRRMA”) on August 13, 2018. The current Annual Report was released just six months after the previous Annual Report, covering 2016 and 2017, demonstrating the Committee is continuing its active effort to catch up with and meet its Congressional reporting obligations. You can find our alert on the previous annual report [here](#).

While FIRRMA was only fully implemented through regulations that took effect on February 13, 2020, the U.S. Department of the Treasury, as chair of CFIUS, issued interim rules on October 10, 2018, which became effective a month later, implementing CFIUS’s expanded jurisdiction under FIRRMA over certain non-passive but non-controlling investments in U.S. businesses involved with “critical technologies.” Our analysis of these rules, known as the “Pilot Program,” can be found [here](#).

Recognizing that the 2018 report captures less than the first two months of data on the Pilot Program, it reflects the Committee’s and transaction parties’ initial adjustment with respect to the procedural changes under the declaration process, the substantive expansion of the Committee’s jurisdiction, and the significant conceptual shift with regard to mandatory filings. We would expect the data on declarations for 2019, however, to show that the Committee, and transaction parties and their counsel, have become more accurate in identifying transactions suitable for the declaration process.

Beyond the Pilot Program, the report shows that in 2018 CFIUS continued to struggle to manage its materially increased caseload in a timely manner. The limited data available for 2019, however, shows that these circumstances have improved substantially, likely in large part due to the expanded timeline for reviews and the additional resources afforded by FIRRMA.

CFIUS has also announced via its website that it will be implementing a secure online portal that will facilitate the submission of all transaction-related information and documentation to the Committee, which we also briefly discuss below.

Discussion – Key Issues

We discuss first data on the Pilot Program before turning to the data on filings in general.

1. First Data on Declarations Submitted Under the Pilot Program

The Pilot Program required parties to file a declaration or a notice with CFIUS for transactions that would result in a foreign person acquiring certain rights in a U.S. business that “produced, designed, tested, manufactured, fabricated, or developed” any “critical technologies” in connection with the designated Pilot Program industries. As noted above, the Pilot Program — the substantive provisions of which were made permanent by the final regulations implementing FIRRMA that went into effect on February 13, 2020 — initially became effective on November 10, 2018. The report therefore only reflects data on the first two months or so of the Pilot Program’s existence. In these two months, parties filed 21 declarations that CFIUS determined to be subject to its jurisdiction.

Of these 21 declarations, CFIUS cleared only two transactions (less than 10 percent) at the declaration stage. CFIUS requested that 5 of the 21 declarations (approximately 24 percent) be filed as full notices, and determined that it could not conclude action as to another 11 declarations (52 percent). CFIUS also found that one declaration was not subject to the jurisdiction of the Pilot Program, and one declaration was withdrawn for business reasons. The report does not specify the disposition of the remaining declaration. Twelve of the 21 declarations were determined to be non-controlling but non-passive investments, as opposed to control transactions.

This limited data shows some of the difficulties — as well as opportunities — that parties and the Committee have encountered with the short-form declaration process. For the five declarations where CFIUS requested the parties to file a formal notice, the CFIUS review process potentially lasted longer than if the parties had filed a formal notice at the outset. For the 11 declarations as to which the Committee determined it could not conclude action, the parties did not receive the safe harbor that would accompany CFIUS clearance. While we regard such non-determinations to be a form of advisory opinion, signaling that the Committee’s more limited review did not find sufficient areas of concern to demand a full review, such conclusions do not provide the same legal certainty as a full clearance. At the same time, the “no action” response can allow parties to move forward more quickly with a transaction, and therefore is a potentially important procedural outcome. In addition, we expect that the percentage of declarations “approved” went up considerably in 2019, reflecting that the declaration process can produce meaningful results for certain transactions.

2. CFIUS Continued to Struggle with a Larger Docket, but FIRRMA Offered Relief

The trends identified in the 2016-2017 combined report have remained consistent, in that the Committee became increasingly challenged by both the number and complexity of cases under review, in the face of its limited resources.

The number of notices filed decreased from 237 in 2017 to 229 in 2018, but the percentage of notices that proceeded to investigation remained high, dropping only slightly, from approximately 73% in 2017 to approximately 69% in 2018, reflecting the Committee's ongoing struggles to manage its increased caseload. Moreover, the percentage of notices withdrawn held relatively consistent from approximately 31% in 2017 to approximately 29% in 2018, as well as the number of cases withdrawn and refiled, from approximately 19% in 2017 to approximately 18% in 2018. The number of withdrawn cases that were abandoned because of CFIUS-related national security concerns did drop slightly, in both absolute and percentage terms, however, from 24 (32%) to 18 (27%).

The report also notes, however, that when FIRRMA became law on August 13, 2018, it had the immediate effect of extending CFIUS's initial review period from 30 days to 45 days, which allowed CFIUS to dispose of more cases within the initial review period without requiring proceeding to an investigation. The report explains that, for notices filed before August 13, 2018, 76% proceeded to investigation, whereas only 53% of notices filed after August 13 proceeded to investigation. This trend is also borne out by the available 2019 data, which shows that, of the 231 notices filed, approximately 48% proceeded to investigation. Moreover, for 2019, only about 13% of notices were withdrawn and only about 8% of notices were withdrawn and refiled.

As previewed in our analysis of the 2016-2017 combined report, the Committee's increased effectiveness in case management likely also stemmed from the agencies' ability to secure additional resources to process and assess transactions under FIRRMA.

3. CFIUS Filings Have Otherwise Remained Relatively Consistent

Investments by country have remained relatively consistent, revealing no overall change in patterns. Filings by Chinese parties dropped slightly, from 60 in 2017 to 55 in 2018, but were still the most from any one country. However, we expect that number to be considerably lower for 2019.

Investors from Canada, Japan, and France were the most frequent filers after those from China, with Canada increasing from 22 filings in 2017 to 29 in 2018; Japan increasing from 20 in 2017 to 31 in 2018; and France increasing from 14 in 2017 to 21 in 2018. Other allies, however, did not follow this trend of increased filings, with the UK dropping from 18 filings in 2017 to 5 filings in 2018 and Australia holding steady from 5 filings in 2017 to 4 filings in 2019.

Filings by sector also remained relatively unchanged between 2017 and 2018. The Finance, Information, and Services sector continued to represent the greatest portion of transactions filed at 38%, with the Manufacturing sector close behind at 35%. The portion of notices in the Mining, Utilities, and Construction sector increased from 12% in 2017 to 21% in 2018, and the Wholesale Trade, Retail Trade, and Transportation sector represented the smallest portion of transactions filed at 7%.

Finally, the percentage of filings cleared with mitigation measures remained exactly the same in terms of absolute number between 2017 and 2018 at 29, which accounted for approximately 12% of all notices filed in 2017 and approximately 13% of all notices filed in 2018.

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New CFIUS Case Management System

In addition to releasing the Annual Report for 2018, CFIUS also announced on its website that it will release a new CFIUS Case Management System (“CMS”) as soon as late May, which will allow parties and their counsel to submit all transaction-related information to CFIUS electronically through Treasury’s website. CFIUS recommends that parties planning to file a notice or submit a declaration around late May or after should consider creating an account through ID.me, which will enable an individual to register as a user for the CFIUS CMS.

This CMS has the potential to increase the efficiency for both Committee agencies and transaction parties, but the paradigm shift is likely to present certain challenges that will have to be overcome if CFIUS seeks widespread and welcome adoption of the tool by filing parties.

We will keep our clients apprised of the developments related to the CMS as it rolls out.

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If you have any questions concerning the material discussed in this client alert, please contact the following members of our CFIUS practice group:

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