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The 2021 Annual CFIUS Report Shows the Committee's Ability to Review More Transactions with Improved Timelines

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The Committee on Foreign Investment in the United States (“CFIUS” or “the Committee”) has released its [annual report](#) to Congress, covering CFIUS’ activity during calendar year 2021 (the “Annual Report”). This Annual Report covers statistical changes related to CFIUS’ review of 2021 transactions (i.e., declarations and joint voluntary notices (“JVNs”)), as compared to prior years.

Key Highlights:

- CFIUS reviewed 436 transactions (i.e., JVNs and declarations) in 2021. The overall number of covered transactions reviewed by the Committee increased 39% from 2020 to 2021.
- Parties continue to show an increasing willingness to submit declarations instead of JVNs.
- CFIUS reviewed more transactions from China than from any other country.
- CFIUS required mitigation in less than 10% of the total JVNs reviewed, which is a historically stable trend.
- The President did not issue any orders prohibiting or divesting any transactions in 2021.
- While CFIUS continued to expand its review of non-notified transactions, it requested a formal JVN only in less than 6% of the total non-notified/non-declared transactions it considered.

Record High Review of JVNs

CFIUS reviewed 272 JVNs in 2021, as compared to 187 in 2020 (i.e., a 46% increase). Once CFIUS accepts a JVN, CFIUS commences the 45-day “review” period and has the option to initiate a follow-on 45-day “investigation” period. In the context of a JVN, CFIUS must reach a dispositive action at the end of the review or investigation period unless CFIUS extends the investigation by a final 15 days for extraordinary circumstances. Part of this dispositive action can be a requirement that the parties adopt mitigation measures intended to reduce risks to the national security of the United States. The President also has the authority to prohibit a transaction or to require divestment.

CFIUS approved 52% of the 272 JVNs at the end of the initial review period, as compared to 53% in 2020. The Committee initiated 130 investigations, i.e., accounting for 48% of the JVNs, as compared to 47% of the JVNs in 2020. In 3 instances, CFIUS utilized its authority to extend the investigation period under Section 721 of the Defense Production Act of 1950 (“[Section 721](#)”), which allows for one 15-day extension of the investigation period in extraordinary circumstances. These are the first instances in which CFIUS has utilized this authority, but the Annual Report does not provide any description of the “extraordinary circumstances” involved.

The Committee required mitigation in 26 instances of the 272 JVNs that CFIUS approved—this is less than 10% of the total JVNs reviewed/investigated, a consistent trend over many years. CFIUS adopted mitigation measures to address residual national security concerns with respect to 2 JVNs that parties voluntarily withdrew and abandoned. CFIUS imposed conditions, separately, in letters issued by Treasury granting the withdrawal and abandonment for 2 JVNs, none of which involved mitigation agreements. CFIUS imposed measures to mitigate interim risk with respect to 1 JVN filed in 2021. CFIUS did not reject any JVNs and the President did not issue any orders prohibiting or divesting any transactions in 2021.

The Annual Report data support CFIUS' increased efficiency with respect to timing as well. The average number of business days that elapsed between the date of submission of a draft JVN and the date on which the Committee provided written comments on the draft JVN was 6.2 days, less than the 10-day deadline applicable under Section 721, as compared to 7.7 days in 2020. The average number of business days that elapsed between the date of submission of a formal written JVN and the date on which the Committee accepted the formal written JVN was 6.0 days, which is also less than the 10-day deadline applicable under Section 721, as compared to 9.1 days in 2020. CFIUS continues to expedite its review process and filing timelines for JVNs. We expect this trend to continue.

Expanded Usage and Approval of Declarations

In 2021, CFIUS reviewed 164 declarations, more than any prior year. CFIUS has the authority to take 4 types of action with respect to a transaction notified through the declaration process:

1. Request that the parties file a written JVN;
2. Inform the parties that the Committee is unable to complete action with respect to the transaction on the basis of the declaration;
3. Initiate a unilateral review; or
4. Notify the parties that the Committee has completed all action.

CFIUS also has the procedural authority to permit the parties to withdraw a declaration or to reject a declaration.

CFIUS reviewed 30% more declarations in 2021 than it did in 2020. Of the 164 declarations, less than a third (i.e., 29%) were utilized to satisfy a mandatory filing requirement and the remaining 71% were voluntarily submitted. CFIUS requested that parties file a full JVN in 18% of the declarations, as compared to 22% in 2020. CFIUS approved 73% of the declarations within the 30-day review period, as compared to 64% in 2020. CFIUS was unable to complete action in 7% of the declarations, as compared to 13% in 2020, and no declaration was withdrawn in 2021.

Declaration use by parties has increased every year since they became available in 2018. As such, in 2021, CFIUS demonstrated an increased ability to clear transactions within the 30-day time period in the context of a material increase in the volume of declarations submitted, which is all-the-more notable given the prevalence of mandatory filing requirements that parties satisfied by filing a declaration as opposed to a JVN. We expect CFIUS to continue these positive trends in 2022 as CFIUS and parties continue to establish increased comfort with the declaration format.

Additionally, the Annual Report highlights that the average time it took CFIUS in 2021 to accept a declaration and start the 30-day review period was 5.48 calendar days from the time CFIUS deems the declaration complete, as compared to 4.7 business days in 2020. As we expected, CFIUS continues to take the full 30 days to reach a result in each declaration.

CFIUS Reviewed More Transactions from China than from Any Other Country

When declarations and JVNs are combined, CFIUS reviewed 436 total filings (i.e., 164 declarations and 272 JVNs) in 2021, as compared to 313 in 2020 (i.e., 39% increase from 2020). This includes the Committee's review of 45 Chinese transactions (i.e., 1 declaration and 44 JVNs) and 8 Russian transactions (i.e., 1 declaration and 7 JVNs). Notably, the 44 Chinese JVNs (including Hong Kong) constituted more transactions than were filed from any other country—approximately 16% of the total JVNs, as compared to 17 Chinese and 3 Hong Kong JVNs filed in 2020 (i.e., 11% of the total JVNs filed in 2020). The Annual Report includes a footnote that references Executive Order 13936 on Hong Kong Normalization (85 Fed. Reg. 43413 (July 17, 2020)), which eliminates differential treatment between Hong Kong and China for purposes of the Annual Report as of July 14, 2020 (i.e., Hong Kong transactions are reported as originating from China as of July 14, 2020). Additionally, Russian JVNs constituted approximately 3% of the total JVNs filed in 2021 whereas there were none in 2020.

While these trends are encouraging for Chinese investors, the Annual Report also discloses a concerning increase in the percentage of transactions that were withdrawn and refiled. Specifically, parties withdrew 27% of the 272 JVNs, as compared to 16% and 13% in 2020 and 2019, respectively, and filed a new JVN in 63 of these instances (i.e., approximately 85% of withdrawn JVNs were re-filed). In 11 instances, parties withdrew a JVN and subsequently abandoned the transaction. The parties withdrew the JVN and abandoned the transactions after either CFIUS informed the parties that it was unable to identify mitigation measures that would resolve its national security concerns or it proposed mitigation measures that the parties chose not to accept in 9 of these instances. In the 2 remaining instances, the parties withdrew their JVN and abandoned the transaction for commercial reasons. While the Annual Report does not disclose the nationalities involved, we suspect that majorities of both these transactions involved Chinese parties.

CFIUS Continues to Expand Its Review of Non-Notified Transactions

CFIUS, as well as certain of its member agencies, have developed internal systems to identify transactions that may be subject to its jurisdiction and may raise national security concerns, but were not filed for its review (i.e., non-notified transactions). Once CFIUS identifies a non-notified transaction of potential concern, it contacts the parties and poses a set of questions to determine if further action is required. CFIUS has the authority to request that the parties file a JVN and CFIUS exercised this authority in 8 instances out of a total of 135 identified non-notified transactions (6%), as compared to 17 of the 117 transactions (14.5%) in 2020. This is significant as it confirms that CFIUS is increasing its ability to identify non-notified transactions; however, it is only initiating reviews on a very small percentage of these transactions (i.e., 6% in 2021). Thus, the Annual Report suggests that parties are making defensible decisions after conducting reasonable due diligence to inform their decisions as to whether the facts and circumstances of their particular transaction necessarily warrant a voluntary filing.

CFIUS' non-notified transaction system utilizes various sources of information, including interagency referrals, public tips, media reports, commercial databases, and congressional notifications. The Annual Report identifies increased hiring of non-notified process staff, increased training across CFIUS member agencies, and increasing public awareness of the CFIUS tip mailbox as ways to enhance the coverage of the non-notified transactions system. We expect the number of non-notified transactions identified and considered by CFIUS to further increase in 2022 – 2023.

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If you have questions concerning the contents of this alert, or would like more information, please speak to your regular contact at Weil or to the authors:

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