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More Resources, More Tools: The 2020 Annual CFIUS Report Shows Faster Clearance Times and More Robust Review Capabilities

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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 2020 (the "Annual Report"). This is the first annual report covering the significant updates to the CFIUS process instituted by the Foreign Investment Risk Review Modernization Act ("FIRRMA"), which became fully effective on February 13, 2020.

Key Highlights:

- CFIUS continues to spend significant time and resources reviewing mandatory filings involving critical technologies. Early sell-side due diligence is vital to identifying potential triggers for a mandatory filing.
- Parties continue to show an increasing willingness to submit declarations instead of notices. Declarations seem particularly well suited for those parties who have had recent success before CFIUS.
- CFIUS has significantly expanded its review of non-notified transactions. This is increasing the risk of potential post-close inquiries for transactions that were not filed voluntarily despite being subject to CFIUS' jurisdiction. This is also increasing the risk of CFIUS identifying transactions that should have been filed under the mandatory regulations, which could expose non-filing parties to significant penalties. Accordingly, parties need to ensure they conduct adequate due diligence and risk assessments as early as possible.
- We expect all of these trends to continue in 2021.

The New Mandatory Filing Requirement

FIRRMA transformed CFIUS' voluntary filing regime by creating, for the first time, a mandatory filing requirement if a transaction and the parties satisfy certain conditions. In most instances, a foreign person must acquire control over a U.S. business that is involved with "critical technology" as defined in CFIUS' regulations. Parties can satisfy the mandatory filing requirement by either submitting a short-form declaration ("declaration") or a long-form notice ("notice"). According to the Annual Report, CFIUS reviewed 34 declarations submitted because of the mandatory filing requirement. The Annual Report does not contain a similar statistic for notices; however, CFIUS reviewed 122 transactions encompassing both declarations and notices (39% of declarations and notices combined) involving a foreign person's acquisition of control over a U.S. business with critical technology. While all of these cases may not have involved a mandatory filing requirement,[1] a reasonable approximation would suggest that a substantial number of them did.

Declaration Usage Grew Significantly

In 2020, CFIUS reviewed 126 declarations. CFIUS has the authority to take four types of action with respect to a transaction notified through the declaration process:

1. Request that the parties file a written notice;
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 approved 64% of the declarations within the 30-day review period, as compared to 37% in 2019. CFIUS requested parties to file a full notice in 22% of the declarations, as compared to 28% in 2019. CFIUS was unable to complete action in 13% of the declarations, as compared to 34% in 2019, and 1 declaration was withdrawn in each of 2020 and 2019. We expect the percentage of cases where CFIUS completes all action within the 30-day time period to continue to increase in 2021 due to increased staffing and dedicated resources, which will make declarations an even more attractive option for some investors.

Second-Stage Investigations Are Less Likely, Benefits of Declarations Increases

In 2020, CFIUS reviewed 187 notices. Once CFIUS accepts a notice, 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 notice, CFIUS must reach a dispositive action at the end of the review or investigation period (unless the investigation is extended 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 187 notices at the end of the initial review period, as compared to 51% in 2019. It approved 32% from the investigation period, as compared to 36% in 2019. Parties withdrew 16% of the 187 notices (as compared to 13% in 2019), and approximately three quarters of the notices withdrawn in 2020 were subsequently refiled by the parties in 2020 or 2021, with the remaining withdrawn notices being abandoned altogether. Of the 84% of notices that CFIUS approved, it required mitigation in 17 instances (10.8% of the total reviewed/investigated). CFIUS required mitigation for 6 of the 8 notices that parties withdrew and did not refile because the parties abandoned the transaction (75% of all notices withdrawn and not refiled). CFIUS also rejected one notice. The President issued an order prohibiting one acquisition. These statistics reflect CFIUS' decreasing reliance on extending cases into the second 45-day review investigation and, by extension, CFIUS' increasing ability to clear cases in the initial 45-day review period. We expect this trend to continue in 2021.

CFIUS reviewed 313 total filings (i.e., declarations and notices) in 2020 compared to 325 in 2019 (a 4% reduction from 2019) and 249 in 2018. While total notices filed in 2020 declined by 19% as compared to 2019, the increase in total declarations in 2020 nearly made up for this with declarations increasing by 34% as compared to 2019. The increasing use of declarations continues a trend observed since the creation of the declaration option in 2018.

While the total number of CFIUS cases dropped slightly in 2020 as compared to 2019, after having increased markedly in 2018, the total number of cases that proceed to the second 45-day period investigation stage has continued to decline noticeably from 2018 to 2020. Specifically, the percentage of total cases that proceeded to the investigation stage was 69.0%, 48.9% and 47.1% in 2018, 2019 and 2020, respectively. This positive trend development likely is attributable to the increased staffing resources made available via FIRRMA. We expect CFIUS to improve this trend further by approving even more cases from the review period this year. Additionally, on average, CFIUS used the full statutory periods prescribed for each of a declaration (30 days) and a notice (45 days for the review period and 45 days for the investigation period). We expect the average time for CFIUS to conclude action to remain relatively constant in 2021.

CFIUS Significantly Expands Its Review of Non-Notified Transactions

CFIUS, as well as certain of its member agencies, have developed internal systems to identify transactions that may by subject to its jurisdiction and may raise national security concerns, but were not filed for its review ("non-notified transactions"). Where CFIUS identifies a non-notified transaction of potential concern, CFIUS contacts the parties and poses a set of questions to them. CFIUS has the authority to request that the parties file a notice and CFIUS exercised this authority in 17 instances out of a total of 117 identified non-notified transactions (15%). This is the first time CFIUS published this type of data on its non-notified activities.

The Annual Report states that CFIUS' non-notified transactions system utilizes various sources of information, including interagency referrals, tips from the public, media reports, commercial databases and congressional notifications. The Annual Report identifies increased training across CFIUS member agencies and increasing public awareness of the CFIUS tip mailbox as ways to improve the coverage of the non-notified transactions system. We expect the number of non-notified transactions to increase in 2021.

ENDNOTES

[1] A transaction does not trigger a mandatory filing requirement if the foreign acquirer constitutes an "excepted investor" or if a U.S. export license or other regulatory authorization is not required in order to export the critical technology to the acquirer's home country.

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