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# Top 10 takeaways from the latest CFIUS annual report to Congress



*Grigore Alexandru is a policy advisor at Sidley.*

**A**s we reported last week, CFIUS reviewed a record number of transactions in 2021, according to the Committee's latest [annual report](#) to Congress. We asked Grigore Alexandru, a policy advisor in the

*Global Arbitration, Trade and Advocacy group at Sidley, to provide his top 10 insights from the latest report. Alexandru, who we [interviewed](#) back in January, was most recently a Deputy Director at the Office of Foreign Investment Review at the Department of Defense.*

As Foreign Investment Watch recently reported, the U.S. Treasury Department released its Calendar Year 2021 CFIUS Annual Report to Congress on August 2nd, 2022. Given that FIRRMA regulations became effective on February 13, 2020, this marks the first CFIUS Annual Report issued by Treasury that captures post-FIRRMA data over a full calendar year. The CFIUS legal team at Sidley and I reviewed the report, and identified 10 key takeaways that Foreign Investment Watch readers should know about.

**1. Transactions:** “CFIUS reviewed a record number of Covered Transactions, including 164 declarations and 272 notices.”

**Takeaway:** CFIUS activity is way up. After a down year in 2020 (187 notices), in part due to COVID-19, the volume of CFIUS notices have set a new record, breaking the previous high in 2017 (237).

As most Foreign Investment Watch readers already know, declarations first became available under a FIRRMA pilot program between Nov. 10, 2018, and Feb. 12, 2020. Twenty declarations were filed in 2018, and 94 were filed in 2019. On Feb. 13, 2020, the new FIRRMA regulations entered into force and made declarations available for any covered transaction. In 2020, 126 declarations were filed (including both pilot program and non-pilot program declarations).

**2. Notices:** “... with respect to 164 declarations of covered transactions

submitted in 2021 ... CFIUS requested that the parties to 30 declarations file a written notice, following an assessment . . . CFIUS informed the parties to 12 declarations that the Committee was unable to conclude action . . . CFIUS notified the parties to 120 declarations that the Committee had concluded all action under Section 721.”

**Takeaway:** As CFIUS and parties become more comfortable with the declaration process, approval rates continue to rise and “shoulder shrugs” (i.e., instances when CFIUS is unable to conclude action) and requests for notice continue to fall. For declarations, the 2021 approval rate is 73 percent, the “shoulder shrug” rate is 7 percent, and the rate of requests for a notice is 18 percent.

**3. Friendly Countries:** “Canadian investors accounted for the most declarations in 2021. Investors from Canada accounted for the largest proportion of declarations for the three-year period with 14 percent (54 declarations). Investors from Japan and the United Kingdom accounted for the second and third-most declarations from 2019 to 2021 with 11 percent (43 declarations) and 8.6 percent (33 declarations), respectively.”

**Takeaway:** Parties representing “friendly” countries continue to use the declaration process to their advantage to expedite CFIUS approval.

**4. Investigations:** “The proportion of notices proceeding to investigation in 2021 was approximately 48 percent, up from 47 percent in 2020 but down from 49 percent in 2019.”

**Takeaway:** From 2012 to 2021, 52 percent of notices (953) resulted in an investigation. Although the CY 2021 investigation rate (48 percent) is down 4 percent historically, it has remained relatively consistent.

It is a bit surprising that, as a result of FIRRMA, the additional 15 days added to the review period (i.e., from 30 days to 45 days) have not resulted in a larger proportion of clearances in review. Notably, during the first year of the Trump Administration in 2017, the investigation rate was nearly 73 percent and subsequently decreased the remaining three years of the Administration (69 percent in 2018, 49 percent in 2019, and 47 percent in 2020). It remains to be seen whether the investigation rate will decline under the Biden Administration, as new political appointees and parties to transactions become more comfortable with one another and the new requirements and processes.

**5. China:** “In 2021, the highest number of notices were from Chinese investors, accounting for 16.5 percent (44 notices),

followed by Canadian and Japanese investors, accounting for 10.3 percent and 9.6 percent, respectively (28 and 26 notices).”

**Takeaway:** After years of steadily decreasing filings, bottoming out in 2020 (17), Chinese notices nearly tripled in 2021 and reclaimed the top spot, perhaps signaling that Chinese companies are willing to test the temperature of the Biden Administration as to its position on Chinese foreign direct investment in the United States.

**6. Withdrawals:** “74 of the 272 notices were withdrawn. In 63 of these instances, the parties filed a new notice. 52 were re-filed in 2021 and 11 in 2022. In nine of these instances, the parties withdrew the notice 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.”

**Takeaway:** The 2021 withdrawal rate (both re-filed and abandoned) was 27 percent (23 percent re-filed and 4 percent abandoned). Historically, most withdrawn notices have been subsequently re-filed rather than abandoned. Notably, during the first year of the Trump Administration in 2017, the withdrawal rate was 31 percent

and proceeded to trend downward during the remaining three years of the Administration (29 percent in 2018, 13 percent in 2019, and 16 percent in 2020).

It is possible that the withdrawal rate will decline in future years under the Biden Administration, as the Administration gets more comfortable with the process.

**7. Mitigation:** “In 2021, CFIUS adopted mitigation measures and conditions with respect to 31 notices of covered transactions (approximately 11 percent of the total number of 2021 notices):”

**Takeaway:** Mitigation rates have historically remained around 11 percent (13 percent in 2018, 14 percent in 2019, and 9 percent in 2020) so the 2021 figure is relatively consistent with historical data.

**8. Monitoring:** “Of the mitigation agreements and conditions entered into by the Committee, 187 are currently being monitored. Twelve mitigation agreements and conditions were modified materially in 2021, including eight of those that were terminated.”

**Takeaway:** The number of annual CFIUS cases mitigated continues to outpace the number of annual CFIUS mitigation agreements terminated. Thus, the total

number of mitigation agreements being monitored has reached a new high and continues to steadily increase.

**9. Site Visits:** “For each of the agreements monitored by the Committee, CFIUS and the monitoring agencies have worked to ensure compliance by the parties. Monitoring agencies reported having conducted 29 site visits in 2021.”

**Takeaway:** Given that travel restrictions related to COVID-19 continue to ease, the number of site visits by monitoring agencies will likely increase. This would be consistent with [recent coverage](#) in Foreign Investment Watch regarding the first CFIUS Conference, which noted that site visits would likely increase.

**10. Non-Notified Transactions:** “There were 135 transactions identified through the non-notified/non-declared process in 2021 that were put forward to the Committee for consideration. From the transactions identified, eight transactions resulted in a request for filing.”

**Takeaway:** As a result of FIRRMA, resources dedicated to identifying non-notified transactions have increased; Foreign Investment Watch has been covering this focus on non-notified transactions for [several years](#).

Unsurprisingly, the number of transactions identified through the non-notified process have also increased (from 117 in 2020 to 135 in 2021).

However, the filing rate for transactions identified through the non-notified process dipped from 2020 (15 percent of all transaction identified through the non-notified process) to 2021 (6 percent). The fact that the filing rate decreased while the number of identified transactions increased demonstrates that a non-notified inquiry is not necessarily a cause for panic.

## MORE INFORMATION

The complete [2021 CFIUS Annual Report to Congress](#) is available for download. [Downloadable charts](#) with updated data, which you are free to use in blog posts or client alerts, are also available.

Grigore Alexandru is a policy advisor in the Global Arbitration, Trade and Advocacy group at Sidley Austin LLP. We conducted a Q&A with Grigore earlier this year on the [DoD’s unclassified CFIUS procedures document](#), and interviewed him in May 2021 on the topic of CFIUS [co-leads](#). He can be reached at [galexandru@sidley.com](mailto:galexandru@sidley.com) or 202-736-8156.