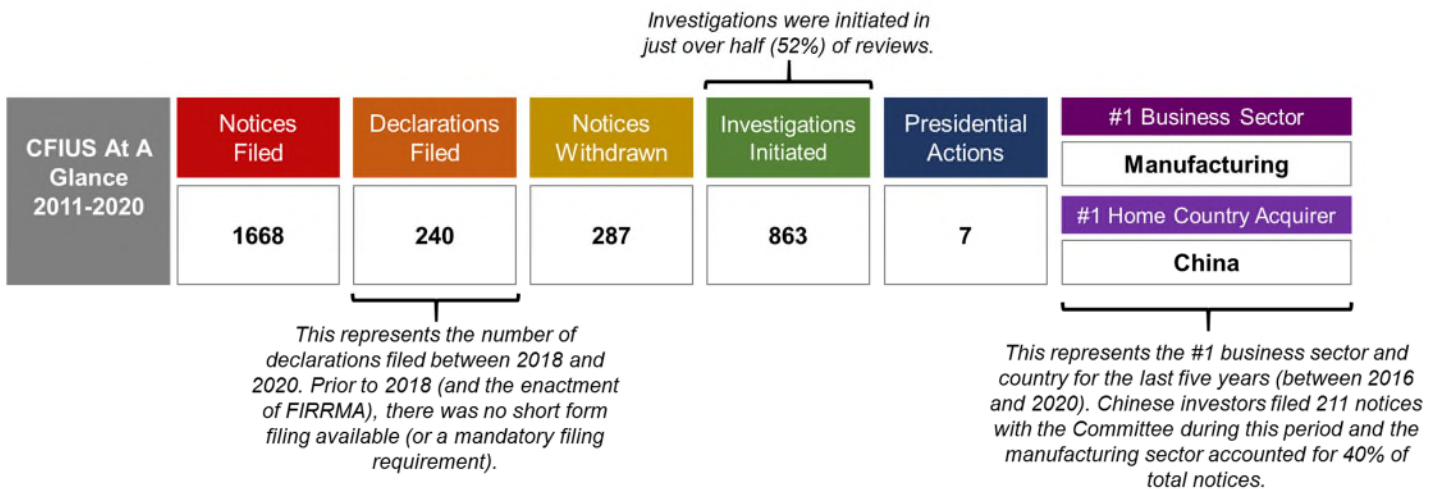
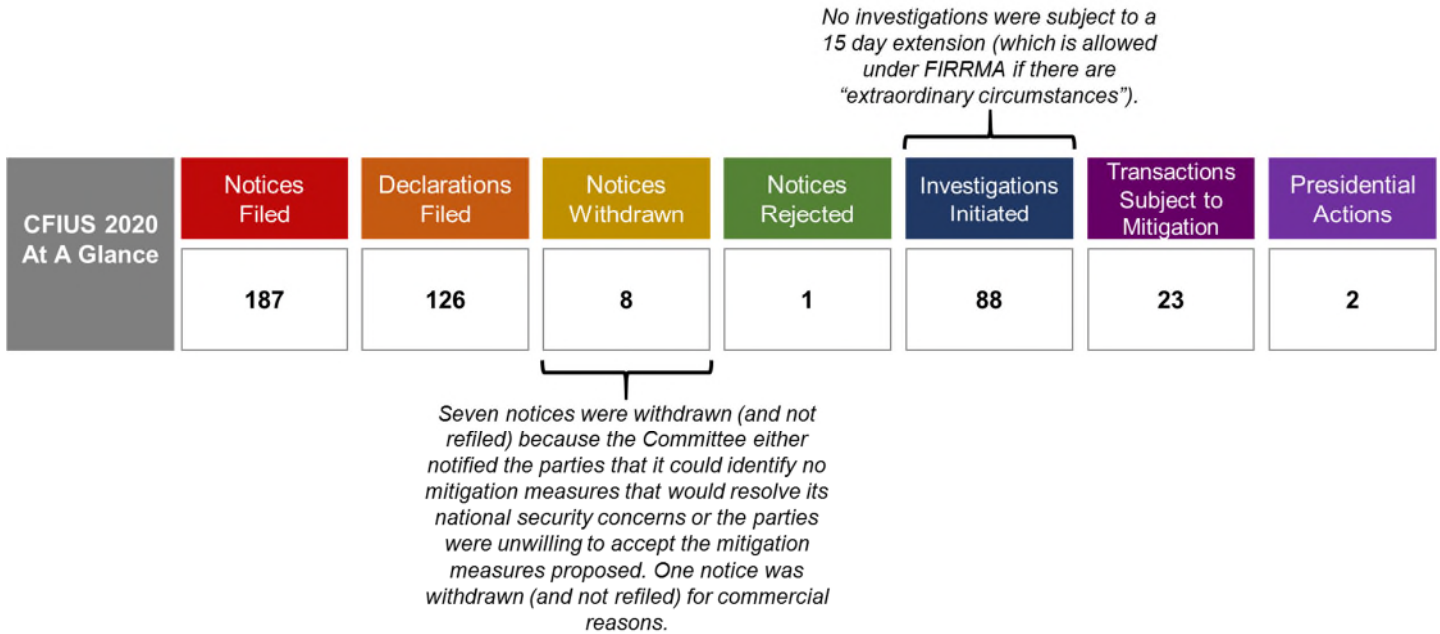


## CFIUS Releases 2020 Annual Report to Congress

### Key Takeaways

- On July 26, 2021, the U.S. Treasury Department, as chair of the Committee on Foreign Investment in the United States (“CFIUS” or the “Committee”), published its [Annual Report to Congress](#) on key activities, including notices, declarations, and withdrawals through 2020 (“Annual Report”).
- CFIUS, an interagency committee principally comprising nine members and chaired by the Secretary of the Treasury, has broad powers to review foreign investments in and acquisitions of U.S. businesses to determine the potential impact on U.S. national security. The Committee has the authority to impose mitigation measures, suspend transactions and, where appropriate, recommend that the President block or unwind transactions.
- The Annual Report holds important insights for non-U.S. acquirers contemplating acquisitions and other investments in the United States. The Annual Report also marks the third data set for reviews and investigations completed since the [Foreign Investment Risk Review Modernization Act of 2018](#) (“FIRRMA”) became law. FIRRMA made several substantial changes to the CFIUS process—including expanding the scope of CFIUS jurisdiction to permit review of a wider range of transactions, adopting a new, short-form declaration process and strengthening the Committee’s authority to restrict transactions that threaten U.S. national security—the effects of which are reflected in the Annual Report data.
- Post-FIRRMA, CFIUS has been extremely active, and the 2020 data highlight this point: there were 313 filings (both declarations and notices) in 2020 and, in a change from 2019, 40% of filings in 2020 were declarations (whereas only 28% of filings in 2019 were declarations). There were also more declarations presented to the Committee overall in 2020 in comparison to 2019 (126 versus 94) and a substantially larger portion of these declarations (81 versus 35) resulted in notifications by the Committee that it had completed all action under Section 721 on the basis of its review.
- Although CFIUS received slightly fewer filings in 2020 than it did in 2019 (313 versus 325), the number of second-stage investigations remained consistent. In 2019 49% of reviews extended into the investigation phase; in 2020 47% of reviews extended into the investigation phase.
- The percentage of notices withdrawn from the Committee’s consideration has also remained consistent from 2019 to 2020 (3% in 2019 and 2% in 2020).
- Japan, the United Kingdom, Canada and China were the leading sources of foreign investments in and acquisitions of U.S. businesses reviewed by CFIUS in 2020, as was the case in 2019, with the recent downward trend in Chinese investment continuing (55 in 2018, 25 in 2019 and 17 in 2020).
- Below, we highlight six important data sets in the Annual Report. To revisit our OnPoint that covers the 2019 Annual Report, please find it [here](#).

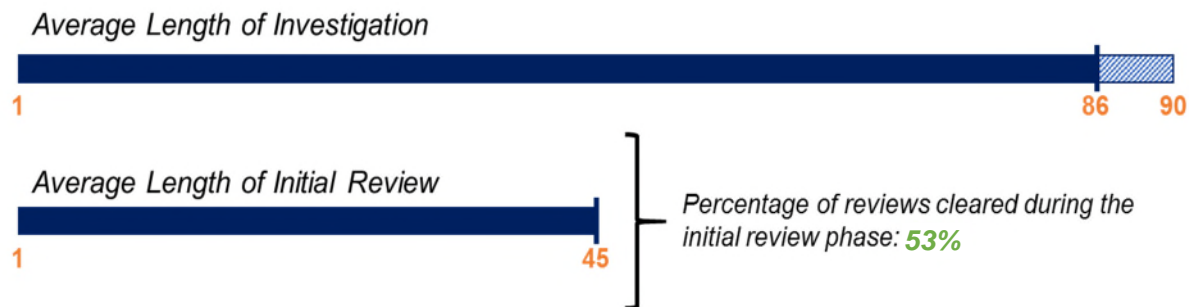


## Annual Report Highlights for Dealmakers

### 1. *Almost half of all CFIUS reviews extended into an investigation period.*

Pre-FIRRMA, in the normal course the longest possible review timeline for the Committee (prior to submission for Presidential consideration) was 75 days: CFIUS would conduct a 30-day review and could conduct an additional investigation of up to 45 days under certain circumstances. Post-FIRRMA the longest possible review timeline is 105 days: the initial review period is now 45 days, after which CFIUS can conduct an additional 45-day investigation if determined necessary and, in extraordinary circumstances, can extend the investigation period by an additional 15 days (prior to submission for Presidential consideration).

As in 2019, in 2020, almost half of all notices went into an investigation period (47% in 2020, 48% in 2019). Both 2019 and 2020 represent a notable decrease from 2018 and 2017, when 69% and 73% of reviews proceeded to investigation. The average investigation in 2020 lasted 86 days (i.e., almost the entire 90 day period) and the Committee did not exercise its authority to extend an investigation by 15 days in 2020.




The Annual Report also provides other valuable data on Committee timing. In 2020 (the same as 2019), it took CFIUS on average ten business days to provide written comments on draft notices submitted to the Committee. In addition, it took on average seven days for CFIUS to accept a formal notice for review once it had been submitted.

### 2. *2020 saw the 7<sup>th</sup> CFIUS Presidential Order.*

Only seven transactions reviewed by CFIUS have been blocked by Presidential Order. Four of the seven Presidential Orders were issued by President Trump (in fact, six of the seven were issued since 2012).

In March 2020, President Trump issued an order requiring Beijing Shiji Information Technology Co. (“Shiji Group”) to divest the U.S.-based cloud-based hotel management software company StayNTouch, Inc. (“StayNTouch”). The order came 18 months after Shiji Group acquired StayNTouch in September 2018. In August 2020, President Trump issued an order requiring ByteDance, Ltd. (“ByteDance”) to divest the U.S.-based social media company Musical.ly (now known as TikTok) three years after ByteDance acquired the company in 2017. However, not every order to divest results in divestment. For example, while Shiji Group actually divested StayNTouch, ByteDance did not have to divest TikTok, as President Biden rescinded President Trump’s order.

Transactions are not only subject to formal disruption via Presidential Order but also may be withdrawn in anticipation of such orders. During 2020 seven transactions were withdrawn from the CFIUS review process (and ultimately abandoned) because either CFIUS could not identify mitigation measures that would resolve the Committee’s national security concerns or the parties were unwilling to accept the mitigation measures presented to them.



## CFIUS Presidential Orders

**1990** | President Bush directed the China National Aero-Technology Import and Export Corporation, a Chinese state owned entity, to divest its acquisition of the airplane components manufacturer MAMCO

**2012** | President Obama directed the Ralls Corporation, a privately-owned Chinese company, to divest itself of an Oregon wind farm project

**2016** | President Obama blocked the acquisition of Aixtron, a semiconductor company, for \$670 million by Fujian Grand Chip Investment Fund, a privately owned Chinese fund

**2017** | President Trump blocked the acquisition of Lattice Semiconductor Corp. for \$1.3 billion by Canyon Bridge Capital Partners, a Chinese investment firm partially funded by the Chinese government

**2018** | President Trump blocked the \$117 billion acquisition of semiconductor chip maker Qualcomm by Broadcom, a Singapore based company

**2020** | President Trump ordered Beijing Shiji Information Technology Co., a subsidiary of the public Chinese company Shiji Group, to divest its acquisition of the U.S. hotel software developer StayNTouch

**2020** | President Trump ordered ByteDance, a public Chinese company, to divest its acquisition of the U.S. social media company Musical.ly (now known as TikTok)

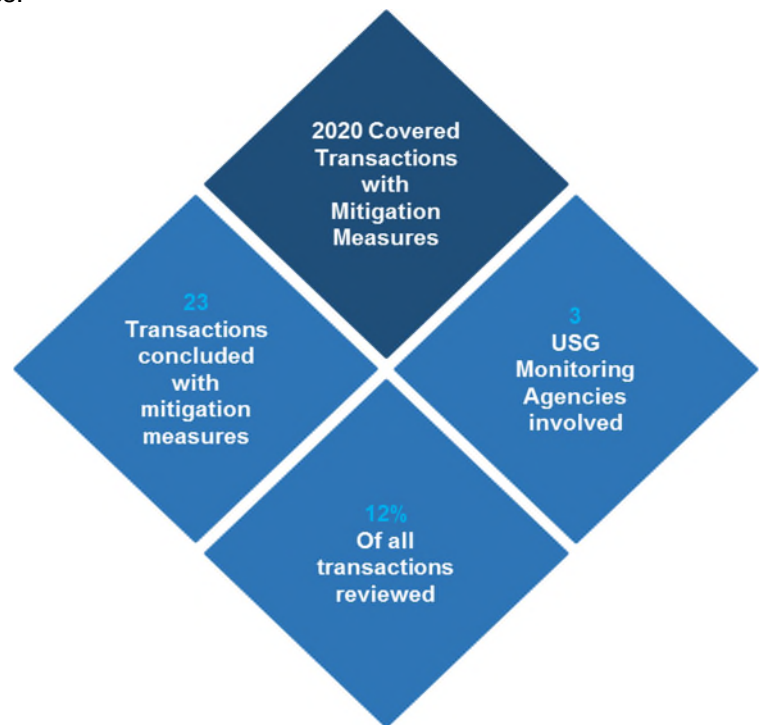
**3. *It remains important to consider potential mitigation measures early in the transaction process.***

CFIUS can impose mitigation measures on a non-U.S. acquirer's investment in or acquisition of a U.S. business in order to resolve any national security risks that the Committee identifies during its review. The Annual Report included examples of mitigation measures negotiated in 2020 that required the parties involved to take specific and verifiable actions. These actions included the following:

- Prohibiting or limiting the transfer or sharing of certain intellectual property, trade secrets, or know-how;

- Establishing guidelines and terms for handling existing or future USG contracts, USG customer information, and other sensitive information;
- Ensuring that only authorized persons have access to certain technology, that only authorized persons have access to USG, company or customer information; and that the non-U.S. acquirer not have direct or remote access to systems that hold such information;
- Ensuring that only U.S. citizens handle certain products and services, and ensuring that certain activities and products are located only in the United States;
- Establishing a Corporate Security Committee and other mechanisms to ensure compliance with all required actions, including the appointment of a USG-approved security officer or member of the board of directors and requirements for security policies, annual reports, and independent audits;
- Exclusion of certain sensitive assets from the proposed transaction;
- Prior notification to approval by relevant U.S. government parties in connection with any increase in ownership or rights by the non-U.S. acquirer; and
- Divestiture of all or part of the U.S. business.

The data in the Annual Report reflects fewer transactions requiring mitigation measures in 2020 (23, which represented 12% of all transactions reviewed by the Committee) in comparison to 2019 (28, which also represented 12% of all transactions reviewed by the Committee) and 2018 (29, which represented 13% of all transactions reviewed by the Committee). However, there were seven transactions withdrawn from the CFIUS review process because either CFIUS could not identify mitigation measures that would resolve the Committee’s national security concerns or the parties were unwilling to accept the mitigation measures presented to them. Furthermore, CFIUS still adopted mitigation measures (i.e., National Security Agreements or “NSAs”) to address residual national security risks regarding three of the withdrawn notices and adopted certain other mitigation conditions (short of NSAs) with respect to three other withdrawn notices.



Transaction parties should continue to evaluate in advance of CFIUS review what mitigation measures might be required and determine whether and to what extent such measures might impact the feasibility of proceeding with the transaction.

#### 4. **CFIUS is actively identifying “non-notified” transactions for review.**

One of the overarching changes under FIRRMA was the strengthening and broadening of the Committee’s authority to review foreign investments in and acquisitions of U.S. businesses, including with respect to review of so-called “non-notified/”non-declared” transactions, meaning transactions that fall within CFIUS’ jurisdiction but were not submitted by the transaction parties to the Committee for review. According to the Annual Report, during 2020 CFIUS identified and requested information regarding 117 “non-notified/non-declared” transactions. From these 117 transactions, 17 resulted in a formal request for a filing. The Annual Report identified several methods that CFIUS utilizes for identifying such transactions, including: tips from the public, media reports; commercial databases; interagency referrals; and congressional notifications.

The Annual Report also identified additional methods for improving the Committee’s identification of “non-notified/”non-declared” transactions going forward, such as increased training and increased staffing across the CFIUS member agencies to help increase coordination and effective identification of transactions of potential interest and increased public awareness of the CFIUS tip mailbox. This highlights the importance of including CFIUS considerations during the diligence process.

**5. Japan continues to represent the top country for foreign direct investment in the United States in transactions reviewed by CFIUS, followed by Canada, the United Kingdom and China.**

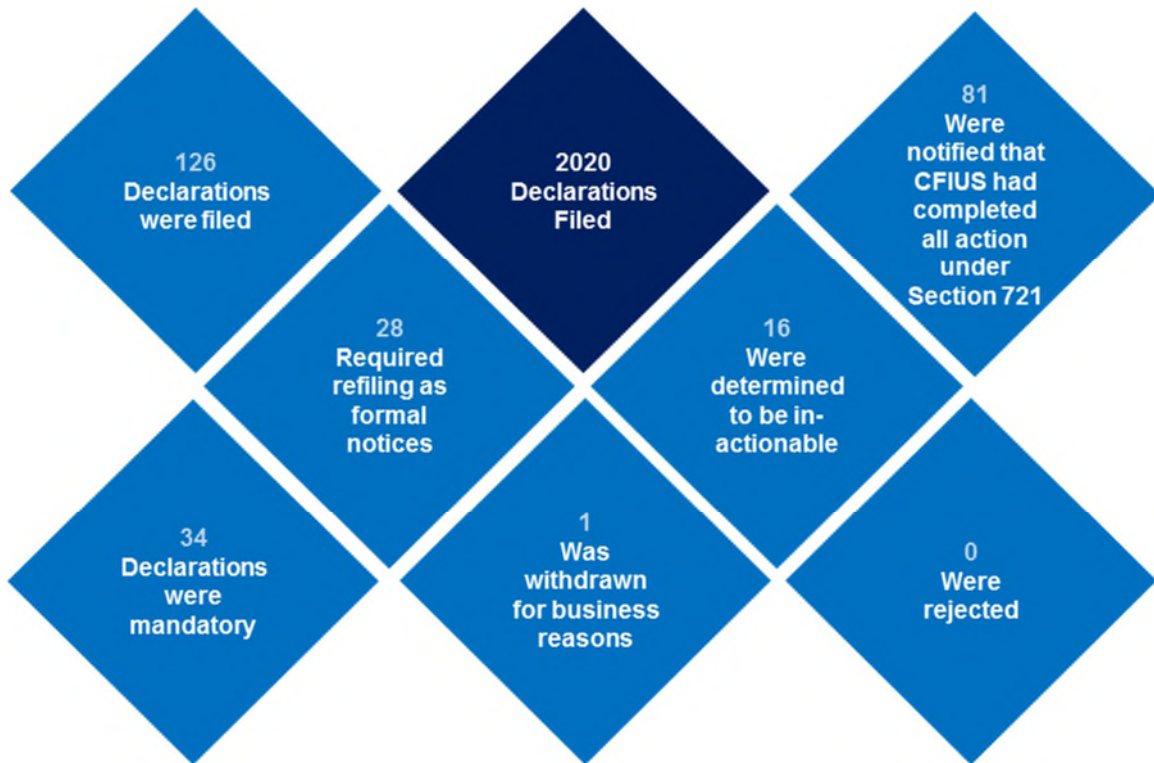
Japan continued to lead the charge as the top non-U.S. acquirer and/or investor in 2020. As was the case in 2019, Japanese investors were responsible for the largest share of transactions presented to the Committee overall, representing 10% of all notices, 14% of all declarations and 9% of all foreign acquisitions of U.S. critical technologies. Following behind Japan were Canada, the United Kingdom, and China. Investors from Japan, China and Canada accounted for 26% of all notices filed with the Committee in 2020 and investors from Canada, Japan and the United Kingdom accounted for 40% of all declarations filed with the Committee in 2020.

<i>Top 5 Home Country Acquirers (Notices)</i>	<i>Top 5 Home Country Acquirers (Declarations)</i>	<i>Top 5 Home Country Acquirers (Critical Tech)</i>
Japan	Canada	Japan
China	Japan	Sweden
United Kingdom	United Kingdom	Canada
British Virgin Islands	Germany	Germany
France	Sweden	United Kingdom

In addition, while Chinese acquisitions have been in decline over the past ten years, it is notable that in 2020 Chinese investors were responsible for the second largest share of notices filed with the Committee (in 2019, China represented the third largest share) and the seventh largest share of acquisitions and investments in U.S critical technologies (in 2019, China represented the eight largest share). Overall, China represents the fourth largest share of all transactions presented to the Committee.

**6. The use of declarations continues to increase, and more declarations are being cleared than before.**

As discussed above, there are two CFIUS filing options: declarations and notices. Declarations may result in a range of possible outcomes (as opposed to the filing of a notice, which provides parties with a clear cut response from the Committee). CFIUS may respond to a declaration by informing parties that it: (1) cleared the transaction, (2) initiated a unilateral review, (3) requested that the parties submit a full formal notice, or (4) is unable to reach a decision regarding clearance on the basis of the declaration alone. The data from the Annual Report shows how these options continue to play out during the first years of implementation.



In a departure from 2019, CFIUS was “unable to complete action” in only 12% of the declarations filed (as compared to 34% of declarations filed in 2019), and 64% (as opposed to 37%) of the proposed transactions were cleared through the declaration process. In addition, 73% of declarations were filed by parties that did not have a mandatory filing requirement.

One way to account for this change is the fact that 47% of the total declarations filed came from non-U.S. acquirers from Australia, Canada and the United Kingdom, or the so-called “excepted foreign states.” Pursuant to the post-FIRRMA regulations, non-U.S. investors with ties to excepted foreign states may be exempted from CFIUS’ expanded jurisdiction regarding non-controlling investments in U.S. businesses involving critical technologies, critical infrastructure, or sensitive personal data (so-called “TID U.S. Businesses”), over certain U.S. real estate transactions, and mandatory filing requirements related to investments in certain U.S. businesses dealing in critical technologies.

In general, the gap between declarations and notices filed tightened in 2020; there were 126 declarations filed to 187 notices filed, and 40% of all transactions notified to the Committee were made via declaration. This is a marked departure from 2019, when only 29% of all transactions notified to the Committee were filed via declaration. Nevertheless, parties should consider whether it is preferable to submit a full formal notice from the outset in order to be guaranteed a final response from CFIUS that provides the desired certainty.

## Conclusion

Non-U.S. acquirers should continue to consider CFIUS implications early on when developing plans to pursue investments in or acquisitions of U.S. businesses so that they can enter the CFIUS process prepared to address its potential risks and obstacles.

Dechert has represented many clients through CFIUS reviews, including major operators and investors in the high tech, telecommunications, energy, defense, and infrastructure industries. We regularly advise foreign and domestic entities (“buyers” and “sellers,” as well as other interested third parties) through the CFIUS review process, helping them determine whether or not to bring a transaction before the committee (and whether or not CFIUS review is required), to assemble the required information and materials for a filing, and then (as necessary) to negotiate national security agreements with CFIUS in a manner that minimizes both delay and the imposition of conditions that might threaten the transaction. We also give counsel on strategies for identifying and addressing political and policy considerations that may arise.