



FDI OVERSIGHT: DAWN OF A NEW ERA?

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I.	INTRODUCTION	2
II.	INBOUND FDI.....	3
	A. <i>What is CFIUS?</i>	3
	B. <i>The History of CFIUS</i>	3
	A. <i>CFIUS Composition</i>	7
III.	CFIUS'S AUTHORITY.....	8
	A. <i>Covered Control Transactions</i>	8
	B. <i>Covered Investments: Technology, Infrastructure & Data</i>	9
	C. <i>Covered Real Estate Transaction</i>	10
IV.	CFIUS FILING AND REVIEW PROCESS.....	11
	A. <i>Filing a Declaration or Notice</i>	12
	B. <i>Declaration and Notice Review Process</i>	14
	C. <i>Safe Harbor Letter</i>	15
	D. <i>Mitigation Agreements</i>	15
V.	INDEPENDENTLY INITIATED CFIUS REVIEW	16
VI.	CFIUS ANNUAL REPORT TO CONGRESS	17
	A. <i>CFIUS Filings by Country</i>	21
	B. <i>Reports on Filed Notices</i>	22
	C. <i>Notices Filed by Country or Economy</i>	25
	D. <i>Notices Filed by Country and Target Sector</i>	26
	E. <i>Critical Technologies Covered Transactions by Country</i>	27
VII.	CFIUS TRANSACTIONS THAT HAVE BEEN BLOCKED.....	28
VIII.	APPROVED CFIUS TRANSACTIONS	31
IX.	EXCEPTED STATES	34
X.	COMMITTEE ON NATIONAL CRITICAL CAPABILITIES–U.S. OUTBOUND FDI REVIEW MECHANISM	35
XI.	CONCLUSION	37

I. INTRODUCTION

Recent developments in U.S. law and proposed policy constitute what could become a dramatic shift towards heavily scrutinized Inbound and Outbound Foreign Direct Investment (“FDI”). FDI involves moving money across borders, and can take many forms (i.e., sovereign wealth funds, ground-up manufacturing, mergers & acquisitions (“M&A”)). The United States is primarily concerned when an FDI transaction implicates national security. The United States oversees Inbound FDI—money flowing from a person located abroad *into* the United States—via the Committee on Foreign Investment in the United States (“CFIUS”). Recent changes to law and practice have broadly expanded the level of scrutiny applied to Inbound FDI, particularly in M&A transactions. Conversely, at the time this Article was published, the United States does not have a committee reviewing Outbound FDI—money flowing from a United States company *outside* the United States to acquire an asset or company abroad—but proposed legislation aims to change that.

This Article begins by exploring the mandate, scope of authority, and certain actions of CFIUS, which reviews Inbound FDI. The U.S. Treasury Department has produced annual reports based on four years of CFIUS activity, which this article uses to highlight trends to the extent discernable. Next, this Article describes CFIUS’s actions on specific transactions, which demonstrate the current trend of scrutiny applied towards semiconductor investment from China (though this is not the only type of investment under scrutiny). Because the semiconductor industry particularly has fallen under scrutiny, this Article juxtaposes the incentive-based programs added by the Chips and Science Act—the “carrot”—against the blocking action taken by CFIUS —the “stick.” Finally, this Article explores the proposed National Critical Capabilities Defense Act of 2022, which, as drafted now, would create the Committee on National Critical Capabilities (“CNCC”) to review Outbound FDI,¹ which is

¹ Bob Casey & John Cornyn, *National Critical Capabilities Defense Act*, https://www.casey.senate.gov/imo/media/doc/one_pager_nccda.pdf (last visited Oct. 27, 2022).

colloquially being called “reverse CFIUS.”² Taken as a whole, the oversight afforded to CFIUS and CNCC has never been fully employed by the United States and could mark a shift away from free market principles where international borders are concerned.

II. INBOUND FDI

A. *What is CFIUS?*

Under certain circumstances, the United States has authority to review Inbound FDI via CFIUS.³ “CFIUS is an interagency committee authorized to review certain transactions involving foreign investment in the United States and certain real estate transactions by foreign persons, in order to determine the effect of such transactions on the national security of the United States.”⁴

B. *The History of CFIUS*

Although CFIUS has existed since the 1970s, presidents and congresses have made several notable expansions to its authority and scope. Originally, in 1975, President Ford created CFIUS by Executive Order 11858 to provide the President and CFIUS with the authority to review any transaction that is made by or with any foreign person, which could result in control of a U.S. business by a foreign person, also known as a “covered transaction.”⁵ The national security reviews conducted by CFIUS allow the committee to “identify and address any

² Fisher et al., *Overview of the Proposed “Reverse CFIUS” Process via the National Critical Capabilities Defense Act of 2022*, JDSUPRA (June 22, 2022), <https://www.jdsupra.com/legalnews/overview-of-the-proposed-reverse-cfius-9474074/>; Chase D. Kaniecki & Pete Young, *Support for Reverse CFIUS Outbound Investment Screening Regime Grows*, CLEARY GOTTLIEB (Mar. 31, 2022), <https://www.clearytradewatch.com/2022/03/support-for-reverse-cfius-outbound-investment-screening-regime-grows/>.

³ Exec. Order No. 14083, 87 Fed. Reg. 57,369 (Sep. 20, 2022).

⁴ *The Committee on Foreign Investment in the United States (CFIUS)*, U.S. DEP’T OF THE TREASURY, <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius> (last visited Oct. 27, 2022).

⁵ Guidance Concerning the National Security Review Conducted by the Committee on Foreign Investment in the United States, 73 Fed. Reg. 74567, 74568 (Dec. 8, 2008) (internal quotes omitted).

national security risk arising as a result of a covered transaction,” apply mitigating measures where appropriate, and, in certain circumstances, request that the “President determine whether to suspend or prohibit a covered transaction or take other action.”⁶

At the time, by executive order, CFIUS was directed to

(1) arrange for the preparation of analyses of trends and significant developments in foreign investment in the United States; (2) provide guidance on arrangements with foreign governments for advance consultations on prospective major foreign governmental investment in the United States; (3) review investments in the United States which . . . might have major implications for United States national interests; and (4) consider proposals for new legislation or regulations relating to foreign investment as may appear necessary.⁷

In 2007, Congress and President Bush signed the Foreign Investment and National Security Act of 2007 (“FINSA”), which expanded upon the prior definition of national security and amended CFIUS review by requiring CFIUS to engage in greater scrutiny during its review of certain types of foreign direct investment.⁸ However, not all members of Congress were satisfied with this law. These members argued that the law remained deficient in requirements for “reviewing investment by foreign governments” and did not resolve “issues concerning the role of foreign investment in the nation’s overall security framework and [] methods” used to assess this impact.⁹

On August 13, 2018, President Trump signed into law the Foreign Investment Risk Review Modernization Act (“FIRRMA”) of 2018.¹⁰ This new legislation amended the process for CFIUS to review the national security implications of FDI in the United States, on behalf of the President.¹¹ Importantly, “[b]efore FIRRMA, CFIUS had

⁶ *Id.*

⁷ Exec. Order No.11858 (b), 40 Fed. Reg. 20263 (May 7, 1975).

⁸ JAMES JACKSON, CONG. RSCH. SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES, SUMMARY 5 (2020).

⁹ *Id.*

¹⁰ *Id.* at Summary.

¹¹ *Id.* at 1-2.

jurisdiction to review mergers, acquisitions, and takeovers only where a foreign person was acquiring or could acquire control of a U.S. business.”¹² FIRRMA addressed the concern that a loophole was created by CFIUS’s “existing focus on takeovers by foreign entities.”¹³ This alleged loophole allowed “foreign buyers learn to replicate sensitive U.S.-based technologies without triggering CFIUS review.”¹⁴

FIRRMA appears to have strengthened and modernized CFIUS’s authority and scope for reviewing potential effects of foreign investment transactions on U.S. national security, which was last updated in 2007.¹⁵ In general, FIRRMA maintained core components of the previous CFIUS process for evaluating proposed or pending investments in the U.S. but also:¹⁶

- Broadened the scope of review to include “real estate transactions in close proximity to a military installation, a U.S. government facility, or property of national security [in]sensitivities; . . . any non-controlling investment in certain U.S. business involved in critical technology, critical infrastructure, or collecting sensitive personal data on U.S. citizens; any change in foreign investor rights; transactions in which a foreign government has a direct or indirect substantial interest; and any transaction or arrangement designed to . . . evade CFIUS;
- “Allow[ed] CFIUS to [potentially] discriminate among foreign investors by country of origin” and transactions tied to certain countries;
- “Provided additional factors for consideration that CFIUS and President may use to determine if a transaction threatens . . . U.S. national security”;

¹² CFIUS REVIEW OF ACQUISITIONS AND INVESTMENTS, WESTLAW PRAC. LAW CORP. & SEC. NOTE w-032-4566 (last accessed Oct. 20, 2022).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See JACKSON, *supra* note 8, at Summary.

¹⁶ See JACKSON, *supra* note 8, at 1-2.

- “Lengthens most time periods for CFIUS reviews and investigations”;
- “Shifted filing requirements for foreign firms”; and
- Required CFIUS to meet various deadlines in programs and developing and in developing new regulations to implement key aspects of CFIUS’s expanded jurisdiction.¹⁷

On September 15, 2022, President Biden signed an Executive Order¹⁸ ensuring the detailed review by CFIUS of transactions that threaten National Security. This is the first Executive Order (“Order”) since the establishment of CFIUS in 1975 aimed at providing “formal Presidential direction on the risks that CFIUS should consider.”¹⁹ “The United States has long recognized that certain investments . . . from foreign persons . . . can present risks to national security.”²⁰ The Order “seeks to ensure that CFIUS remains an effective tool to combat these threats now and in the future.”²¹ Without changing processes or legal jurisdiction.²²

The Order directs CFIUS to consider five specific sets of factors:

- A given transaction’s effect on the resilience of critical U.S. supply chains that may have national security implications, including those outside of the defense industrial base . . . The Committee shall consider, as appropriate, a covered transaction’s effect on supply

¹⁷ See *id.*

¹⁸ Exec. Order No. 14083; 87 Fed. Reg. 57369 (2022).

¹⁹ *Fact Sheet: President Biden Signs Executive Order to Ensure Robust Reviews of Evolving National Security Risks by the Committee on Foreign Investment in the United States*, THE WHITE HOUSE (Sept. 15, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/15/fact-sheet-president-biden-signs-executive-order-to-ensure-robust-reviews-of-evolving-national-security-risks-by-the-committee-on-foreign-investment-in-the-united-states/>.

²⁰ *Id.*

²¹ *Id.*

²² See *id.*

chain resilience and security, both within and outside of the defense industrial base.

- A given transaction's effect on U.S. technological leadership in areas affecting U.S. national security, including but not limited to microelectronics, artificial intelligence, biotechnology and biomanufacturing, quantum computing, advanced clean energy, and climate adaptation technologies The Committee shall consider whether a covered transaction could reasonably result in future advancements and applications in technology that could undermine national security, and whether a foreign person involved in the transaction has ties to third parties that may pose a threat to U.S. national security.
- Industry investment trends that may have consequences for a given transaction's impact on U.S. national security The Committee shall consider, as appropriate, the risks arising from a covered transaction in the context of multiple acquisitions or investments in a single sector or in related sectors.
- Cybersecurity risks that threaten to impair national security Investments by foreign persons with the capability and intent to conduct cyber intrusions or other malicious cyber-enabled activity may pose a risk to national security
- Risks to U.S. persons' sensitive data The Committee shall consider whether a covered transaction involves a U.S. business with access to U.S. persons' sensitive data, and whether the foreign investor has, or the parties to whom the foreign investor has ties, have sought or have the ability to exploit such information to the detriment of national security, including through the use of commercial or other means.²³

A. CFIUS Composition

CFIUS members consist of a variety of department and office heads, including Department of Commerce, Department of Defense, Department of Energy, Department of Homeland Security,

²³ *Id.*

Department of Justice, Department of State, Department of the Treasury, Office of the U.S. Trade Representative, and the Office of Science and Technology Policy.²⁴ Additionally, as necessary, White House offices may “observe and . . . participate in CFIUS’s activities.”²⁵ These offices include the Council of Economic Advisors, Homeland Security Council, National Economic Council, National Security Council, and Office of Management & Budget.²⁶

Two additional individuals, the Secretary of Labor and the Director of National Intelligence, serve as *ex officio* members of CFIUS.²⁷ In January 2008, Executive Order 13456 added five White House representatives, including the Director of the Office of Management and Budget and the Assistant to the President for National Security.²⁸ Executive Order 13456 also gave the President the authority to appoint other Executive officers to serve on the committee on a case-by-case basis.²⁹

III. CFIUS’S AUTHORITY

A. Covered Control Transactions

CFIUS has the authority to review (1) covered control transactions, (2) covered investments, and (3) covered real estate transactions.³⁰ A covered control transaction is one “that results or could result in control” of a U.S. business by a “foreign person.”³¹ A foreign person is any individual other than a U.S. citizen or a person who owes permanent allegiance to the U.S., any non-U.S. government or body exercising governmental functions, or any entity formed

²⁴ See *CFIUS Overview: Committee Composition*, U.S. DEP’T OF TREASURY, <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-overview> (last visited May 11, 2022, 3:05 PM).

²⁵ See *id.*

²⁶ *Id.*

²⁷ *Id.*; JACKSON, *supra* note 8.

²⁸ JACKSON, *supra* note 8.

²⁹ *Id.*

³⁰ *The Committee on Foreign Investment in the United States (CFIUS)*, *supra* note 4.

³¹ Transaction that are covered control transactions, 31 C.F.R. § 800.301 (2020).

under a foreign state.³² Covered control transactions involve transactions in which a foreign person conveys control over a U.S. business to another foreign person; a transaction by a foreign person that results or could result in control of a U.S. entity or of U.S. assets by a foreign person; or a joint venture in which parties enter into an agreement and one or more of those parties contributes a U.S. business and a foreign person could control that U.S. business through the joint venture.³³

B. Covered Investments: Technology, Infrastructure & Data

Years after CFIUS's formation, there were still concerns over the continued risks to U.S. technological leadership to support national defense and economic security due to growing FDI.³⁴ As such, a covered investment includes any direct or indirect non-controlling investment by a foreign person in an unaffiliated business involved in critical technology, critical infrastructure, or sensitive personal data ("TID Business").³⁵ A U.S. business involved in critical technology is a business that produces, designs, tests, manufactures, fabricates, or develops one or more critical technologies.³⁶ Critical technologies are defined as munitions; nuclear facilities, equipment, and technologies; certain agents and toxins; controlled chemical and biological weapons; or other similar weapons technologies.³⁷ Critical technologies also includes "emerging and foundational technologies controlled under Section 1758 of the Export Control Reform Act of 2018," which further identifies these technologies that are deemed essential to national security.³⁸

³² See Part 800-Regulations Pertaining to Certain Investments in the United States by Foreign Persons, 31 C.F.R. § 800.220-800.224 (2020).

³³ Transactions that are covered control transactions, 31 C.F.R. § 800.301.

³⁴ See, JAMES K. JACKSON & CATHLEEN D. CIMINO-ISAACS, CONG. RSCH. SERV., IF10952, CFIUS Reform Under FIRRMA (2020).

³⁵ See Covered Investment, 31 C.F.R. § 800.211 (2020).

³⁶ See TID U.S. Business, 31 C.F.R. § 800.248 (2020).

³⁷ See Critical Technologies, 31 C.F.R. § 800.215 (2020).

³⁸ *Id.*, accord Requirements to Identify and Control the Export of Emerging and Foundational Technologies, 50 U.S.C. § 4817(a)(1)(A) (2018).

A U.S. business that owns, operates, manufactures, supplies, or services critical infrastructure is also covered investment.³⁹ Critical infrastructure includes the physical and virtual systems and assets considered so vital to the United States that their incapacity or destruction would have a debilitating effect on national security.⁴⁰

CFIUS also reviews U.S. businesses directly or indirectly involved in maintaining or collecting sensitive personal data of U.S. citizens that could be exploited and ultimately threaten national security.⁴¹ Sensitive data is defined as data that: (1) “targets or tailors products or services to any U.S. executive branch agency or military department with intelligence, national security, or homeland security responsibilities . . .”; (2) “has [been] maintained or collected . . . with one more listed categories . . . on greater than one million individuals . . . ; or (3) “[h]as a demonstrated business objective to maintain or collect any identifiable data . . . on greater than one million individuals and such data is an integrated part of the U.S. business’s primary products or services.”⁴² Section 800.241 of title 31 of the Code of Federal Regulations includes a broad list of what is categorized as “sensitive personal data,” with definitions ranging from financial data to genetic tests.⁴³

C. Covered Real Estate Transaction

A covered real estate transaction is a transaction in which a foreign person purchases or leases real estate “located within, or will function as part of, a covered port” or “is located within close proximity of any military installation . . . another facility or property of the U.S. government”; a transaction in “extended range of any military installation”; “any county or other geographic area identified in connection with any military installation”; or “any part of a military

³⁹ 31 C.F.R. § 800, app. A (2020).

⁴⁰ Critical infrastructure, 31 C.F.R. § 800.214 (2020).

⁴¹ See generally 31 C.F.R. § 800.248 (noting that a TID business “maintains or collects directly or indirectly, sensitive personal data of U.S. citizens”); Ogra Cadet et al., *National Security Law*, 56 ABA/SIL INT’L LAW. YIR (n.s.) 469, 475-76 (2022) (noting that CFIUS created the concept of a TID business).

⁴² Sensitive personal data, 31 C.F.R. § 800.241 (2020).

⁴³ *Id.*

installation . . . located within the limits of the U.S. territorial sea.”⁴⁴ This definition is broad, and what constitutes “close proximity” is nebulous, considering that elected officials are calling on federal review of even acquisitions of agricultural land by foreign investors.⁴⁵

IV. CFIUS FILING AND REVIEW PROCESS

CFIUS’s jurisdiction covers an expansive range of transactions. If a transaction might qualify as a covered transaction, then the parties may submit the transaction for CFIUS review.⁴⁶ In this context, most transactions that appear before CFIUS are self-reported.⁴⁷ FIRRMA introduced two processes where parties can file either a short-term declaration with basic information regarding the transaction or a more formal written notice.⁴⁸ Filing might be *advertised* as voluntary, but filing can become mandatory if the declaration involves a U.S. TID business dealing with foreign government linked transactions or critical technology linked transactions.⁴⁹ Further, CFIUS can independently review a transaction before or after closing and impose mitigation measures where they see fit.⁵⁰ The decision to file a voluntary declaration or notice is a decision the parties must make independently. The cost of a notice alone seems designed to encourage parties to first file a declaration, which may or may not lead to a more robust inquiry by

⁴⁴ Covered real estate, 31 C.F.R. § 802.211 (2020).

⁴⁵ See Letter from Rep. Glenn Thompson et al., to Hon. Gene L. Dodaro, Comptroller Gen. (October 1, 2022), https://republicans-oversight.house.gov/wp-content/uploads/2022/10/20221001_GAO_foreignlandownership.pdf (referring to Letter from Doug Burgum, Governor of N.D., to Hon. Janet Yellen, Sec. of U.S. Dep’t of Treasury, and Hon. Lloyd Austin, Sec. of the U.S. Dep’t of Def. (July 25, 2022), <https://www.governor.nd.gov/sites/www/files/documents/Gov.%20Burgum%20letter%20urging%20expedited%20CFIUS%20review%2007.25.2022.pdf>).

⁴⁶ See JACKSON, *supra* note 8.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ CFIUS REVIEW OF ACQUISITIONS AND INVESTMENTS, *supra* note 12.

⁵⁰ See *CFIUS Monitoring Enforcement*, U.S. DEP’T OF THE TREASURY, <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-monitoring-and-enforcement> (last visited Oct. 27, 2022, 2:55 PM).

CFIUS.⁵¹ Filing a declaration or draft notice does not require a fee, whereas filing a notice does.⁵² The required fees of a notice vary depending on the value of the transaction:

- (a) Where the value of the transaction is less than \$500,000:
No fee;
- (b) Where the value of the transaction is equal to or greater than \$500,000 but less than \$5,000,000: \$750;
- (c) Where the value of the transaction is equal to or greater than \$5,000,000 but less than \$50,000,000: \$7,500;
- (d) Where the value of the transaction is equal to or greater than \$50,000,000 but less than \$250,000,000: \$75,000;
- (e) Where the value of the transaction is equal to or greater than \$250,000,000 but less than \$750,000,000: \$150,000;
- (f) Where the value of the transaction is equal to or greater than \$750,000,000: \$300,000.⁵³

A. *Filing a Declaration or Notice*

CFIUS notification filings take one of two forms: (1) a declaration or (2) a notice.⁵⁴ A declaration is a short-form filing that must include and certify basic information.⁵⁵ The parties filing a declaration must provide the information requirements of the short-form filing: the transaction parties; the transaction rationale, the structure of the U.S. business, value of transaction, the financing methods, and terms of the transaction; the control percentage and ownership rights of the U.S. business being transferred to the foreign person; the nature of the U.S. business that is the subject of the transaction, including its status as a TID U.S. business or U.S. government contractor or supplier; and the status and expected timing of the transaction.⁵⁶

⁵¹ See Amount of Fee, 31 C.F.R. § 800.1101 (2020).

⁵² See *id.*

⁵³ *Id.*

⁵⁴ See Voluntary declarations, 31 C.F.R. § 800.402 (2020); see also Contents of voluntary notices, 31 C.F.R. § 800.502.

⁵⁵ See Contents of declarations, 31 C.F.R. § 800.404 (2020).

⁵⁶ Contents of declarations, 31 C.F.R. § 800.405 (2020).

There are advantages and disadvantages to filing a declaration. Filing a declaration may be a good option for low-sensitivity, cross-border deals in which the parties do not expect CFIUS to object to the transaction. The total time for a declaration filing process is shorter than a notice process and requires submitting less information.⁵⁷ The review period for a declaration only requires 30 days, and there is no filing fee.⁵⁸ However, if it is likely CFIUS will request the submission of a notice, the parties should consider whether going through the declaration process is an advantageous decision. If CFIUS will likely request submission of a notice, this will only delay completion of CFIUS review and parties may be better off using that time to prepare a notice. Also, parties could incur transaction costs for the additional filing of both a declaration and a notice.

A notice includes the same information as a declaration, but requires more detailed information regarding the foreign person and the nature of the U.S. business that is the subject of the transaction.⁵⁹ If the transaction includes an asset acquisition, the notice must include a detailed description of the assets of the U.S. business being acquired, including approximate value.⁶⁰ If the transaction involves establishing a joint venture in which a party is contributing a U.S. business, the notice must be prepared on the assumption that the foreign party to the joint venture has made an acquisition of the existing U.S. business.⁶¹ Upon receipt of a notice, there is a forty-five day review period of the transaction.⁶²

Declarations and notices must be submitted electronically through the CFIUS Case Management System.⁶³ The parties may request that a declaration be withdrawn at any time before CFIUS takes action, but the requesting party must state the reasons for the request and whether the transaction is being abandoned.⁶⁴ CFIUS

⁵⁷ Compare Beginning of 30-day assessment period, 31 C.F.R. § 800.405 (2020), with Beginning of 45-day review period, 31 C.F.R. § 800.503 (2020).

⁵⁸ Beginning of 30-day assessment period, 31 C.F.R. § 800.405 (2020).

⁵⁹ Contents of voluntary notice, 31 C.F.R. § 800.502 (2020).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Beginning of 45-day review period, 31 C.F.R. § 800.503 (2020).

⁶³ Procedures for notices, 31 C.F.R. § 800.501 (2020).

⁶⁴ Rejection, disposition, or withdrawal of declarations, 31 C.F.R. § 800.406 (2020).

recommends a consultation before filing a notice, and parties may file a draft notice to provide CFIUS with the opportunity to request additional information.⁶⁵ Transaction parties may also request that a notice be withdrawn and again must state reasons for the withdrawal.

B. Declaration and Notice Review Process

CFIUS can either reject or choose to review a declaration or notice. CFIUS may reject any declaration or notice if it is incomplete or noncompliant, if it contradicts other available material information regarding the covered transaction, or if there is a “material change in the covered transaction.”⁶⁶ If CFIUS chooses to review a declaration or a notice submitted by a party, it does so on a risk-based analysis of the transaction.⁶⁷ From the time a declaration is filed, CFIUS has 30 days to review the declaration and must notify the party if it determines that the declaration falls under a covered transaction.⁶⁸ During this 30-day period, CFIUS can either request that the parties submit a more detailed notice if there are national security concerns or begin a unilateral review under the notice process.⁶⁹ Once satisfied that the transaction either does not qualify or does not present a national security risk, CFIUS can clear the transaction and issue a safe harbor letter.⁷⁰

If the parties elect to submit a notice detailing the covered transaction, as opposed to a declaration, then within 10 days after the submission CFIUS must provide comments or accept the notice.⁷¹ If CFIUS accepts the notice, CFIUS proceed to conduct a 45-day review of the transaction.⁷² CFIUS must notify the parties if it determines the transaction is not a covered transaction or if it decides not to

⁶⁵ Procedures for notices, 31 C.F.R. § 800.501 (2020).

⁶⁶ Rejection, disposition, or withdrawal of declarations, 31 C.F.R. § 800.406 (2020).

⁶⁷ Determination of whether to undertake an investigation, 31 C.F.R. § 800.505 (2020).

⁶⁸ See Beginning of 30-day assessment period, 31 C.F.R. § 800.405(b); see also Rejection, disposition, or withdrawal of declarations, 31 C.F.R. § 406(b) (2020).

⁶⁹ Committee actions, 31 C.F.R. § 800.407 (2020).

⁷⁰ *Id.*

⁷¹ Procedures for notices, 31 C.F.R. § 800.501(i) (2020).

⁷² See Beginning of 45-day review period, 31 C.F.R. § 800.503 (2020).

investigate the transaction further.⁷³ If CFIUS finds the transaction to be a covered transaction, then CFIUS must investigate whether the transaction poses a threat to US national security.⁷⁴ CFIUS must start this investigation by the end of the 45-day review period and is allowed a one-time, 15-day extension, but only under extraordinary circumstances.⁷⁵

C. *Safe Harbor Letter*

CFIUS may clear a transaction and issue a safe harbor letter to inform the parties that the transaction is not a covered transaction.⁷⁶ In a safe harbor letter, CFIUS informs the parties it concluded review of a covered transaction or that the President has decided not to exercise authority over the covered transaction.⁷⁷ A safe harbor letter communicates to the parties that CFIUS no longer has authority over that transaction.⁷⁸ However, this authority is reinstated if it is later discovered that a transaction party submitted false or misleading information or materially breaches a mitigation agreement.⁷⁹

D. *Mitigation Agreements*

The parties may negotiate a mitigation agreement if CFIUS determines that a covered transaction threatens U.S. national security but does not need to be blocked entirely.⁸⁰ In this case, CFIUS has authority to:

- Suspend a proposed or pending transaction;

⁷³ See Determination not to undertake an investigation, 31 C.F.R. § 800.506 (2020).

⁷⁴ Determination of whether to undertake an investigation, 31 C.F.R. § 800.505 (2020).

⁷⁵ Completion or termination of investigation and report to the President, 31 C.F.R. § 800.508 (2020).

⁷⁶ See *id.*

⁷⁷ Finality of actions under Section 721, 31 C.F.R. § 800.701 (2020).

⁷⁸ *Id.*

⁷⁹ Effect of lack of compliance, 31 C.F.R. § 800.902 (2020).

⁸⁰ Authority to Review Certain Mergers, Acquisitions, and Takeovers, 50 U.S.C. § 4565 (2020).

- Negotiate, enter into, impose or enforce a mitigation agreement that resolves the national security concerns;
- Negotiate, enter into, impose, or enforce any agreement evidencing the decision by the transaction parties to voluntarily abandon the transaction and mitigating any risk to national security; and
- Refer the transaction to the President for action.⁸¹

Common mitigation measures include governance controls; third-party oversight; reporting requirements; facility, sensitive information, personnel security controls; and operational restrictions.⁸² The President has the authority under Section 721 of the Defense Product Act to suspend or prohibit covered transactions within 15 days of receiving the CFIUS report.⁸³ If a party fails to comply with the mitigation agreement, then CFIUS can impose penalties, not exceeding \$250,000 per violation or the transaction value.⁸⁴

V. INDEPENDENTLY INITIATED CFIUS REVIEW

In some cases, CFIUS can initiate a review and can independently request that the parties involved provide relevant information about the transaction even when a voluntary declaration or a notice has not been submitted.⁸⁵ If CFIUS independently determines the transaction is a covered transaction, it can request that

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

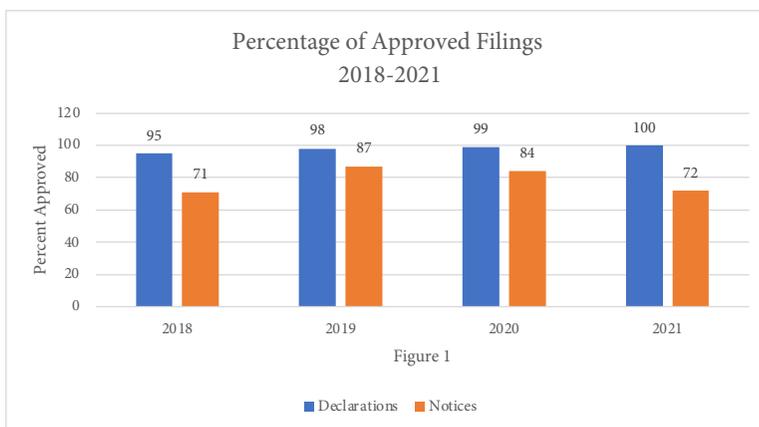
⁸⁴ Penalties and damages, 31 C.F.R. § 800.901 (2020).

⁸⁵ *CFIUS Frequently Asked Question*, U.S. DEP'T OF THE TREASURY, <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-frequently-asked-questions> (last visited Oct. 26, 2022).

the parties file a notice.⁸⁶ A CFIUS initiated review cannot be made more than 5 years after the transaction completion date.⁸⁷

VI. CFIUS ANNUAL REPORT TO CONGRESS

In 2008, CFIUS began to produce an annual report to Congress each year with data and statistics on declarations and notices made based on country and business sector.⁸⁸ The most recent available report is for the calendar year 2021.⁸⁹ This Article evaluates the recent trends seen in the annual CFIUS reports for 2018 and 2021.



Source: CFIUS Annual Reports 2018-2021

Between 2018 and 2021, the majority declarations and notices that were filed were approved.⁹⁰ In years and instances where the

⁸⁶ 50 U.S.C § 4565.

⁸⁷ 50 U.S.C. § 4565(l)(6)(D)(ii).

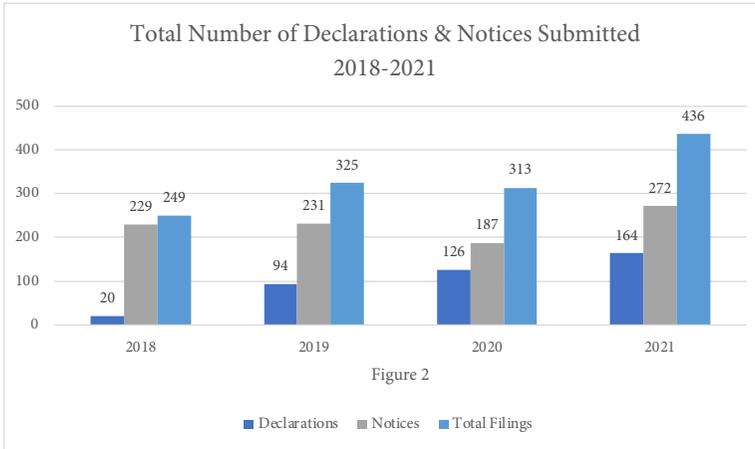
⁸⁸ *CFIUS Frequently Asked Questions*, *supra* note 85.

⁸⁹ *CFIUS Reports & Tables*, U.S. DEP'T OF THE TREASURY,

<https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-reports-and-tables> (last visited Nov. 7, 2022); *see generally* COMM. ON FOREIGN INV. IN THE U.S., CFIUS ANNUAL REPORT TO CONGRESS FOR CY 2021 (2022), <https://home.treasury.gov/system/files/206/CFIUS-Public-AnnualReporttoCongressCY2021.pdf> [hereinafter 2021 CFIUS Annual Report].

⁹⁰ COMM. ON FOREIGN INV. IN THE U.S., CFIUS ANNUAL REPORT TO CONGRESS FOR CY 2018 2-3 (2020), <https://home.treasury.gov/system/files/206/CFIUS-Public-Annual-Report-CY-2018.pdf> [hereinafter 2018 CFIUS Annual Report]; COMM. ON FOREIGN INV. IN THE U.S., CFIUS ANNUAL REPORT TO CONGRESS FOR CY 2019 2-3 (2020),

approval rate fell below 100%, it was mainly due to withdrawal and very few rejections.⁹¹ In 2020, 126 declarations regarding covered transactions were submitted to CFIUS⁹² and in 2021, 164 declarations were submitted.⁹³ This was an increase from previous years, with only 20 being submitted in 2018, and 94 submitted in 2019.⁹⁴



Source: CFIUS Annual Reports 2018-2021

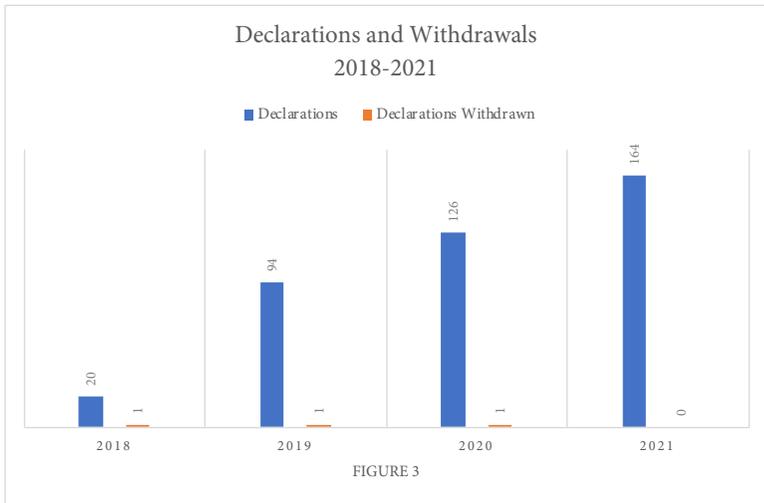
<https://home.treasury.gov/system/files/206/CFIUS-Public-Annual-Report-CY-2019.pdf> [hereinafter 2019 CFIUS Annual Report]; COMM. ON FOREIGN INV. IN THE U.S., CFIUS ANNUAL REPORT TO CONGRESS FOR CY 2020 6 (2021), <https://home.treasury.gov/system/files/206/CFIUS-Public-Annual-Report-CY-2020.pdf> [hereinafter 2020 CFIUS Annual Report]; 2021 CFIUS Annual Report, *supra* note 89, at 15; *see infra* Figure 1.

⁹¹ 2018 CFIUS Annual Report, *supra* note 90, at 2; 2019 CFIUS Annual Report, *supra* note 90, at 2; 2020 CFIUS Annual Report, *supra* note 90, at 5, 15; 2021 CFIUS Annual Report, *supra* note 89, at 4, 15.

⁹² 2020 CFIUS Annual Report, *supra* note 90, at 6; 2021 CFIUS Annual report, *supra* note 89, at 5.

⁹³ 2021 CFIUS Annual Report, *supra* note 89, at 4-5.

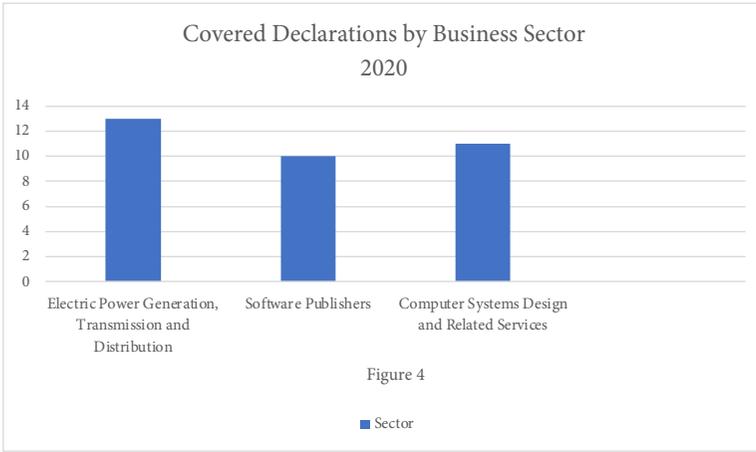
⁹⁴ *See* 2021 CFIUS Annual Report, *supra* note 89, at 4-5, 17; *see infra* Figures 2-3.



Source: CFIUS Annual Reports 2018-2021

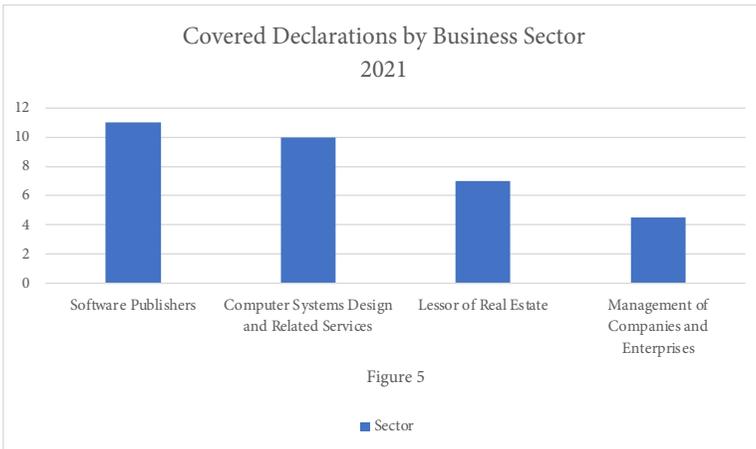
The three business sectors with the most submitted declarations in 2020 were the Electric Power Generation, Transmission, and Distribution sector with 13 submitted declarations; the Computer Systems Design and Delated Services sector with 11 submitted declarations; and the Software Publishers sector with 10 submitted declarations.⁹⁵

⁹⁵ See 2020 CFIUS Annual Report, *supra* note 90, at 7-10; see also *infra* Figure 4.



Source: CFIUS Annual Report 2020

In 2021, the top business sectors with the most submitted declarations were Software Publishers with 11 submitted declarations, Computer Systems, Design and Related Services with 10 submitted declarations, and both Lessor of Real Estate and Management of Companies and Enterprises, each with 7 submitted declarations.⁹⁶



Source: CFIUS Annual Report 2021

⁹⁶ See 2021 CFIUS Annual Report, *supra* note 89, at 6-10; see also *infra* Figure 5.

A. CFIUS Filings by Country

CFIUS also organizes declarations from 2018 through 2021 by country or geographic economy.⁹⁷

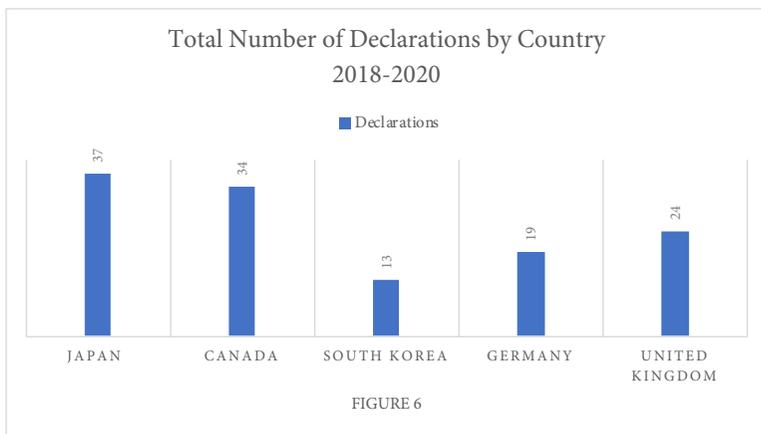


FIGURE 6
Source: CFIUS Annual Reports 2018-2020

Investors from Japan accounted for the largest proportion of declarations for the period between 2018 and 2020, with 37 declarations submitted.⁹⁸ Whereas, in 2021, Canadian investors took the lead submitting 54 declarations between 2019 and 2021,⁹⁹ a rise from the 34 declarations submitted between 2018 and 2020.¹⁰⁰ However, this trend is unlikely to continue since CFIUS added Canada to its list of Excepted Foreign States. Investors from Germany accounted for the third most, with 19 declarations submitted, between 2018 and 2020.¹⁰¹

In 2021 investors from Japan and United Kingdom accounted for the second and third-most declarations from 2019-2021, with 43

⁹⁷ 2020 CFIUS Annual Report, *supra* note 90, at 11-12; 2021 CFIUS Annual Report, *supra* note 89, at 11-12.

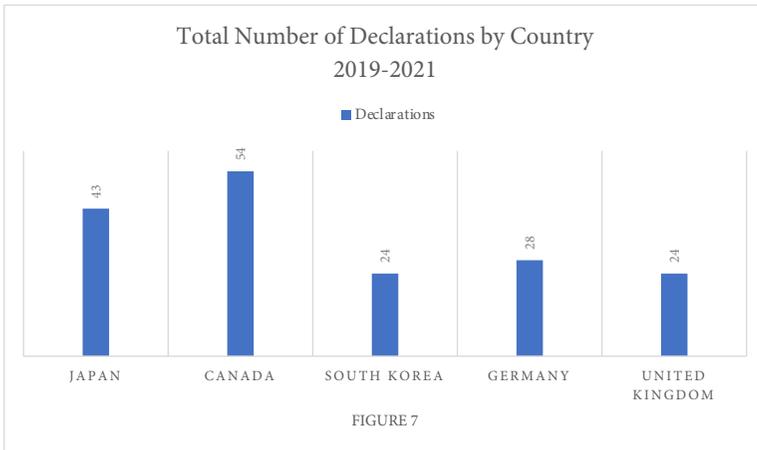
⁹⁸ See 2020 CFIUS Annual Report, *supra* note 90, at 11-12.

⁹⁹ See 2021 CFIUS Annual Report, *supra* note 89, at 11-12.

¹⁰⁰ See 2020 CFIUS Annual Report, *supra* note 90, at 11.

¹⁰¹ *Id.* at 11-12; see also *infra* Figure 6.

declarations and 33 declarations submitted, respectively.¹⁰² Germany was fourth with 28 declarations filed.¹⁰³



Source: CFIUS Annual Reports 2019-2021

On average, for the declarations submitted in 2020, it took CFIUS 29.8 calendar days to complete reviews and investigations,¹⁰⁴ whereas there was a slight increase in 2021 to 29.9 calendar days for review.¹⁰⁵

B. Reports on Filed Notices

In 2020, parties filed 187 notices with CFIUS, and 88 of those 187 notices required a subsequent investigation.¹⁰⁶ Whereas in 2021, parties filed an increase of 272 notices, and “CFIUS conducted a subsequent “investigation” with respect to 130 of those notices.”¹⁰⁷ CFIUS concluded action on 16 of the 187 notices in 2020 and 26 of the

¹⁰² See 2021 CFIUS Annual Report, *supra* note 89, at 11-12.

¹⁰³ See 2021 CFIUS Annual Report, *supra* note 89, at 11-12; *see also infra* Figure 7.

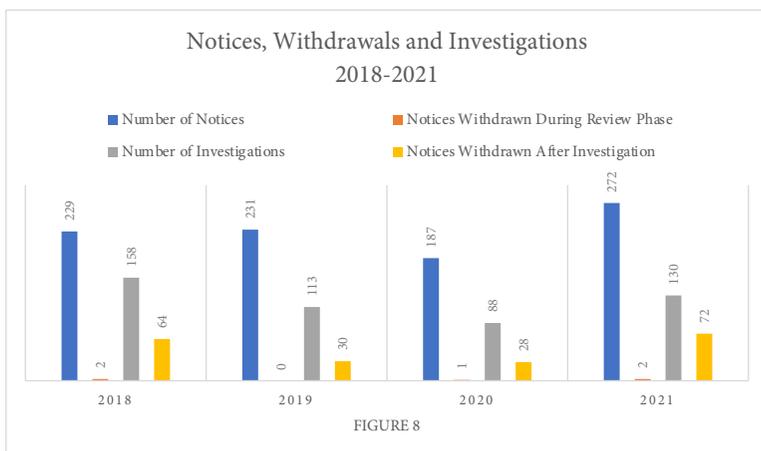
¹⁰⁴ 2020 CFIUS Annual Report, *supra* note 90, at 13.

¹⁰⁵ 2021 CFIUS Annual Report, *supra* note 89, at 13.

¹⁰⁶ 2020 CFIUS Annual Report, *supra* note 90, at 17; *see also* 2021 CFIUS Annual Report, *supra* note 89, at 17.

¹⁰⁷ 2021 CFIUS Annual Report, *supra* note 89, at 15, 17.

272 notices in 2021 following the adoption of mitigation measures to resolve national security concerns.¹⁰⁸



Source: CFIUS Annual Reports 2018-2021

In 2020, parties withdrew 29 of these notices, and in 2021, parties withdrew 74 notices.¹⁰⁹ The parties withdrew either after filing a new notice at a later date or abandoning the notice.¹¹⁰ Parties abandoned the notice after “CFIUS informed the parties that it was unable to identify mitigation measures that would resolve its national security concerns” or declined to accept the proposed mitigation measures.¹¹¹ Of the 187 notices filed in 2020, CFIUS only rejected one “due to a material change in the transaction.”¹¹² However, in 2021, no notices filed were rejected and no Presidential decisions issued.¹¹³ In 2021, CFIUS took an average of 46.3 calendar days to complete reviews and 65 days to close an investigation.¹¹⁴ In contrast, in 2020, CFIUS

¹⁰⁸ 2020 CFIUS Annual Report, *supra* note 90, at 15; 2021 CFIUS Annual Report, *supra* note 89, at 15; *see also infra* Figure 8.

¹⁰⁹ 2020 CFIUS Annual Report, *supra* note 90, at 15; 2021 CFIUS Annual Report, *supra* note 89, at 15.

¹¹⁰ 2020 CFIUS Annual Report, *supra* note 90, at 15; 2021 CFIUS Annual Report, *supra* note 89, at 15.

¹¹¹ 2021 CFIUS Annual Report, *supra* note 89, at 15.

¹¹² 2020 CFIUS Annual Report, *supra* note 90, at 15.

¹¹³ 2021 CFIUS Annual Report, *supra* note 89, at 15, 17.

¹¹⁴ *Id.* at 18.

took an average of 45 calendar days to complete reviews and 86 calendar days to complete investigations regarding filed notices.¹¹⁵

The greatest number of transactions for both 2020 and 2021 occurred in the Finance, Information, and Services sector, with 80 notices filed in 2020 and 147 notices in 2021.¹¹⁶ In 2020, Professional, Scientific, and Technical services accounted for the largest subsector filing, with 29 out of 80 notices filed.¹¹⁷ The Manufacturing sector accounted for the second greatest number of transaction, with 67 notices filed in 2020.¹¹⁸ As subsectors, the Computer and Electronic Products were the largest for both 2020 and 2021, accounting for 28 of the 67 notices filed in 2020 and for 57 of the 147 notices filed in 2021.¹¹⁹ The Mining, Utilities, and Construction sector accounted for 33 notices filed in 2021, an upward trend from the 21 filed notices in 2020.¹²⁰ The largest subsector was the Utilities subsector, accounting for 18 of the 21 filed notices in 2020, and 31 of the 33 filed notices in 2021.¹²¹

¹¹⁵ 2020 CFIUS Annual Report, *supra* note 90, at 18.

¹¹⁶ *Id.* at 19-24; 2021 CFIUS Annual Report, *supra* note 89, at 20-25.

¹¹⁷ 2020 CFIUS Annual Report, *supra* note 90, at 23; *see also infra* Figure 9.

¹¹⁸ *Id.* at 22.

¹¹⁹ 2020 CFIUS Annual Report, *supra* note 90, at 22; 2021 CFIUS Annual Report, *supra* note 23.

¹²⁰ 2021 CFIUS Annual Report, *supra* note 89, at 24.

¹²¹ 2020 CFIUS Annual Report, *supra* note 90, at 24.

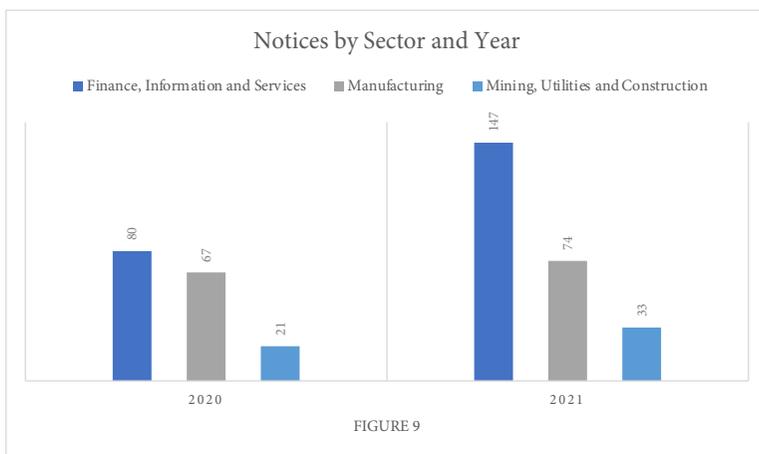


FIGURE 9

Source: CFIUS Annual Reports 2018-2021

C. Notices Filed by Country or Economy

From 2018 to 2020, China accounted for 15% of notices filed.¹²² From 2018 to 2020, “[i]nvestors from Japan, Canada, and France ranked second, third, and fourth, respectively” in the amount of filed notices.¹²³ As previously mentioned, in 2020 alone, the highest number of filed notices were from Japanese investors, accounting for 19 of the 187 notices filed.¹²⁴ However, in 2021, Chinese investors earned the top spot, filing 44 notices and accounting for 16.5% of notices in 2021.¹²⁵ However, over the three-year period from 2019 to 2021, Japanese investors accounted for the highest total number of filed notices, totaling 91.¹²⁶ Chinese investors were a close second with 86 total filed notices, followed by Canadian investors with 62 filed notices.¹²⁷

¹²² *Id.* at 35.

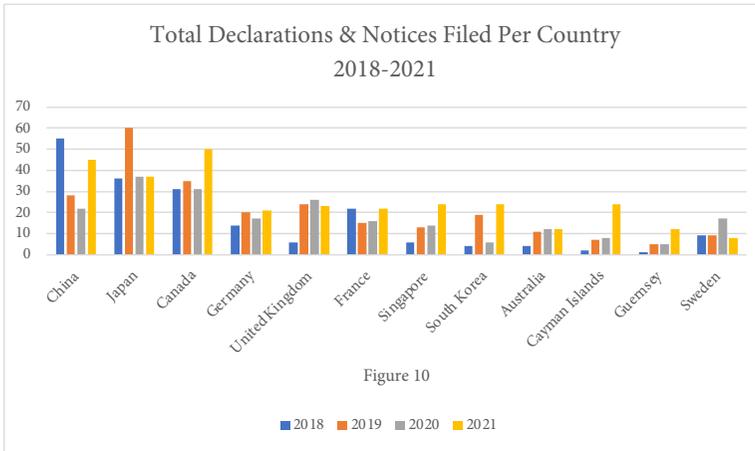
¹²³ *Id.*

¹²⁴ *Id.* at 35-36.

¹²⁵ 2021 CFIUS Annual Report, *supra* note 89, at 32.

¹²⁶ *Id.* at 32-33.

¹²⁷ *Id.* at 33; *see also infra* Figure 10.



Source: CFIUS Annual Reports 2018-2021

D. Notices Filed by Country and Target Sector

CFIUS’s 2020 and 2021 Congressional Reports further subdivides notices by country and business sector from 2018 through 2020.¹²⁸ From 2018 to 2020, China filed the largest amount of notices in the Manufacturing sector, Japan filed the largest amount of notices in the Finance, Information, and Services sector.¹²⁹ Also, Canada and France filed the majority of their notices in the Finance, Information, and Services sector.¹³⁰ From 2019 to 2021, “Japan, China, and Canada together accounted for approximately 35[%] of notices filed,” with Canada filing its majority in the mining, utilities and construction sectors, opposed to the Manufacturing sector, consistent with previous years’ reports.¹³¹ Additionally, from 2019 to 2021, China filed the most notices in the Finance, Information and Services sector.¹³²

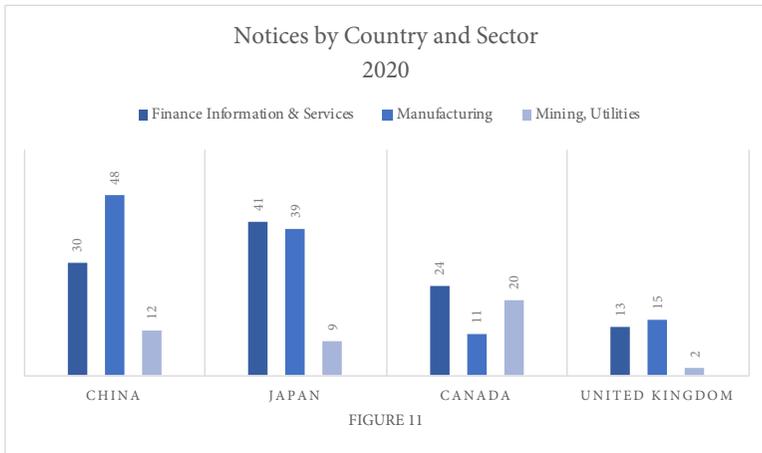
¹²⁸ See 2020 CFIUS Annual Report, *supra* note 90 at 19-20, 32-33; see 2021 CFIUS Annual Report, *supra* note 89 at 19, 34-35.

¹²⁹ See 2020 CFIUS Annual Report, *supra* note 89, at 37; see 2021 CFIUS Annual Report, *supra* note 90, at 34-35; see also *infra* Figure 11.

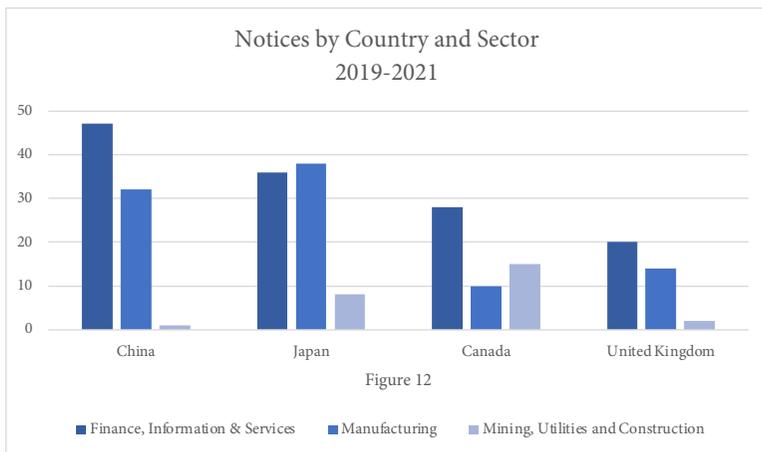
¹³⁰ See 2020 CFIUS Annual Report, *supra* note 89, at 37; see 2021 CFIUS Annual Report, *supra* note 90, at 34.

¹³¹ 2021 CFIUS Annual Report, *supra* note 89, at 34.

¹³² *Id.*; see also *infra* Figures 11-12.



Source: CFIUS Annual Report 2018-2020



Source: CFIUS Annual Reports 2019-2021

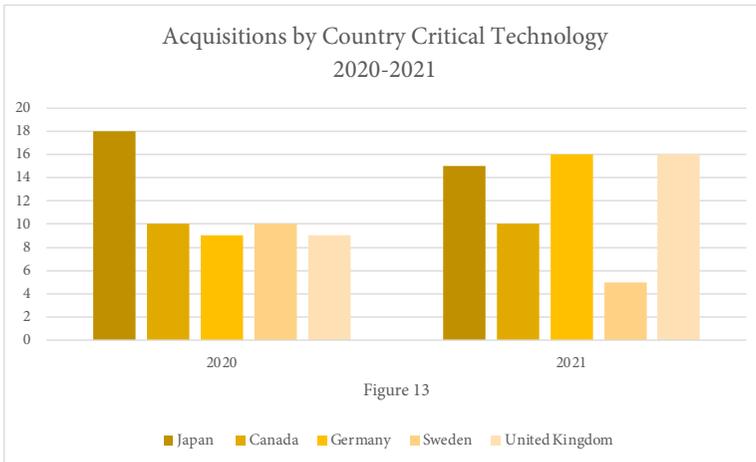
E. Critical Technologies Covered Transactions by Country

In 2020, “CFIUS reviewed 122 covered transactions involving acquisitions of U.S. critical technology companies.”¹³³ Japan, Sweden, and Canada were the top three foreign acquirers of U.S. critical technology in 2020.¹³⁴ However, in 2021, Germany, the United Kingdom, and Japan took the reigns as the top three foreign acquirers

¹³³ 2020 CFIUS Annual Report, *supra* note 90, at 51.

¹³⁴ 2021 CFIUS Annual Report, *supra* note 89, at 51.

of U.S. Critical Technology, accounting for 47 of the 184 covered transactions.¹³⁵



Source: CFIUS Annual Reports 2020-2021

VII. CFIUS TRANSACTIONS THAT HAVE BEEN BLOCKED

Technically, CFIUS cannot independently and directly block a transaction because CFIUS's function is to identify national security concerns and refer the matter to the President, who can block the transaction.¹³⁶ However, CFIUS's mitigation authority can indirectly block a transaction by causing a company to withdraw. Thus, a withdrawal can be tantamount to a blocked transaction where mitigation negotiations have caused a company to abandon the transaction.

For example, in 2017, a transaction was withdrawn due to national security concerns posed by CFIUS.¹³⁷ A year earlier,

¹³⁵ *Id.* at 49; *see also infra* Figure 13.

¹³⁶ Guidance Concerning the National Security Review Conducted by the Committee on Foreign Investment in the United States, 73 Fed. Reg. 74567, 74568–69 (Dec. 8, 2008); *See also* 50 U.S.C. § 4565 (2021) (giving the President the authority to review certain transactions for national security purposes).

¹³⁷ Press Release, Cree, Inc., Cree Announces termination of Wolfspeed and Infineon sale transaction (Feb. 16, 2017),

President Obama blocked the Chinese-based firm, Fujian Grand Chip Investment Fund L.P., from acquiring Aixtron S.E., a German-based semiconductor firm.¹³⁸ Despite the fact that neither firm was U.S.-based, the acquisition was blocked because Fujian Grand Chip Investment Fund LP. would have acquired Aixtron S.E.'s U.S. assets in California.¹³⁹ While the Obama Administration did not cite national security concerns for blocking the transaction, the U.S. Department of the Treasury issued a statement that noted, "the national security risk posed by the transaction relates, among other things, to the military applications of the overall technical body of knowledge and experience of Aixtron, a producer and innovator of semiconductor manufacturing equipment and technology."¹⁴⁰

In 2017, President Trump blocked Chinese investment firm Canyon Bridge Capital Partners Inc.'s \$1.3 billion acquisition of U.S.-based Lattice Semiconductor Corp.¹⁴¹ The transaction was blocked for four national security concerns: "(1) the potential transfer of intellectual property to a foreign acquirer; (2) the Chinese Government's role in the transaction; (3) the importance of the semiconductor supply chain integrity to the [U.S. government]; and (4) the use of Lattice products by the [U.S. government]."¹⁴²

In 2018, President Trump also blocked the acquisition of U.S.-based semiconductor chip maker Qualcomm Incorporated (Qualcomm) by Singapore-based Broadcom Limited for \$117

<https://www.sec.gov/Archives/edgar/data/895419/000089541917000021/ex9918k021617.htm>.

¹³⁸ Maria Alonso, *U.S. Scrutiny of Foreign Investment in the Semiconductor Industry: CFIUS Review and Export Controls Place Deals under the Microscope*, TORRES TRADE LAW (Apr. 8, 2021), <https://www.torrestradelaw.com/posts/U.S.-Scrutiny-of-Foreign-Investment-in-the-Semiconductor-Industry%3A--CFIUS-Review-and-Export-Controls-Place-Deals-under-the-Microscope/238>.

¹³⁹ *Id.*

¹⁴⁰ *Id.*; *Statement on the President's Decision Regarding the U.S. Business of Aixtron SE*, U.S. DEP'T OF THE TREASURY (2016), <https://home.treasury.gov/news/press-releases/jl0679>.

¹⁴¹ Alonso, *supra* note 138.

¹⁴² *Id.*

billion.¹⁴³ Prior to the President blocking the decision, CFIUS expressed that there was a “risk of China dominating 5G technology development and the potential disruption of the trusted supply relationship between Qualcomm and the U.S. Department of Defense.”¹⁴⁴

More recently, in 2021 CFIUS recommended the President block a Chinese-based private equity firm from acquiring a South Korea-Based semiconductor company.¹⁴⁵ In March 2021, the Chinese private equity firm, Wise Road Capital, agreed to indirectly acquire Magnachip for \$1.4 billion.¹⁴⁶ Magnachip designed and manufactured analog and mixed signal semiconductors.¹⁴⁷ Wise Road and Magnachip did not notify CFIUS of the transaction,¹⁴⁸ perhaps resulting from a false conclusion that CFIUS lacked jurisdiction because of Magnachip’s limited connections to the U.S.

CFIUS requested that the parties submit a CFIUS filing and issued an interim order that prevented the parties from closing the transaction until CFIUS finished its review.¹⁴⁹ A few months later, CFIUS stated that the transaction was a risk to U.S. national security and that “no mitigation measures, including those proposed” by both parties, would successfully “mitigate the identified risks.”¹⁵⁰ In this transaction, Magnachip was incorporated in Delaware, owned a Delaware subsidiary, and listed on the New York Stock Exchange.¹⁵¹ However, Magnachip had little presence in the U.S.; its manufacturing, research and development, and sales all took place in

¹⁴³ See *Trump Blocks Broadcom Takeover Bid for Qualcomm*, NBC NEWS, (Mar. 12, 2018), <https://www.nbcnews.com/business/business-news/trump-blocks-broadcom-takeover-bid-qualcomm-n856021>.

¹⁴⁴ See Alonso, *supra* note 138.

¹⁴⁵ See Jonathon Babcock et al., *CFIUS Prepares to Block Semiconductor Sale to Chinese Entity*, JDSUPRA (Sep. 3, 2021), <https://www.jdsupra.com/legalnews/cfius-prepares-to-block-semiconductor-5407154/>.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ See Babcock et al., *supra* note 145.

other countries.¹⁵² Nonetheless, CFIUS relied on the fact that Magnachip was a U.S. listed company.¹⁵³ This example illustrates that transactions involving non-U.S. investments in non-U.S. companies, even those with a limited connection to the U.S., should carefully consider whether or not would be subject to a CFIUS review of the transaction.¹⁵⁴

The foregoing examples suggest the following conclusions: (1) the semiconductor sector is a sector sensitive to U.S. national security, especially if it involves a Chinese entity, and (2) any acquisition by a Chinese entity of a semiconductor business connected to the U.S. is subject to high scrutiny, if not, a high risk of being jettisoned.¹⁵⁵ Semiconductors are used in nearly ubiquitous sectors, including communication, computers, consumer electronics, automotive, industrial, and government.¹⁵⁶ Even if the President has not directly blocked the transaction, CFIUS's scrutiny over semiconductor deals has caused other deals to be thwarted.¹⁵⁷ In this instance, parties might withdraw or abandon the deal to avoid a public presidential order blocking the deal.¹⁵⁸ However, there are examples of semiconductor deals that CFIUS has cleared, but none of these involve Chinese investment.¹⁵⁹ Although CFIUS cleared these deals were cleared, it was only after intense scrutiny, "possibly including at least one withdrawal and refile of the CFIUS notice", and the parties likely entered into some mitigation agreement.¹⁶⁰

VIII. APPROVED CFIUS TRANSACTIONS

The foregoing examples might wrongly paint a bleak outlook for FDI transactions. In fact, CFIUS approves a variety of transactions,

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ See SEMICONDUCTOR INDUS. ASS'N, STATE OF THE U.S. SEMICONDUCTOR INDUSTRY (2020), <https://www.semiconductors.org/wp-content/uploads/2020/07/2020-SIA-State-of-the-Industry-Report-FINAL-1.pdf>.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ See Alonso, *supra* note 138; see *supra* Section VII.

¹⁶⁰ *Id.*

as shown above in the graph on Figure 8.¹⁶¹ One example from 2017 where Bayer AG, a German company “with core competencies in the Life Science fields of health care and agriculture,”¹⁶² sought to acquire Monsanto, a U.S. company.¹⁶³ Both companies announced that they “signed a definitive merger agreement under which Bayer will acquire Monsanto for \$128 U.S. per share with a total enterprise value of approximately of \$66 billion.”¹⁶⁴ The CEO of Bayer stated Bayer and Monsanto would “voluntarily file for CFIUS review.”¹⁶⁵ CFIUS subsequently determined that there were “no unresolved national security concerns” and approved the transaction.¹⁶⁶

Another transaction that CFIUS approved was in 2020 and involved Yageo Corporation, a Taiwanese company, and Kemet Corporation, a U.S., publicly traded corporation.¹⁶⁷ Kemet Corporation, a manufacturer of electronic components, and Yageo, a producer of electronic components, entered into a \$1.8 billion merger agreement.¹⁶⁸ CFIUS determined there were “no unresolved national security concerns” and approved the transaction.¹⁶⁹

Even though there seems to be a large number of China-involved blocked transactions, as described below, a variety of China-involved transactions have been approved in various sectors.¹⁷⁰ One

¹⁶¹ See *supra* Figure 8.

¹⁶² *CFIUS completes review of proposed merger of Bayer and Monsanto*, BAYER (Dec. 5th, 2017), <https://www.bayer.com/en/id/cfius-completes-review-of-proposed-merger-of-bayer-and-monsanto>.

¹⁶³ See *CFIUS Filing Clearance: Bayer AG and Monsanto*, TRADE PRAC., <https://www.tradepractitioner.com/2017/12/bayer-ag-and-monsanto/> (last visited June 21, 2022, 10:24 AM).

¹⁶⁴ *Id.*

¹⁶⁵ *CFIUS Filing Clearance: Bayer AG and Monsanto*, *supra* note 163; see also BAYER *supra* note 162.

¹⁶⁶ *CFIUS Filing Clearance: Bayer AG and Monsanto*, *supra* note 163.

¹⁶⁷ See *KEMET Announces Completion of CFIUS Review*, KEMET, <http://newsroom.kemet.com/news-releases/news-release-details/kemet-announces-completion-cfius-review> (last visited Nov. 6, 2022).

¹⁶⁸ *CFIUS Clearance: Yageo Corporation and Kemet Corporation*, TRADE PRAC., <https://www.tradepractitioner.com/2020/04/cfius-yageo-kemet/> (last visited June 21, 2022, 10:30 AM).

¹⁶⁹ *Id.*

¹⁷⁰ George Shen, *CFIUS' Chinese Deal Reviews Have Steady 57% Success Rate Under Trump Administration – Data Analysis*, DEALREPORTER (July 27, 2018),

example involves a US-based financial services company, Genworth Financial, and the buyer, China Oceanwide.¹⁷¹ This transaction was approved after three attempts of refileing, with CFIUS's primary concern being personally identifiable information.¹⁷² The parties entered a mitigation agreement that required third-party monitoring and ceded Genworth a majority of the board seats.¹⁷³

An example of a China-involved transaction that did not require a mitigation agreement involved Zhongyuan Union Cell, a Chinese buyer, acquiring OriGene Technologies, a U.S. genecentric research tool provider in 2018.¹⁷⁴ This transaction was in the biotechnology sector and CFIUS did not find any national security risk and approved the transaction.¹⁷⁵

Beyond voluntary declarations or notices, CFIUS can proactively review non-notified and finalized transactions.¹⁷⁶ While dated, a 2012 example is illustrious of this point. In 2012, a Chinese-owned company failed to notify CFIUS about its purchase of four smaller companies in an area near an Oregon military base.¹⁷⁷ CFIUS ordered the Chinese company to sell all four companies, destroy what they had constructed, and stay off the land.¹⁷⁸ Similarly, and more

https://www.dorsey.com/~media/Files/Uploads/Images/Ward_CFIUS-Chinese-Deal-Reviews.

¹⁷¹ *CFIUS Clearance; Mitigation: China Oceanwide Holding Group Co. Ltd. and Genworth Financial, Inc.*, TRADE PRAC. (June 11, 2018),

<https://www.tradepractitioner.com/2018/06/china-oceanwide-holdings-group-co-ltd-and-genworth-financial-inc/>.

¹⁷² *Id.*

¹⁷³ George Shen, *supra* note 170.

¹⁷⁴ *CFIUS Clearance: Vcanbio Cell & Gene Engineering and OriGene Technologies*, TRADE PRAC. (August 28, 2018), <https://www.tradepractitioner.com/2018/08/cfius-vcanbio-cell-gene-engineering-origene-technologies/>.

¹⁷⁵ *Id.*

¹⁷⁶ See Guidance Concerning the National Security Review Conducted by the Committee on Foreign Investment in the United States, 73 Fed. Reg. 74567, 74568 (Dec. 8, 2008).

¹⁷⁷ See Julie Pace, *Obama blocks Chinese purchase of U.S. wind farms*, WASHINGTON POST (Sept. 28, 2016), https://www.washingtonpost.com/business/economy/obama-blocks-chinese-purchase-of-us-wind-farms/2012/09/28/e1cd8246-09bd-11e2-a10c-fa5a255a9258_story.html.

¹⁷⁸ See Helene Cooper, *Obama Orders Chinese Company to End Investment at Sites Near Drone Base*, THE NEW YORK TIMES (Sept. 28, 2012),

recently, in 2022, a proposed acquisition by a Chinese company, Fufeng Group, of land near a North Dakota military installation prompted elected officials to call for CFIUS intervention “to conduct an expedited review” of the transaction.¹⁷⁹ Growing tension between the United States and China could lead to further proactive action by CFIUS. Passage of the Chips and Science Act of 2022, which among other things, subsidizes the semiconductor manufacturing sector to promote U.S. domestic manufacturing of technology critical to national security, could suggest an isolating of economies by boosting the United States’s competitiveness with China.¹⁸⁰

IX. EXCEPTED STATES

In contrast to CFIUS’s growing scrutiny of Chinese investment, CFIUS has developed an “excepted” country list, allowing investors from these excepted countries to be exempt from CFIUS review.¹⁸¹ Australia, Canada, and the United Kingdom became the first CFIUS Excepted Foreign States on February 13, 2020.¹⁸² In 2022, New Zealand was added to this list.¹⁸³

<https://www.nytimes.com/2012/09/29/us/politics/chinese-company-ordered-to-give-up-stake-in-wind-farms-near-navy-base.html>.

¹⁷⁹ See Burgum urges federal agency to expedite review of Fufeng Group land purchase and project, OFF. OF THE GOVERNOR OF N. D. (July 25, 2022),

<https://www.governor.nd.gov/news/burgum-urges-federal-agency-expedite-review-fufeng-group-land-purchase-and-project>.

¹⁸⁰ See Kevin Breuninger, *Biden to sign bill boosting China competition and U.S. chip production*, CNBC (August 2, 2022), <https://www.cnbc.com/2022/08/02/biden-signs-china-competition-bill-to-boost-us-chip-production.html>.

¹⁸¹ *The Committee on Foreign Investment in the United States (CFIUS)*, *supra* note 4.

¹⁸² *CFIUS Excepted Foreign States*, U.S. DEP’T OF THE TREASURY, <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-excepted-foreign-states> (last visited Oct. 20, 2022).

¹⁸³ Michael Rose and Michael Eisenberg, *CFIUS Trends and Considerations for 2021/22*, EISNERAMPER (Mar. 21, 2022), <https://www.eisneramper.com/cfius-trends-considerations-0321/>.

X. COMMITTEE ON NATIONAL CRITICAL CAPABILITIES–U.S.
OUTBOUND FDI REVIEW MECHANISM

This Article has primarily discussed scrutiny on Inbound FDI, but a short discussion on growing Outbound FDI scrutiny is also in order. On June 13, 2022, a bipartisan group of House and Senate lawmakers announced an agreement on a new draft of the National Critical Capabilities Defense Act of 2022.¹⁸⁴ This new act would establish an outbound review mechanism for investments and other transactions in other “countries of concern,” including “China, Russia, Iran, North Korea, Cuba, and Venezuela.”¹⁸⁵ Senators John Cornyn, a Republican from Texas, and Bob Casey, a Democrat from Pennsylvania, offered a compromise proposal for the House and Senate that would create an inter-agency committee, the CNCC.¹⁸⁶ The CNCC would be similar to CFIUS and would give this outbound review agency authority to “review, mitigate, or prohibit.”¹⁸⁷ The bill defines “national critical capability” as

- (i) Certain sensitive supply chains, including but not limited to Manufacturing, pharmaceuticals, and large capacity batteries;
- (ii) Critical and emerging technologies, including but not limited to Artificial intelligence;
- (iii) “Manufacturing and other capabilities necessary to produce critical goods and materials and other

¹⁸⁴ *Senators Introduce Compromise Proposal Regarding Review of Outbound Investment*, SIDLEY (June 23, 2022), <https://www.sidley.com/en/insights/publications/2022/06/senators-introduce-compromise-proposal-regarding-review-of-outbound-investment>; SENATOR BOB CASEY & SENATOR JOHN CORNYN, NATIONAL CRITICAL CAPABILITIES DEFENSE ACT, https://www.casey.senate.gov/imo/media/doc/one_pager_ncdda.pdf (last visited Nov. 11, 2022).

¹⁸⁵ Reid Whitten, *Reverse CFIUS? New Outbound Investment Review Process Becoming More Likely*, NAT’L L. REV. (July 8, 2022), <https://www.natlawreview.com/article/reverse-cfius-s-i-new-outbound-investment-review-process-becoming-more-likely>.

¹⁸⁶ *Senators Introduce Compromise Proposal Regarding Review of Outbound Investment*, *supra* note 184.

¹⁸⁷ *Id.*

essential goods and materials, including sectors underlying those sensitive supply chains identified in (i)”; and

- (iv) “Other industries, technologies, and supply chains which may be identified by the CNCC.”¹⁸⁸

The bill defines “covered transactions” as “any transaction by a U.S. business ‘that shifts or relocates to a country of concern or transfers to an entity of concern the design, development, production, supply, servicing, testing, operation, investment, ownership, or any other essential element involving one or more critical capabilities’” and “any transaction ‘that could result in a risk to a national critical capability.’”¹⁸⁹ For example, the new rule will require semiconductor chip makers to obtain a license from the U.S. Commerce Department in order to export chips and chip-making equipment “in an effort to prevent American technology from [increasing] China’s military power.”¹⁹⁰

The bill is H.R. 6329, titled National Critical Capabilities Defense Act of 2021. The House was set to vote on this bill on July 1, 2022, there were no updates regarding the status of the bill at the time this Article was published.¹⁹¹ Experts state that “the [U.S.] would become the first major Western advanced economy to adopt an outbound investment screening process” if H.R. 6329 is enacted.¹⁹²

¹⁸⁸ *Id.*

¹⁸⁹ David Plotinsky et al., *US National Security Review for Outbound Investment: Domestic and Global Impact*, MORGAN LEWIS (May 9, 2022), <https://www.morganlewis.com/pubs/2022/05/us-national-security-review-for-outbound-investment-domestic-and-global-impact>.

¹⁹⁰ John McKinnon & Asa Fitch, *U.S. Restricts Semiconductor Exports in Bid to Slow China’s Military Advance*, WALL ST. J. (Oct. 7, 2022), <https://www.wsj.com/articles/u-s-restricts-semiconductor-exports-in-bid-to-slow-chinas-military-advance-11665155702>.

¹⁹¹ National Critical Capabilities Defense Act of 2021, H.R. 6329, 117th Cong. (2021-2022).

¹⁹² *National Security Update—The House of Representatives Proposes an Outbound Investment Review Regime as Part of the America COMPETES Act*, COVINGTON (Jan. 27, 2022), <https://www.cov.com/en/news-and-insights/insights/2022/01/national->

XI. CONCLUSION

Overall, the current FDI review seems targeted at transactions involving Chinese entities in the semiconductor sector. These transactions appear to be facing intense scrutiny and have a higher chance of being blocked.¹⁹³ Conversely, transactions involving other countries in other sectors seem to get approved with fewer issues, though not necessarily without mitigating measures.¹⁹⁴ A growing number of western trading partners are becoming exempted from CFIUS review entirely.¹⁹⁵ A tempting allegation is that all the legal parameters are a bit of subterfuge, drafted broadly enough to allow CFIUS to target any country and any sector posing the most significant, perceived national security threat of any given time. Today that might be semiconductor businesses acquired by Chinese companies, and that trend might continue—tomorrow, who is to say? Although the future is uncertain, a U.S. review of the Inbound FDI review seems to be an established aspect of investing in the United States, with a review of Outbound FDI potentially on the horizon. Companies conducting cross-border transactions need to be ready to comply.



security-update-the-house-of-representatives-proposes-an-outbound-investment-review-regime-as-part-of-the-america-competes-act.

¹⁹³ *The Committee on Foreign Investment in the United States (CFIUS)*, *supra* note 4.

¹⁹⁴ See *CFIUS Monitoring and Enforcement*, U.S. DEP'T OF THE TREASURY, <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-monitoring-and-enforcement> (last accessed Nov. 6, 2022).

¹⁹⁵ See Aimen Mir et al., *There's a New CFIUS Excepted Foreign State, But Status Will Still Benefit Relatively Few Investors*, FRESHFIELDS BRUCKHAUS DERINGER LLP (Jan. 14, 2022), <https://blog.freshfields.us/post/102hgb8/theres-a-new-cfius-excepted-foreign-state-but-status-will-still-benefit-relativ>.