

[Latham & Watkins CFIUS & US National Security Practice](#)

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CFIUS Annual Report: 6 Key Takeaways for Calendar Year 2018

CFIUS continued to have a busy year in 2018, and CFIUS reveals first available data about the declaration process under the new Pilot Program.

On May 16, 2020, the Committee on Foreign Investment in the United States (CFIUS) published the public version of its [Annual Report to Congress for Calendar Year 2018](#) (the Report). The time period covered by the Report encompasses the enactment of the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) on August 13, 2018, the implementation of the CFIUS Pilot Program in November 2018, and the beginning of a US government shutdown. Because CFIUS publishes these required annual reports more than a full year after the covered period, the Report does not fully reflect more recent trends. The Report largely describes the pre-FIRRMA CFIUS process, although it does provide initial data on the CFIUS Pilot Program, and reflects the increase in the CFIUS Review Period from 30 to 45 days, which occurred post-FIRRMA.

For more information about FIRRMA, see Latham's *Client Alert* [US Treasury Department Publishes Proposed Regulations to Implement FIRRMA: 10 Key Questions Answered](#).

6 Key Takeaways

1. The number of notices filed with CFIUS in 2018 continues to be significant

CFIUS reviewed 250 filings in 2018, including 229 joint voluntary notices and 21 mandatory Pilot Program declarations. These numbers reflect a slight decrease from the 237 notices filed in 2017 but an overall increase in the number of filings. For perspective, there was a nearly 250% increase in filings from 2010 (93 notices) to 2018 (229 notices).

| Covered Transactions, Withdrawals, and Presidential Decisions* 2010-2018 | | | | | |
|--|-------------------|---------------------------------------|--------------------------|--|------------------------|
| Year | Number of Notices | Notices Withdrawn During Review Phase | Number of Investigations | Notices Withdrawn During Investigation Phase | Presidential Decisions |
| 2010 | 93 | 6 | 35 | 6 | 0 |
| 2011 | 111 | 1 | 40 | 5 | 0 |
| 2012 | 114 | 2 | 45 | 20 | 1 |
| 2013 | 97 | 3 | 48 | 5 | 0 |
| 2014 | 147 | 3 | 51 | 9 | 0 |
| 2015 | 143 | 3 | 66 | 10 | 0 |
| 2016 | 172 | 6 | 79 | 21 | 1 |
| 2017 | 237 | 7 | 172 | 67 | 1 |
| 2018 | 229 | 2 | 158 | 64 | 1 |
| Total | 1343 | 33 | 694 | 207 | 4 |

Data sourced from [CFIUS Annual Report to Congress \(Report Period: CY 2018\)](#)

2. A significant portion of notices proceeded into the second-stage investigation period, but after FIRRMA's extension of the statutory review period to 45 days, that number decreased

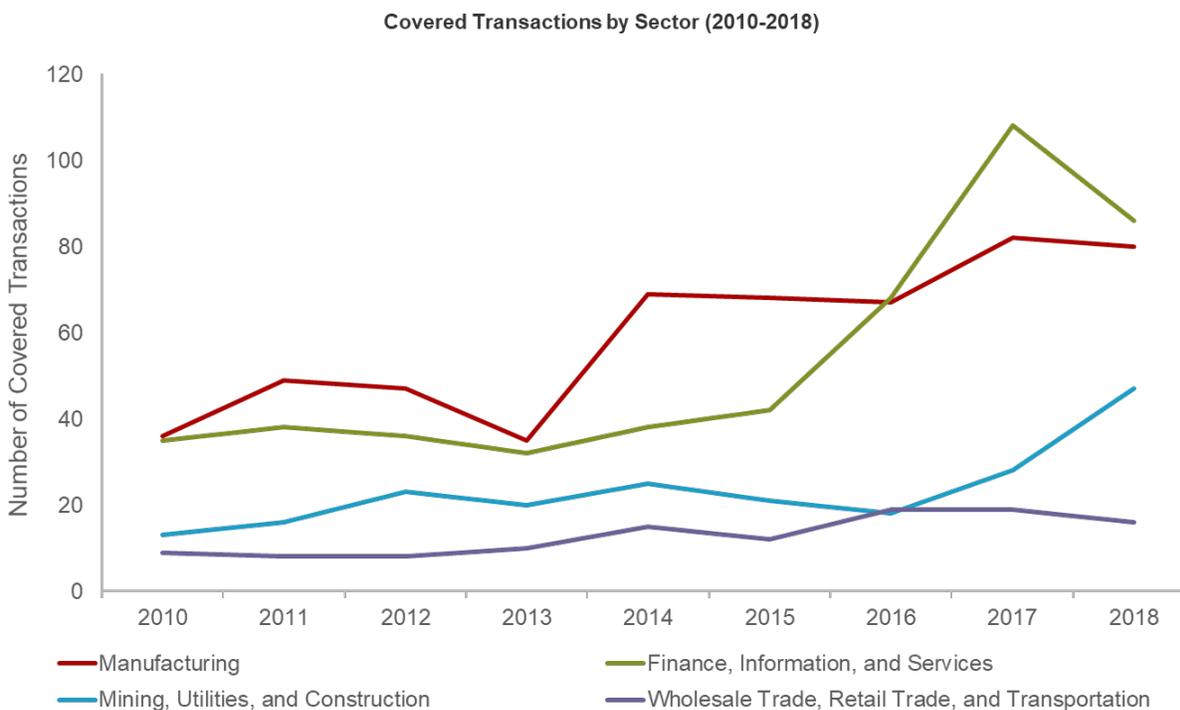
In 2018, about 69% of cases (158 notices) proceeded to the second-stage investigation period. This compares to about 73% (172 notices) proceeding to investigation in calendar year 2017. Notably, the extension of the statutory review period from 30 days to 45 days as a result of FIRRMA allowed CFIUS to address more cases in the initial review period. For notices filed before August 13, 2018, 76% proceeded to the second-stage investigation period, compared to 53% proceeding to the investigation period after the FIRRMA increase of initial review period from 30 days to 45 days.

A smaller proportion of notices overall were withdrawn in 2018 (29%) than in 2017 (31%), however a slightly greater percentage of notices were withdrawn during the investigation stage in 2018 (41%) compared to 2017 (39%). In addition, a greater percentage of notices that were withdrawn in 2018 were later refiled (64%), compared to notices withdrawn in 2017 and later refiled (60%).

3. Investors from China continue to account for the largest number of CFIUS notices, and the Finance, Information, and Services sector continues to account for the greatest number of transactions

Acquisitions by investors from China continued to account for the largest proportion of notices filed (24%), as has been the case since 2012. Japan accounted for the second-largest proportion of notices filed in (14%), overtaking Canada, which accounted for the third-largest proportion of notices filed (13%).

The greatest number of transactions reviewed by CFIUS in 2018 related to the Finance, Information, and Services sector (38%), followed by Manufacturing (35%). From 2016 to 2018, more than three-fourths of the notices were either in the Finance, Information, and Services sector (41%) or the Manufacturing sector (36%). Mining, Utilities, and Construction accounted for about 14%, and Wholesale Trade, Retail Trade, and Transportation accounted for about 8%. Notices from Canada, China, and Japan generally followed this distribution across sectors, however China accounted for a higher proportion of Manufacturing sector transactions, while Canada accounted for a large proportion of Mining, Utilities, and Construction sector transactions.



Data sourced from [CFIUS Annual Report to Congress \(Report Period: CY 2018\)](#)

4. When a case is extended into the investigation phase, CFIUS takes the full investigation period to complete its review — even with the lengthened statutory review period

FIRRMA requires that the Annual Report include information on the average number of days it takes for CFIUS to provide written comments at the stage when a CFIUS notice is submitted as a draft, the average number of business days it takes CFIUS to accept the formal notice or provide additional comments to a notice submitted as a formal notice, as well as the time it takes CFIUS to complete its review and (if needed) investigation. In the Report, CFIUS explains that it was able to provide this information for formal notices filed in 2018, but it did not yet have the infrastructure in place to collect the

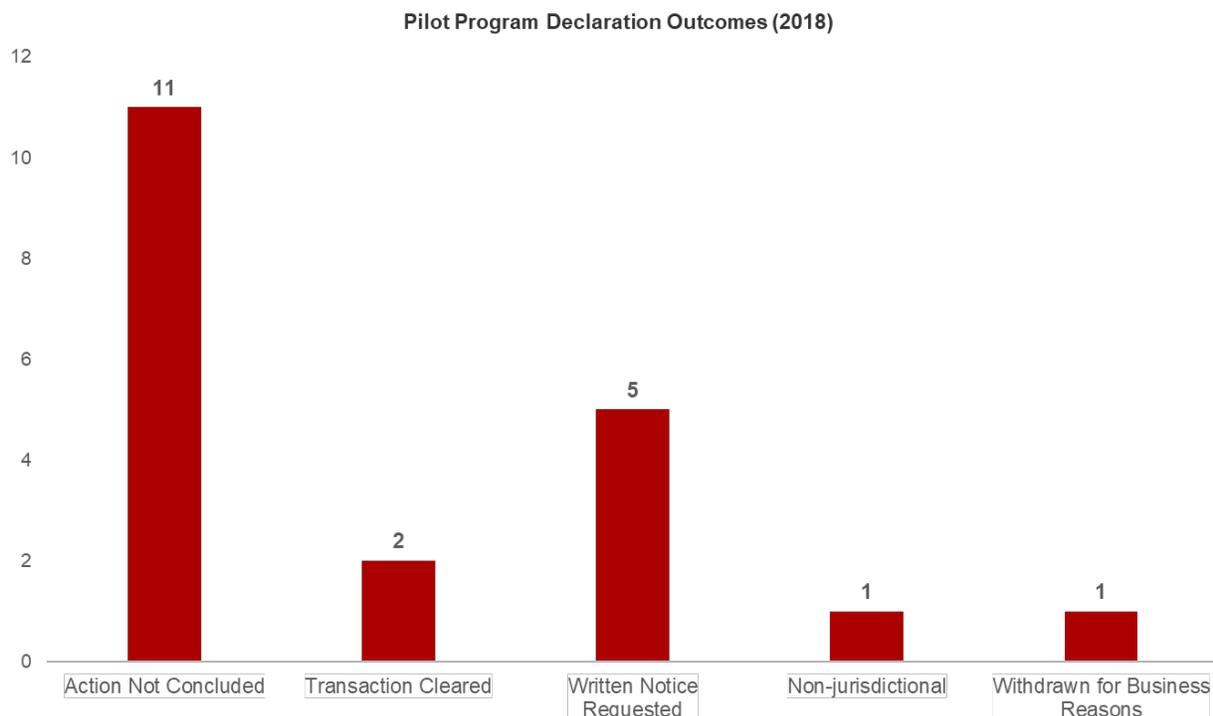
information with respect to notices submitted as a draft. As reflected in the chart, CFIUS generally takes the full investigation period to complete its review when cases are pushed into the investigation phase.

| Average and Median Days to Complete Reviews and Investigations | | |
|--|-----------------------|----------------------|
| For Covered Transactions in 2018 | Average Calendar Days | Median Calendar Days |
| Closing in Review, Pre-FIRRMA | 30 | 30 |
| Closing in Review, Post-FIRRMA | 44 | 45 |
| Closing in Investigation | 74 | 75 |

Data sourced from [CFIUS Annual Report to Congress \(Report Period: CY 2018\)](#)

5. The first statistics on mandatory declarations filed pursuant to the Pilot Program reflect that CFIUS most often determined it could not conclude action on the declarations

The Pilot Program expanded the scope of transactions subject to CFIUS review and imposed mandatory declarations for certain transactions involving investments in critical technology companies. (See Latham's *Client Alert* [CFIUS Pilot Program Makes Notifications Mandatory for Specific Areas of Critical Technology](#)). The Report includes information on the Pilot Program mandatory declarations submitted during the end of the 2018 calendar year. CFIUS reviewed 21 declarations filed in 2018, more than half of which (12) were non-controlling covered transactions. For nearly half of the declarations (11), CFIUS determined that it could not conclude action. CFIUS cleared only two of the 21 submissions. For five transactions, CFIUS requested the parties file a full, joint notice. CFIUS determined that one declaration was not subject to the jurisdiction of the Pilot Program, and reported that another declaration was withdrawn by the parties for business reasons.



Data sourced from [CFIUS Annual Report to Congress \(Report Period: CY 2018\)](#)

6. The percentage of cases in which CFIUS imposed mitigation on the parties as a condition of receiving CFIUS clearance remained steady

For about 13% of the cases in 2018 (*i.e.*, 29 notices of a total of 229), CFIUS required the parties to agree to mitigation measures as a condition of receiving the CFIUS clearance. This result is largely consistent with mitigation imposed on cases in recent years: 10% in 2016 and 12% in 2017. Common mitigation measures imposed by CFIUS that were identified in the Report matched those from previous reports, and new mitigation measures were not identified. Mitigation measures adopted in 2018 included:

- 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 foreign acquirer not have direct or remote access to systems that hold such information
- Ensuring that only US 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
- Notifying, for approval, security officers or relevant USG parties in advance of foreign national visits to the US business
- Establishing security protocols to ensure the integrity of goods or software sold to the USG
- Notifying customers regarding the change of ownership
- Ensuring continuity of supply for defined periods, and notification and consultation prior to taking certain business decisions, with certain rights in the event that the company decides to exit a business line. Establishing meetings to discuss business plans that might affect USG supply or national security considerations.
- Excluding certain sensitive assets from the transaction
- Divesting all or part of the US business

* * *

Please contact one of the authors listed below for any assistance in assessing whether a transaction must be submitted to CFIUS under the Pilot Program, advising on the overall CFIUS risk of a transaction, or preparing and prosecuting a filing before CFIUS

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