



## Key Takeaways from the Annual ACI CFIUS Conference

APRIL 29, 2022

ACI held its annual CFIUS conference from April 27 to 28 in Washington, D.C., bringing together practitioners and government officials to discuss a range of CFIUS topics. On the government side, the two-day event involved significant participation by the Department of Defense (DoD), which was represented by officials on a majority of the panels. The following are the key takeaways.

1. **China, China, China.** DoD continues to focus on transactions where the foreign buyer is a Chinese entity. Chinese transactions are a priority for DoD's non-notified team when it searches for transactions that were not voluntarily filed with the Committee. In addition, DoD's mitigation team continues to find that Chinese transactions are difficult to mitigate. Although inbound investment from China is increasingly difficult, DoD made clear that at least some Chinese transactions continue to make it through the Committee without requiring a proxy agreement or voting trust.
2. **CFIUS is on the lookout for third-party risks.** DoD noted that it is concerned not only when the foreign buyer's country of origin is China but also when a non-Chinese foreign buyer has significant relationships with Chinese entities. CFIUS looks at whether a non-Chinese foreign buyer has joint ventures with Chinese entities. CFIUS also looks at whether the foreign buyer uses equipment made in China or has supply arrangements with Chinese vendors.
3. **Emerging and foundational technology is a major focus.** One of DoD's biggest areas of concern—if not its main focus—is protecting U.S. businesses that are developing emerging and foundational technologies. DoD is risk averse in general, but it is especially risk averse when analyzing technology that is still in its infancy. DoD must try to assess how the technology will be used in the future, and DoD officials find it difficult to conduct that assessment within CFIUS's statutory deadlines.
4. **Export classification exercises are increasingly important.** Whether CFIUS has jurisdiction over some transactions, and whether a CFIUS filing is mandatory in certain cases, is now determined in part by whether the U.S. business involved in the transaction makes products that are controlled for export. Accordingly, it is more important than ever for any U.S. business that is interested in obtaining foreign investment to know the export classification of its products.
5. **Data cases are on an upward trend.** DoD noted that there are more and more data cases. According to DoD, data cases are the hardest to mitigate, and CFIUS is still trying to figure out how to mitigate data cases effectively.

6. **Be careful when deciding to file a declaration.** DoD finds it difficult to conduct a risk analysis within 30 days because it has a large bureaucracy with numerous stakeholders. Multiple DoD officials noted that DoD's CFIUS staff has approximately 10 working days to review a declaration before it has to submit its findings up the chain of command in order to get the package approved by the statutory deadline. DoD cautioned that declarations are best for cases that have a low risk, and that declarations are not best for control transactions, high-dollar transactions, and transactions where the U.S. business has numerous touchpoints with the U.S. government. In addition, DoD warned that declarations are not a good option for foreign buyers who have previously been before CFIUS and had their transactions mitigated.
7. **DoD is actively searching for non-notified transactions.** Although the non-notified process is administered by the Department of the Treasury, DoD has built its own non-notified team to look for transactions that were not filed with the Committee but may have DoD equities. DoD's non-notified team is focused on China, emerging and foundational technology, and data. DoD noted that it has already reviewed 2,000 transactions this year. DoD further noted that prime contractors will notify DoD's CFIUS team if a subcontractor is getting bought out by a foreign company.
8. **Non-notified transactions may be starting to impact deal documents.** One panelist noted that he has started to see provisions in deal documents that address how the parties will behave if CFIUS's non-notified team inquires about a post-closing transaction (e.g., cooperation provisions or redemption rights).
9. **CFIUS is questioning the transaction parties more aggressively.** During the conference, it was recognized by practitioners and acknowledged by government representatives that CFIUS is questioning transaction parties more aggressively during the review and investigation period. DoD noted that it has developed standard questions that it asks transaction parties that go above and beyond the information required by the regulations.
10. **Excepted Foreign State (EFS) status— "much ado about nothing."** Although foreign governments want to be recognized by CFIUS as "excepted foreign states," there was widespread agreement at the conference that EFS status has had little impact. To date, CFIUS has given four countries EFS status—Canada, the United Kingdom, Australia, and New Zealand. Not every investor from these countries is entitled to the benefits of EFS status. Rather, a foreign investor receives the benefits of its home country's EFS status only if the investor qualifies as an "excepted investor." But the criteria for qualifying as an "excepted investor" are incredibly stringent and very few foreign investors qualify, which means that very few foreign investors receive the benefits of EFS status.

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