# What the CFIUS 2020 Annual Report Says About Investment from China

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The Committee on Foreign Investment in the United States ("CFIUS") is required by law to provide a confidential report to Congress each year regarding foreign investment activities, CFIUS filings and related matters. The public version of the CFIUS Annual Report to Congress for Calendar Year 2020 (the "2020 Report") has recently been released.

One of the more noteworthy revelations of the CFIUS 2020 Report is the declining share of CFIUS filings concerning investments originating from China. In 2017 China was the source of 60 transactions notified to CFIUS, 21 of which fell into the "critical technology" category. Years 2016 and 2018 produced similar numbers with CFIUS reviewing 54 and 55 Chinese transactions respectively. During this period Chinese-origin transactions constituted approximately 15% of all CFIUS filings. In 2020 the number of Chinese filings, which now also includes short-form declarations as well as full notices, fell to 22 (17 notices and five declarations), or less than 7% of total submissions.

This is not surprising. In addition to the widely perceived increase in political tensions between the United States and China and the stated intention of the U.S. Government to lessen U.S. dependence on China and Chinese supply lines, Congress has directed CFIUS to monitor closely Chinese investments, particularly into U.S. critical technologies and new and emerging technologies. The Foreign Investment Risk Review Modernization Act ("FIRRMA") enacted in August 2018, Congress, while not singling out China by name, expressed the "sense of Congress" that CFIUS monitor closely foreign investors whose origin is considered a "country of special concern." A "country of special concern" is identified by its "demonstrated or declared strategic goal of acquiring a type of critical technology or critical infrastructure that would affect U.S. leadership in areas related to national security." China is no doubt the principal intended target of this concern.

The impact of FIRRMA can also be seen in CFIUS treatment of transactions that were not notified to it prior to their consummation but where CFIUS stepped in to force an unwinding even after completion of the investment. For example, Beijing Kunlun Technology Company Limited was ordered to divest its interest in Grindr, LLC in March 2019 over concerns of access to the sensitive personal data of users— including sexual orientation, HIV status, and geolocation. Beijing Shiji Information Technology Company Limited was ordered to divest its investment in StayNTouch, a U.S.-based hotel management software company in March 2020 for similar concerns over Shiji's potential access to the sensitive personal and financial information of users.

This is not to say, however, that all Chinese investors should shy away from lucrative investment opportunities in the United States. The above-described data indicate that while China's share of foreign direct investments into the United States has declined, there remain a not insubstantial number of investments that are proceeding. For example, CFIUS approved Citiking International US LLC's acquisition of U.S.-based jet manufacture ONE Aviation in March 2020. The Chinese investment firm came to the aid of ONE Aviation after the company filed for bankruptcy in October

2018. Similarly, Harbin Pharmaceutical Group, a partly state-owned Chinese pharmaceutical company, acquired U.S.-based GNC in October 2020 after GNC filed for bankruptcy in June 2020.

Both of these examples highlight the fact that even in light of the heightened review standards, CFIUS is still approving acquisitions of U.S. businesses by Chinese investors, as long as critical technologies and national security are not implicated. CFIUS is much more likely to approve a Chinese investment where the objective is to make money rather than acquire technology. Saving a U.S. company from bankruptcy has demonstrably also been welcome. And in transactions where sharing of technology may be incidental, potential investors should confront and evaluate the risk of CFIUS intervention and, where appropriate, structure their transaction so as to mitigate any such risk, such as by limiting Chinese access to technology and by interposing U.S. managers between Chinese owners and the operations of the enterprise. The old axiom is to “buy low and sell high.” Now, at a low-point in U.S.-China relations, wise investors may find overlooked buying opportunities.