

# Report from Washington

## Key Takeaways From CFIUS's Annual Report Covering The 2013 Calendar Year

March 2, 2015

### Introduction

On February 26, 2015, the Committee on Foreign Investment in the United States ("CFIUS"), the inter-agency committee charged with reviewing foreign investments in U.S. businesses for potential national security implications, released its Annual Report to Congress detailing the Committee's activity during calendar year 2013. The report offers an overview of the deals that came before the Committee during 2013 and provides insight into trends and touch points that may be helpful for parties to consider in making cross-border investments into the United States.

### In What Will Prove to be a Short-Lived Trend, The Number of Notices Deemed Covered Transactions Decreased for the First Time in Four Years

The annual number of CFIUS notices had increased year over year since the end of the financial recession for the 2009-2012 period, increasing from 65 filings to 114. That trend came to an end in 2013 with just 97 notices reviewed during the year, well below the high of 155 notices reviewed in 2008. However, we believe this decrease will prove to be short-lived. All indications are that the Committee received a near-record number of notices in 2014.

### Covered Transactions Involving East Asian Buyers Continue to Outpace the Rest of the World

In last year's Annual Report, CFIUS noted that 2012 was the first year in which the number of reviewed transactions involving Chinese acquirers exceeded the individual total of any other country. The latest report shows that trend continues. Although the number of covered transactions involving Chinese buyers decreased from 23 to 21, the percentage of covered transactions involving Chinese acquirers slightly increased from 20.2% to 21.6%.

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Following closely behind China, Japan accounted for the second highest number of covered transactions by country of acquirer. From 2012 to 2013, the number transactions involving Japanese buyers doubled, increasing from nine to 18.

### **The Percentage of Filings That Entered the Investigation Stage Increased Significantly**

The percentage of covered transactions proceeding from the initial 30-day review period to the 45-day investigation stage had remained stable since 2009, falling within a few percentage points of 38% of filings each of the previous four years. Of the 97 notices filed in 2013, however, 48 transactions (approximately 49.5% of all notices reviewed) entered the investigation stage. The Committee notes, however, that this statistic is potentially misleading as five of the 48 investigated transactions entered the investigation phase during the government shutdown of October 2013. Excluding those five transactions, the percentage of transactions that went into the investigation stage was 46.7%, which is still substantially higher than the prior trend in investigation frequency.

### **The Number of Notices Withdrawn During the Investigation Phase Returns to the Recent Norm**

Of the 48 covered transactions that entered the investigation phase in 2013, five (10.4%) were voluntarily withdrawn by the parties. Compared to 2012, where 20 of the 45 (44%) notices that prompted investigation by the Committee were withdrawn, the frequency of withdrawals declined sharply. The five withdrawn notifications are on par with 2010 and 2011 data when approximately the same amount of notices were withdrawn in each of those years.

The Annual Report does not disclose the individual circumstances prompting withdrawals, but instead states in general terms that some notices were withdrawn and refiled with approval of CFIUS to allow the Committee more time to consider national security concerns. Others were withdrawn and never resubmitted because of either unavoidable national security concerns raised by CFIUS member agencies, the parties not wanting to abide by the Committee's proposed mitigation measures, or the transactions being abandoned for commercial reasons.

### **Manufacturers Continue to be the Most Frequent Targets in Covered Transactions**

In 2013, the notices of covered transactions considered by the Committee involved a wide range of industrial subsectors. Of the broad categories under which CFIUS classifies U.S. businesses, targets involved in “manufacturing” were the subject of 36% of covered

transactions, followed by “finance, information, and services” businesses, which accounted for 33% of covered transactions. “Mining, utilities, and constructions” accounted for 21% while “wholesale, retail, and transportation” made up the remaining 10%.

Of the leading manufacturing category, the “computer and electronic products” subcategory continued to be the most represented, accounting for 12 notices. Half of those were “semiconductor or other electronic component” manufacturers.

### **Mitigation Measures Imposed to Address National Security Concerns**

In 2013, 11 transactions were approved only after the parties accepted mitigation measures from the Committee. Those transactions involved U.S. companies involved in telecommunications, software, mining, oil and gas, manufacturing, consulting, and technology industries. Mitigation measures negotiated and adopted in 2013 included:

- Ensuring that only authorized persons have access to certain technology and information;
- Establishing a Corporate Security Committee and other mechanisms to ensure compliance with all required actions, including the appointment of a U.S. Government-Approved member of the board of directors;
- 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;
- Requiring prior approval from security officers or relevant U.S. Government parties in advance of foreign national visits to the U.S. business; and
- Providing relevant U.S. Government parties with the right to review certain business decisions and object if they raise national security concerns.

### **The U.S. Intelligence Community’s Conclusion of a Likely Coordinated Foreign Strategy to Acquire Critical Technology Companies is Reasserted**

Based on its assessment of transactions identified by CFIUS in its report for the 2013 calendar year, the U.S. Intelligence Community concluded that there may be an effort among foreign governments or companies to acquire U.S. companies involved in research, development, or production of critical technologies for which the United States is a leading producer.

This finding is consistent with the annual report for 2011, but contrasts with the conclusion contained in the 2012 report in which the Intelligence Community found it unlikely that such a coordinated strategy existed. The unclassified version of the report does not discuss the reasons for this conclusion or the change.

Although CFIUS has been criticized for lack of transparency by some foreign investors and has become embroiled in controversies related to certain Chinese investments in particular, CFIUS continues to clear an overwhelming majority of the transactions it reviews. That said, parties to inbound foreign investments with a nexus to U.S. national security are well-advised to ensure that potential acquisitions and investments include a pre-transaction CFIUS risk analysis.

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To learn more about the CFIUS process and how to navigate it effectively, please contact any of the following:

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