

International Trade Alert

March 6, 2015

CFIUS Annual Report Confirms Strong Chinese Investment and Renewed Concern about Foreign Governments' Efforts to Acquire U.S. Critical Technology

On February 26, 2015, the Committee on Foreign Investment in the United States (CFIUS) released its annual report to Congress summarizing its activities in 2013. CFIUS is an inter-agency committee that reviews the national security risks associated with foreign acquisitions of, and investments in, U.S. businesses that could result in foreign control of U.S. businesses, known as "covered transactions."

According to the report, CFIUS conducted reviews of 97 covered transactions in 2013, a slight decline from its review of 111 notices in 2011 and 114 notices in 2012. Manufacturing investments accounted for 36 percent of the notices reviewed, and approximately one-third of those were in the computer and electronic products subsector, which includes semiconductors. Thirty-three percent of the notices reviewed were in the finance, information and services sectors. Mining, utilities and construction accounted for another 21 percent of the notices reviewed.

CFIUS cleared a total of 46 transactions in 2013, during the initial 30-day review phase. It went to the 45-day investigation phase in 48 of the 97 notices reviewed in 2013. Although this number is slightly higher than CFIUS' 40 investigations in 2011 and 45 investigations in 2012, the report suggested that the increase did not represent a broader trend. Five cases automatically proceeded into the investigation phase because CFIUS had been unable to review them during the federal government shutdown in October 2013.

CFIUS required mitigation measures as conditions to clearing 11 covered transactions. Mitigation measures are legally binding terms that require parties to modify their agreements or implement measures to address specific national security concerns. CFIUS reported that mitigation measures had been applied to investments in the telecommunications, software, mining, oil and gas, manufacturing, consulting and technology industries. Examples of these measures included limitations on access to certain technology and information, guidelines for U.S. government contracts and government notification requirements regarding security incidents or visits by foreign nationals. To ensure compliance with the measures, CFIUS will require periodic reporting, third-party audits and on-site compliance reviews by U.S. agencies, as well as investigations and remedial action in response to violations of mitigation measures or even suspicion of anomalous behavior.

CFIUS also approved the withdrawal of three notices during the initial 30-day review period and another five in the 45-day investigation period. Parties may request a withdrawal to have more time to respond to CFIUS' questions and address potential national security concerns.

For the second year in a row, China accounted for the most CFIUS notices filed (21) by a foreign country in a single calendar year. Chinese investors filed 22 percent of the notices reviewed in 2013, compared to 20 percent of the notices reviewed in 2012. The stronger showing may signal growing Chinese confidence and sophistication regarding the CFIUS review process. In 2013, CFIUS approved the largest Chinese acquisition yet, Hong Kong-based Shuanghui Group's \$4.72 billion acquisition of the world's largest pork producer, Smithfield Foods, Inc.

Japan accounted for the second highest number of notices reviewed (18) in 2013, a significant increase from the country's nine notices in 2012 and seven notices in 2011. Canada's 12 notices made it the third most represented country in 2013. Although the United Kingdom filed 68 notices from 2010-2012, it accounted for just seven notices in 2013.

Finally, CFIUS updated the U.S. intelligence community's 2012 assessment of national security threats to U.S. critical technology. In the 2012 report, CFIUS backed off a previous assessment that there was a coordinated strategy among foreign governments to acquire U.S. critical technology. In the 2013 report, CFIUS reported the U.S. intelligence community's revised position, advising that "foreign governments are extremely likely to continue to use a range of collection methods to obtain critical U.S. technologies," including espionage. Nevertheless, CFIUS approved 85 mergers with, or acquisitions of, U.S. critical technology companies in 2013.

The 2013 report confirms that CFIUS will continue to keep close watch on critical technology and other potentially sensitive investments while it continues to approve, albeit with mitigation measures, an increasing number of foreign investments and acquisitions.

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